

TIME AND COSTS – TAKING CONTROL OF YOUR INTERNATIONAL ARBITRATION

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While the economic crisis has had an impact on international arbitration, the writing was on the wall even before its full financial toll was realised across global markets. From the perspective of an institution that provides a full range of conflict management services, the message was all too clear that users of international arbitration and mediation were concerned with the escalating time and costs of the alternative dispute resolution (ADR) mechanisms they were selecting for their cross-border contracts. In response, the International Centre for Dispute Resolution (ICDR), which is the international division of the American Arbitration Association (AAA), has taken steps to address these concerns and these efforts have resulted in providing users with additional services and options available to them for their dispute resolution processes.

For example, one of the factors contributing to complexity, expense and delay in recent years has been the migration from court systems into arbitration of procedural devices that allow one party to a court proceeding access to information in the possession of the other, without full consideration of the differences between arbitration and litigation. In response to that problem (the overly broad discovery requests also known as ‘fishing expeditions’) the ICDR has promulgated its Guidelines for the Exchange of Information. The purpose of these guidelines is to make it clear to ICDR arbitrators that they have the authority, the responsibility and, in certain jurisdictions, the mandatory duty to manage arbitration proceedings so as to achieve the goal of providing a simpler, less expensive, and more expeditious process for the exchange of information.

As a result, users are now more frequently considering their options and moving away from just copying and pasting their old arbitration clauses from previous contracts. They are taking a fresh look at the institution’s rules, staff and processes and considering all of the time and costs saving options that are now available to them. They are taking a more proactive role in designing, controlling and participating in their international arbitrations and mediations.

Before selecting the administering institution, an examination of its applicable rules and policies will be an important step to ensure they complement the user’s ADR conflict management expectations. For example, the ICDR’s International Arbitration Rules (IAR) have a number of unique provisions which include an express waiver to punitive damages, language of the process provisions, default provisions for the number of arbitrators and for selecting the place of the arbitration as well as appointment mechanisms for cases with multiple parties and parties have access to an emergency arbitrator at the time the case is filed. (See IAR Articles. 28 (5), 14, 5, 13, 6 (5) and 37.) For emergency relief the ICDR provision in Article 37 provides parties with access to an arbitrator to hear a motion for emergency relief at the moment the case is filed. In international arbitration it normally takes some time to have an arbitrator appointed, and parties in need of an emergency measure in the past would have to turn to the courts for such relief. The ICDR will provide for an emergency arbitrator to be appointed within 24 to 48 hours with notice to the other side to make a determination regarding the specific request for emergency relief obviating the need to go to the courts.

The ICDR recognises that this process is not suitable for all cases. The fact that notice is required and that in some jurisdictions arbitrators do not have the authority to grant interim relief nor would the local courts enforce those awards requires the parties to analyse whether invoking Article 37 makes sense. Parties can still request interim relief from a judicial authority directly, without fear of waiving the right to arbitrate. Article 37 in the right circumstances provides the parties with the opportunity to remain within the arbitral regime for all phases of their case.

The ICDR, as of this writing, has successfully administered 24 Article 37 cases. Information on the first four cases filed can be found on the ICDR's website. These Article 37 cases move at a frantic pace, with the majority having their arbitrators appointed in one business day and the longest was five business days, where the ICDR went through the disclosure and challenge procedure for the first two emergency arbitrators and finally clearing the third for the case. The nationalities of the emergency arbitrators have varied extensively, with the ICDR appointing Article 37 emergency arbitrators from Belgium, Brazil, Canada, Republic of Korea, Republic of Singapore, United Kingdom and the United States. The emergency relief requested covered issues from broad range of industries – for example, in an oil and gas case one party wanted to relocate its heavy duty equipment prior to the conclusion of the arbitration; in another case one party wanted to prevent the further use of its confidential client list. Other cases have dealt with requests for injunctive relief concerning the use of trademarks, breach of exclusive distribution and licensing agreements. Not all institutions offer access to an emergency arbitrator at the time of filing, which could be a significant disadvantage if such relief is needed in an international arbitration.

Arbitrations do not occur in a vacuum. They exist because the parties have agreed to an arbitration agreement. Parties familiar with the ICDR system and the types of disputes they are likely to face from their own experience with past cross-border transactions will consider all of these factors and draft their arbitration agreement accordingly. Users have numerous options available to them to customise their arbitration agreement and enhance predictability. They may reduce the number of arbitrators to a sole arbitrator, or include provisions to control or limit the document exchange. They may include a mediation phase prior to the arbitration or scheduled concurrently; time frames may be specified, and hearings may be waived with the matter proceeding on documents only. These options and more are available under the ICDR system. The ICDR can be consulted regarding the drafting of the arbitration agreement and the various ADR options that could be added to the ICDR model clause to further maximise efficiencies and reduce time and costs.

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The global leader in conflict management since 1926, the **American Arbitration Association (AAA)** is a not-for-profit, public service organisation committed to the resolution of disputes through the use of arbitration, mediation, conciliation, negotiation, democratic elections and other voluntary procedures. In 2011, over 187,000 cases were filed with the AAA in a full range of matters including commercial, construction, labour, employment, insurance, international and claims program disputes. The AAA has promulgated rules and procedures for commercial, construction, employment, labour and many other kinds of disputes. It has developed a roster of impartial expert arbitrators and mediators through 30 offices in the United States, and with the ICDR, which has offices in Mexico, Singapore, and Bahrain through the BCDR-AAA.



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