ICDR arbitration--the lawyers' perspective

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Arbitration analysis: The International Centre for Dispute Resolution (ICDR) was established almost twenty years ago as the international arm of the American Arbitration Association (AAA). Aníbal Sabater, international arbitration specialist and partner at Chaffetz Lindsey in New York, and Edward Kehoe, co-head of King & Spalding's international arbitration practice, also in New York, share their experiences of ICDR arbitration.

What has been your involvement in ICDR arbitration?

Aníbal Sabater (AS): Since it was established as the AAA's international division, I have done over 25 ICDR cases, either as a counsel of record or as an arbitrator. I am also a member of the ICDR's neutral roster.

In terms of work for the institution, in 2007 I was appointed founding chairman of the ICDR's translation committee, tasked with translating the institution's rules into several foreign languages. More recently, I was a member of the ICDR committee, chaired by Luis Enrique Graham, that worked on the first ever ICDR expedited procedures. Occasionally, I am also asked to teach the ICDR training program for new arbitrators.

Edward Kehoe (EK): I have acted as counsel in dozens of ICDR cases, and I have sat as an arbitrator in eight or nine ICDR cases.

What is your experience of running a case through ICDR arbitration?

AS: Users who think that all major international arbitration institutions are equal or largely the same are poised to be disappointed. Each institution has distinctive rules, practices, and features, which users should be well acquainted with before delving into their first case there. The ICDR is no exception. In my experience, ICDR features of note include:

List system

The ICDR usually relies on the list system. When the parties or co-arbitrators fail to agree on the tribunal chair, the ICDR tends to provide a list of candidates to the parties, instead of directly making an appointment. Each party can then strike a limited number of names from the list and is expected to rank the rest. The highest commonly ranked candidate is eventually appointed. This procedure tends to minimise the risk of 'surprise' or lack of party involvement in the appointment.

Code of ethics

There is a binding code of ethics for arbitrators. Unlike other institutions, the AAA/ICDR has its own code of ethics, drafted in conjunction with the American Bar Association. The code's most recent version was approved in 2004 and applies mandatorily to all AAA/ICDR cases.

In keeping with the code's tenets, at the beginning of each case the ICDR asks approximately 14 questions to each arbitrator candidate, seeking particulars about the candidate's relationship with the parties, counsel, other arbitrators, the case's subject matter, etc. The last question is of course, whether there are any other circumstances the candidate would like to disclose.

From the questionnaire stem very broad disclosure obligations. And situations that may not be disclosable under the IBA Guidelines must often be disclosed under the ICDR questionnaire. Indeed, the questionnaire is so detailed that, in practice, there are few grey areas for arbitrators to be uncertain as to whether something should or should not be disclosed, and in many respects it chooses for the candidate what needs to be disclosed.

Appeal rules

The ICDR system has a unique set of expedited and optional appeal rules.

Efficiency obligations

The ICDR rules expressly impose certain efficiency obligations on the tribunal. (See, eg, art 20.2: 'The tribunal shall conduct the proceedings with a view to expediting the resolution of the dispute.')

Hourly rate

Arbitrators tend to be compensated on an hourly rate.

Mediation

The ICDR rules encourage the use of mediation in parallel to the arbitration (see, eg, art 5: 'Following the time for submission of an Answer, the Administrator may invite the parties to mediate in accordance with the ICDR's International Mediation Rules. At any stage of the proceedings, the parties may agree to mediate in accordance with the ICDR's International Mediation Rules.')

Exchange of information

The ICDR system has very detailed provisions on exchanges of information (see, eg, art 21). Those provisions contain standards on, for instance, when a document production request should be granted and when not. This level of detail can seldom be found in other sets of international rules.

EK: It has been positive. I find the case managers to be both intelligent and helpful.

How (if at all) has ICDR's arbitration service changed during the period of your involvement?

AS: There has been a very obvious push for efficiency--shortening deadlines, such as those related to the issuance of the award, and generally streamlining the case.

Similarly, there has been a strong push to show users that, if the ICDR could have ever been viewed as a too-American institution, its rules are truly transnational and not wedded to US court litigation techniques. (Article 21.20, for instance, says: 'Depositions, interrogatories, and requests to admit as developed for use in US court procedures generally are not appropriate procedures for obtaining information in an arbitration under these Rule'.)

Also, the ICDR has a tradition of being a pioneer in the adoption of new, and sometimes quite bold, solutions. It was the first major international arbitration institution to provide expedited procedures, to give the parties the opportunity to have an arbitral appeal, or to make arbitral emergency relief available in all its cases (unless the parties expressly opted out from it).

EK: It has remained generally the same during the course of my involvement and is consistently very good.

ICDR revised its rules in 2014--did those revisions go far enough?

AS: The revisions have certainly changed the ICDR system significantly. Even those who were familiar with it, have had to re-study and re-learn the system to a large degree.

I think, in the mid- and long-run, the optional appeal rules will prove successful because they fill a gap. Court set-aside actions usually allow only for the annulment of deeply flawed awards. But there are awards that, while not so blatantly flawed as to guarantee the success of a set aside court action, would still benefit from a serious appeal review. That is where the new optional procedures can fruitfully come into play.

The expedited procedures, for their part, are a development for which existed something akin to 'popular clamour'. I sometimes wonder, however, whether they should be made mandatorily applicable not only to cases under $250,000 (the current limit) but also to higher value disputes.

Of course, areas remain that would benefit from future reform. For instance, ICDR arbitrators typically charge on an hourly basis. ICDR case administrators go to great lengths to review arbitrator bills and expenses, ensuring that they are fair and justified and contacting arbitrators in those very exceptional cases when they are not. But the rules and the arbitrator compensation contract could use more explicit language reminding arbitrators that bad invoicing practices may lead to removal from the panel or even the case.

EK: Yes, I believe they did.

Are there any areas of the ICDR Rules or the service provided that cause you any concerns?

AS: As mentioned above, the ICDR powers to enforce its billing policies could be made more explicit.

EK: No, the service offered is good and I have no cause for concern.

What can ICDR do to attract more contracting parties to choose ICDR?

AS: Ultimately, much of the success of arbitral institutions hinges on two factors--providing top notch dispute resolution services and being known by key users (mostly companies, who can incorporate the institution's rules into their clauses). In this respect, organising seminars and meetings in regions where the institution wants to grow more tends to be very useful and is a helpful tool to attract more contracting parties.

EK: Because the ICDR is based in New York, I think it would benefit from emphasising the importance of selecting New York law in commercial contracts. (New York law is well developed and there is greater certainty of an outcome under New York law making it particularly suitable to arbitration.) And if the parties do choose New York law, I think they are more likely to select the ICDR over competitors such as the International Chamber of Commerce (ICC) who are not headquartered in New York.

Interviewed by Jenny Rayner.

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