International Centre
for Dispute Resolution

Taking Your Case to the International Centre for Dispute Resolution

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Company lawyers involved in transnational commerce have focused on the use of international arbitration and mediation as part of corporate conflict management schemes. Concerns, fueled by recent experience, exist regarding both the economics and business consequences of private dispute resolution. Europeans, in particular, worry about the availability of qualified arbitrators and mediators, seemingly needless delays, escalating costs and enforcement in the new markets that corporate colleagues are entering into each and every day. Despite these concerns, the consensus seems to be that international arbitration and, increasingly, mediation, can be economic, efficient and viable conflict management tools for the growing number of complex, international commercial transactions.

The selection of well-tested international rules to govern dispute resolution proceedings, such as those of the International Centre for Dispute Resolution (ICDR), gives the parties the process they need and the arbitrators and mediators the authority and flexibility they require to conduct efficient[1] proceedings.

Genesis of ICDR

The ICDR was established in 1996 as a separate division of the American Arbitration Association (AAA), the world's leading[2] provider of arbitration, mediation and other conflict management services. The ICDR maintains specialized administrative facilities in New York, where a staff of multilingual attorneys supervises the administration of international cases. ICDR also maintains offices in Mexico City and Singapore and a Senior Executive domiciled in Europe serving Europe, the Middle East and Africa (EMEA). ICDR offers a worldwide panel of more than 650 arbitrators and mediators. Parties in ICDR administered proceedings also have access to hearing facilities and services around the world pursuant to 64 cooperative agreements with arbitral institutions in 44 countries.

The ICDR International Procedures incorporate both arbitration and mediation rules. ICDR's Arbitration Rules, which are modeled on the UNCITRAL Arbitration Rules[3], provide modern rules that respect party autonomy, mirror international expectations of the process and focus on effective case management. Administrative

assistance is provided when it is useful. While the focus of this paper is administration under the ICDR International Arbitration Rules, the ICDR also acts as an appointing or administering authority under the UNCITRAL Rules. The ICDR also administers cases under various industry rules of the AAA.

Filing Your Case with the ICDR

Filing a case with the ICDR is a straightforward matter. Under the ICDR rules, unless otherwise agreed, all written communications may be served on a party by any of the following methods - traditional air mail, air courier, facsimile, personal service, or by e-mail.[4]

Arbitration proceedings are deemed to commence on the date on which the administrator receives the notice of arbitration[5]. The commencement date is critical, inasmuch as it establishes the date from which deadlines flow for the filing of a responsive pleading[6], for responding to a claimant's proposal for such matters as the appointment of arbitrators and the method of their selection[7], and the venue and language of the arbitration[8]. Article 2.3 of the ICDR rules calls for the notice of arbitration to contain a statement of claim including:

- a demand that the dispute be referred to arbitration;
- the names and addresses of the parties;
- a reference to the arbitration clause or agreement that is being invoked;
- a reference to any contract out of or in relation to which the dispute occurs;
- a description of the claim and an indication of the facts supporting it; and
- the relief or remedy sought and the amount claimed.

The notice of arbitration may also include proposals as to the number of arbitrators and the means of designating them, the place of arbitration and the language of the arbitration.

Experienced counsel use the notice of arbitration to educate the arbitrators about the case by attaching relevant documents, such as the contract between the parties. The absence of strict pleading requirements also encourages presentation of the claim in a narrative style.

Early Administrative Involvement

The ICDR focuses on getting qualified arbitrators appointed quickly. Within 48 hours of receiving a notice of arbitration, the ICDR issues an initiation letter, inviting the filing of an answer and/or counterclaim and querying the parties regarding their availability for an administrative conference with an ICDR supervisor.

At the administrative conference, conducted in all but the smallest cases, usually by telephone, the ICDR supervisor presents the parties with a significant opportunity to take control of the proceedings. The supervisor is likely to invite the parties to consider mediation, and will raise the opportunity to address jurisdictional and scheduling issues and the need for interim measures. Importantly, the supervisor will also solicit the parties' preferences regarding the number of arbitrators and the qualifications the parties wish the arbitrators to have.

Parties may request a list of arbitrators from which to choose the chair or their party-appointed arbitrator. In that case, a dialogue regarding appropriate qualifications will assist the ICDR in providing arbitrators who are better able to understand the complexities of the dispute. If time is of the essence, counsel may ask the ICDR to query prospective arbitrators regarding their willingness to schedule consecutive hearings within a specific time frame.

ICDR Mediation – A Growing Practice

The ICDR has an institutional bias in favor of settlement, and encourages the parties to try mediation, both at the commencement of the case and closer to the hearing date. On 1 July 2003 ICDR released amended international procedures, including mediation and arbitration rules. ICDR Mediation Rules may be agreed to in a future disputes clause providing for mediation alone or as part of a multi-step dispute resolution process. The Mediation Rules are simple and straightforward, providing the means of initiating[9] and terminating[10] mediation. They also provide a method for appointment[11] of the mediator, the authority[12] of the mediator and, importantly, extend confidentiality[13] to the process.

Parties often respond favorably to a "neutral" query by the ICDR supervisor regarding their interest in mediation. Statistics compiled by the AAA indicate that mediation is neither a fad nor a waste of corporate assets. Historically, fully 85% of commercial cases submitted to mediation settle.

Preliminary issues

Reflecting best practices in arbitration, the ICDR rules provide arbitrators with the authority to rule on their own jurisdiction, including both the power to determine the existence, scope and validity of the agreement to arbitrate and the existence or validity of the underlying contract[14]. The parties are required to file any jurisdictional objections no later than the filing of their statement of defense[15]. Further participation in the arbitration without raising jurisdictional objections in the responsive statement may constitute waiver of the right to register such objections at a later date[16].

In the absence of the parties' agreement, the ICDR will determine the place of arbitration. However, the arbitrators, who have final authority to determine the appropriate venue within 60 days of their appointment[17],

may change this decision. The arbitrators also have the authority to take evidence at any place they deem appropriate, without regard to the place of arbitration[18].

Because a party may need some form of provisional relief prior to the issuance of a final award, the ICDR rules provide the arbitral tribunal with the authority to "take whatever interim measures it deems necessary, including injunctive relief and measures for the protection or conservation of property"[19]. The tribunal may require security for the costs of such measures[20]. Interim relief can take the form of an interim award, which is useful when seeking enforcement under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

The arbitrators' authority to grant interim relief, however, does not help the situation where emergency relief is needed before the arbitrators are selected. To remedy this problem, a small but significant amendment was made to the ICDR International Arbitration Rules on 1 May 2006.

The new Article 37 ("Emergency Measures of Protection") provides for the appointment of an emergency arbitrator to handle requests for interim arbitral relief prior to formation of the arbitral tribunal. Importantly, this procedure is automatically available to parties who agree to ICDR or AAA International Arbitration Rules. This is in contrast to the AAA Optional Rules and the ICC Referee Procedure, both of which require an express agreement by the parties to adopt them.

Highlights of the Emergency Measures Rule include:

- Date of arbitration clause determines application of the Rule
- Notice to all parties required
- Emergency Arbitrator appointed by ICDR from specially constituted panel within 1 business day after receipt of Notice
- Arbitrator disclosure and rapid challenge procedure provided
- Schedule for hearing of application required within 2 business days after appointment
- International standard followed for grant of emergency relief
- Relief may issue in form of Order or Award
- Full tribunal may reconsider, modify or vacate Order or Award of Emergency Arbitrator

The ICDR rules expressly reserve the parties' right to seek interim relief from a judicial forum. They protect this right by stating that such a court filing "shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate"[21].

Arbitrator selection / Disclosure and Challenge Procedure

The ICDR Procedures are flexible, and designed to respect party autonomy. This might be illustrated best in the area of arbitrator selection. The ICDR rules encourage the parties to agree on the procedure for appointing arbitrators[22], with or without the assistance of the ICDR. The chosen arbitrators need not be members of the ICDR roster. Prior to the appointment of an arbitrator who is not on the ICDR roster, counsel may wish to ascertain the prospective arbitrator's familiarity with the ICDR rules.

At the parties' request, the case manager will assist the parties in identifying arbitrators with international and subject matter experience and expertise. If the parties wish, or absent their agreement on another method, the case manager will send the parties a list of potential arbitrators from the ICDR roster and invite the parties to make a limited number of strikes, numbering the remaining arbitrators in their order of preference. In that case, the case manager will appoint arbitrators from the closest mutual preference of the parties. Party control in this critical aspect of the process is enhanced by ICDR's use of the list selection process.

To aid efficiency, the Rules provide a 45-day period for the parties to agree, after which the case manager may appoint the arbitrator(s) and designate the presiding arbitrator.

Reflecting international expectations, all arbitrators serving under the ICDR rules must be "impartial and independent"[23]. Impartiality and arbitrator disclosure go hand in hand. The ICDR requires arbitrator candidates to submit signed disclosure statements identifying any circumstances connecting them to the parties or their attorneys. If a disclosure is made, the case manager will share it with the parties and ask for comments. In the event of a challenge to a selected arbitrator, the ICDR, after consultation with supervisory staff, will decide whether to disqualify or reaffirm the arbitrator.

The Rules go further to protect the process by making disclosure a continuing obligation of the arbitrators and by largely precluding ex parte contacts between the parties and any candidate for arbitrator or appointed arbitrator. There are a few exceptions. The parties may advise a candidate for party-appointed arbitrator of the general nature of the controversy, discuss the candidate's qualifications, availability or independence and discuss the suitability of a candidate for presiding arbitrator.

Effective Case Management – Use of the Preliminary Hearing

Arbitrators serving under the ICDR rules routinely hold a preliminary hearing to facilitate the organisation and management of arbitration proceedings[24]. Terms of reference are not required.

Parties discuss a wide variety of topics at the preliminary conference, including:

- subject matter and personal jurisdiction;
- locale of the arbitration;
- the law governing the proceedings;
- the language in which the proceedings will be held;
- claims, damages and defenses;
- the necessity for pre-hearing information exchange and the scope, method and timing of such exchange;
- the method and timing for submitting legal argument, documentary and physical evidence;
- the necessity for and scheduling of hearings, witness testimony and site visits;
- the scope, form and timing of pre-hearing submissions;
- the need, if any, for interim relief;
- the form of the award; and
- opportunities for mediation and settlement.

Managing the Taking of Evidence

Fact-finding is crucial to the outcome of any adversarial proceeding[25]. Steeped in their own legal culture, counsel and parties frequently have different expectations in this critical area. For example, the common law concept of filing a lawsuit first and finding out the facts only after obtaining documents in the adversary's possession strikes many Continental European practitioners as reckless and unfair[26]. No single issue is more likely to draw their ire than U.K. or U.S. style discovery, because they believe it permits abusive "fishing expeditions," which is at odds with the civil law concept of due process. There are also legitimate corporate concerns about the public disclosure of trade secrets and other sensitive information. Yet, fact-finding is necessary in arbitration in order to reveal key facts and documents. The question is, how much is enough?

The issue of information exchange is dealt with in a sensible way in the ICDR rules. For example, they do not provide for depositions, interrogatories, requests for admission and other traditional common-law discovery tools. Rather, the ICDR rules take a broad approach that is intended to guide the arbitrator on effective management. Article 16 of the ICDR rules instructs the arbitrators to "conduct the proceedings with a view to expediting the resolution of the dispute"[27]. The tribunal's authority to manage the arbitration process efficiently according to the needs of the particular case has long been considered one of the compelling arguments in favor of arbitration.

Article 19 of the ICDR rules expressly authorizes the arbitrator to order the parties to produce documents, exhibits or other evidence[28]. How much information will be exchanged will depend on the facts of the particular case. Ideally, the scope of pre-hearing exchanges of information should be what is necessary to allow each party to adequately prepare its claims and defenses. Experienced international arbitrators often limit the time period for exchanging information and the scope of the information exchanged in order to expedite the process and prevent "fishing expeditions".

Many arbitrators order the parties to exchange pre-numbered exhibits that they intend to rely on at the hearing. The ICDR rules require the parties to exchange lists of witnesses and their expected testimony at least 15 days before the hearing[29].

In making judgments about the taking of evidence, arbitrators frequently invite counsel's attention to standards in the international law community, such as the International Bar Association (IBA) Rules of Evidence. These rules provide a methodology for the production of documents, the identification of witnesses, the filing of witness statements and the identification of experts and production of their reports[30]. Given the consensual nature of the arbitral process, the parties can agree to as little or as much information exchange as they want in order to make the arbitration as efficient as they would like[31]. If the issue isn't addressed in the arbitration clause, the parties should communicate their expectations to their counsel in advance of the preliminary hearing, where this issue will be raised.

Managing the Hearing

The ICDR rules contain provisions that help the tribunal bring order to proceedings that otherwise could drag on interminably. Article 16 authorises arbitrators to direct the order of proof, bifurcate proceedings, exclude cumulative and irrelevant evidence, and dispose of all or a portion of the case in summary fashion[32].

The order of taking testimony is not prescribed in the ICDR rules. Arbitrators take testimony when it is most efficacious. So, for instance, the tribunal may direct that a particular witness be heard out of turn and order a party's counsel to focus that witness's testimony on issues the tribunal believes will increase its understanding of the facts.

As for the method of presenting evidence, international commercial arbitration has vaulted past harmonizing civil and common law traditions to focusing on the "best practices" of those traditions. One best practice example is the use of written witness statements in lieu of taking live testimony from direct witnesses. Written testimony is said to have several advantages, including saving time and focusing on the real issues in dispute[33].

Privacy/Confidentiality/Publication of Redacted Awards

Mergers and acquisitions, joint ventures, infrastructure and technology contracts are just a few of the many international commercial relationships that may involve large sums of money, sensitive trade secrets, technical complexity and lengthy business relationships. It should come as no surprise then that the private nature of arbitration can be a significant benefit to the parties in a dispute situation[34]. Counsel should be careful not to confuse confidentiality with privacy. Article 20 of the ICDR rules provides that hearings are private unless the parties agree otherwise or the law provides to the contrary. Confidentiality is only required of the arbitrators and the administrator[35]. The award itself may be made public only with the consent of all parties or as required by law[36]. The parties, therefore, should consider additional confidentiality protections at the time of contract. In keeping with changing international expectations regarding the transparency and predictability of arbitral awards, ICDR may publish awards, edited to conceal the names of parties and other identifying characteristics, and selected for the value they might provide to international practitioners[37].

Award of Arbitrators/Applicable Laws and Remedies

The ICDR rules require that the arbitrators, or a majority of them, render their award "promptly", with reasons[38]. The rules also give arbitrators the authority to make interim, interlocutory or partial orders or awards. The tribunal is required to apply the substantive law or the rules of law agreed upon by the parties. Failing such agreement, the tribunal is required to apply the law it deems appropriate[39].

Arbitrators have broad authority to fashion an appropriate remedy, and have specific authority to award pre-award or post-award interest on monetary awards[40]. In a bow to international expectations, the parties to arbitration proceedings under ICDR rules expressly waive any right to punitive or exemplary damages, except as required by statute[41].

Fees and Costs

To encourage settlement, the ICDR administrative filing fees[42] are apportioned, with an incentive for quick settlement. The initial filing fee must accompany the filing of the notice of arbitration or counterclaim. A subsequent case service fee becomes due and payable if the matter proceeds to a first hearing. For counsel, this provides a short "window" within which to negotiate a settlement, useful for collection cases where there is little in the way of factual dispute.

Arbitrators are compensated at rates agreed upon by the parties prior to their service. Transparency in connection with costs is aided by the ICDR practice of asking arbitrators to publish their rate of service on their resumes.

In the event of a party's failure to deposit the arbitrators compensation, as requested by the case manager, the arbitrators have the power to suspend or terminate the proceedings[43]. In these circumstances, it is not unusual for the non-defaulting party to advance the required payment and seek re-payment by way of an award.

Drafting for Control - Some Models to Think About

The selection of well-tested international rules to govern the proceedings usually gives parties the process they need and arbitrators the authority and flexibility they require to conduct an efficient proceeding. The parties' agreement may incorporate the ICDR rules by reference as in the following clause.

"Any controversy or claim arising out of or relating to this contract shall be determined by arbitration in accordance with the International Arbitration Rules of the International Centre for Dispute Resolution."

The parties should consider adding:

"The number of arbitrators shall be (one or three)";

"*The place of arbitration shall be (city and/or country)*"; or

"The language(s) of the arbitration shall be _____."

The parties may agree to amend the rules to suit their particular needs. For example, they may wish to restrict or expand time limits provided for in the ICDR rules, limit information exchanges or change other aspects of the process. They may do so by addressing those issues in their dispute resolution clause.

The following clause limits the time frame in arbitration.

"The award shall be rendered within [9] months of the commencement of the arbitration, unless such time limit is extended by the arbitrator."

The parties should be wary of the dangers inherent in setting artificial deadlines. If time frames can't be met, the ability to enforce the award may be compromised. The alternative clause set forth below addresses the consequences of a "late" arbitration.

"It is the intent of the Parties that, barring extraordinary circumstances, arbitration proceedings will be concluded within [120] days from the date the arbitrator(s) are appointed. The arbitral tribunal may extend this time limit in the interests of justice. Failure to adhere to this time limit shall not constitute a basis for challenging the award."

The parties may limit information exchange by using the following clause.

"Consistent with the expedited nature of arbitration, pre-hearing information exchange shall be limited to the reasonable production of relevant, non-privileged documents explicitly referred to by a party for the purpose of supporting relevant facts presented in its case, carried out expeditiously."

There is a danger in limiting the exchange of information at the time of contracting. In the event that more information exchange would be advantageous to a party in a particular dispute, that additional evidence cannot be taken without further agreement.

The parties should always exercise caution when restricting arbitration procedures and arbitral authority. Doing so may prevent international arbitrators from doing what they usually do so well, managing the process according to the immediate needs of the parties. Moreover, placing such restrictions also may raise questions about the interpretation of the agreement.

Parties may also expand their dispute resolution options by providing for a "step" ADR procedure.

"In the event of any controversy or claim arising out of or relating to this contract, the parties hereto shall consult and negotiate with each other and, recognizing their mutual interests, attempt to reach a solution satisfactory to both parties. If they do not reach settlement within a period of 60 days, then either party may, by notice to the other party and the International Centre for Dispute Resolution, demand mediation under the Mediation Rules of the International Centre for Dispute Resolution. If settlement is not reached within 60 days after service of a written demand for mediation, any unresolved controversy or claim arising out of or relating to this contract shall be settled by arbitration in accordance with the International Arbitration Rules of the International Centre for Dispute Resolution."

The parties should consider adding:

"*The number of arbitrators shall be (one or three)*";
"*The place of arbitration shall be (city and/or country)*"; or
"*The language(s) of the arbitration shall be _____.*"

A legitimate concern of step clauses is the potential for a party to drag each step out unnecessarily in order to delay their day of judgment. The step clause set forth above addresses that issue by providing time limits on each step. These limits are, at best, an educated guess regarding appropriate timing. Alternatively, the clause might be

drafted to allow each party to demand arbitration without recourse to the previous step(s). Otherwise, having agreed to a series of conditions precedent, parties should be prepared to go through each required step[44].

Conclusion

International arbitration can be an effective tool for managing the risks and relationships that are part and parcel of strategic commercial contracts. Taking your case to the ICDR can add predictability and efficiency to the dispute resolution process.

Endnotes

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1. In 2011, the average time from filing to award, in cases administered under the auspices of the International Centre for Dispute Resolution (ICDR), was 365 days.
2. In 2011, the American Arbitration Association conducted over 187,000 cases. The ICDR administered 994 cases, maintaining ICDR's leadership position among the world's international commercial arbitration institutions.
3. The major difference between ICDR procedures and the UNCITRAL Rules is that the ICDR rules provide for administered, as opposed to ad hoc, arbitration. Perceived benefits of administered arbitration include the authority of the administrator to fix the site of arbitration, determine arbitral challenges and, generally, improve the process in terms of quality and efficiency.
4. International Arbitration Rules of the International Centre for Dispute Resolution, As Amended And Effective June 1, 2009 (hereinafter ICDR Arbitration Rules), Art. 18.1
5. ICDR Arbitration Rules, Art. 2.2
6. Id., Articles 3.1 and 3.2
7. Id., Art. 6.3
8. Id, Art. 3.3.
9. Article M-2, International Mediation Rules of the International Centre for Dispute Resolution, hereinafter ICDR Mediation Rules.
10. Id., Article M-12.
11. Id., Articles M-4, M-5 and M-6
12. Id., Art. M-7
13. Id., Art. M-10
14. ICDR Arbitration Rules, Art. 15. For further information regarding the inherent power of arbitrators to rule on their own jurisdiction ("competence/competence") see Alan Redfern and Martin Hunter, Law and Practice of International Commercial Arbitration, 3 ed., Chapter 5-33 at p. 264, Sweet and Maxwell, 1999. The long-established doctrine of separability recognises the parties' intent to have arbitrators determine jurisdictional issues, even where the underlying contract is voidable. Prima Paint v. Flood & Conklin Manufacturing Corp., 388 U.S. 395 (1967).
15. Id., Art. 15.3
16. 1996 English Arbitration Act, §. 73
17. ICDR Arbitration Rules, Art. 13.1

18. Id., Art. 13.2
19. Id., Art. 21.1
20. Id., Art. 21.2
21. ICDR Arbitration Rules, Art. 21.3
22. Id., Articles 6.1.and 6.2
23. Id., Art. 7.1
24. Id., Art. 16.2
25. Karl-Heinz Böckstiegel, "Presenting, Taking and Evaluating Evidence in International Arbitration," 6 (No.2) *ADR Currents* 20 (American Arbitration Assoc. June-August 2001)
26. Siegfried H. Elsing, & John M. Townsend, "Bridging the Common Law – Civil Law Divide in Arbitration," 59, 60, 18 *Arbitration International* (2002). The authors of this article generally underscore the procedural flexibility converging Common Law and Civil Law practice as one of arbitration's great strengths.
27. ICDR Arbitration Rules, Art. 16.2
28. Id., Art. 19.3. The taking of evidence by arbitrators, as opposed to the parties themselves, especially as regards the production of documents, is consistent with Continental European concepts, cf. § 142, German Code of Civil Procedure, pursuant to which the court may order the production of documents.
29. ICDR Arbitration Rules, Art. 20.2
30. IBA Rules on the Taking of Evidence in International Commercial Arbitration (Adopted by the IBA Council on May 29, 2010)
31. Irwin J. Hausman & Michael C. Harrington, "Discovery in Arbitration – Have it Your Way," 7 (No.1) *ADR Currents* 20 (American Arbitration Assoc. March-May 2002)
32. ICDR Arbitration Rules, Art. 16.3
33. Gerald Aksen, "On Being a Pro-Active International Arbitrator", in *Law of International Business and Dispute Settlement in the 21st Century: liber amicorum Karl-Heinz Böckstiegel* 17, supra note 11.
34. Attitudes regarding the importance or even the viability of confidentiality may be changing. In a recent survey of international practitioners by the Global Center for Dispute Resolution Research, confidentiality ranked well below a host of other issues. Further, as the use of arbitration grows for the resolution of investor-state disputes, expectations of privacy and confidentiality may prove untenable. For a thoughtful discussion on this topic see Bernado M. Cremades and David J. A. Cairns, The Brave New World of Global Arbitration, *The Journal of World Investment*, April, 2002.
35. ICDR Arbitration Rules, Art. 34
36. Id., Art. 27.4
37. Id., Art. 27.8
38. Id., Articles 26.1 and 27.1
39. Id., Art. 28.1
40. Id., Art. 28.4
41. Id., Art. 28.5
42. Id., at p. 41-46
43. Id., Art. 33.3
44. Kemiron v. Aguakem , No. 01-16400 (11th Cir. May 8, 2002).