ICDR Offers Concurrent Mediation/Arbitration Clause

ICDR DEVELOPMENTS

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Mediation is said to be widely accepted by attorneys who counsel companies that engage in international commerce and the outside counsel they retain to represent them in connection with disputes.[1] Yet there appears to be a vast difference between the number of lawyers who advise clients concerning the benefits of mediation and those who actually mediate regularly. This disparity could be due in part to challenges encountered while negotiating an agreement to mediate. The challenging issue negotiators face is whether to agree to mediate before or after a dispute arises.

This article discusses a new clause developed by the International Centre for Dispute Resolution (ICDR) that makes it possible for parties to agree to mediate disputes at the same time that they agree to arbitrate. The new clause is not the same as the conventional "step" clause that is negotiated at the time of a deal. In the conventional clause, the parties agree to use one or more dispute resolution processes to resolve disputes that could arise out of, or in connection with, the transaction. The term "step" means that one process must be completed before the next one begins. Earlier steps call for one or more non-binding processes (e.g., mediation or negotiation) with the last step being a binding process (e.g., arbitration). The binding process is used only if earlier steps fail to produce a voluntary settlement.

Some practitioners like a two-step clause with mediation as the first step and arbitration as the second. Others prefer to have three steps, with negotiation by the parties' corporate executives as the first step, followed by mediation, and then arbitration if necessary.

To maximize the effectiveness of a step clause, it is necessary to prevent one party from delaying a step to prevent the next step from occurring. The ICDR's standard step clause does this by calling for mediation to be completed within 60 days of service of the demand for mediation

> In the event of any controversy or claim arising out of or relating to this contract, or a breach thereof, the parties hereto agree first to try and settle the dispute by mediation, administered by the International Centre for Dispute Resolution under its International Mediation Rules. 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.

But some practitioners say it is perilous to wait that long to start arbitration, while others contend that mediation is better held after the arbitration process has begun. Some practitioners oppose time limits altogether.[2]

There are also practitioners who prefer to have a plain arbitration clause, leaving the parties to decide whether to mediate after a dispute arises.[3] While this sounds plausible in theory, in practice it is not always that easy. Experience shows that there are many hindrances to reaching an agreement to mediate (or agreeing on anything else, for that malter) after a dispute arises. Often the parties are so entrenched in their positions that contemplating an amicable resolution seems completely out of the question to them. Equally as often, neither side wants to be the first to agree to mediate, believing that to do so would signal weakness.[4] In addition, it can be difficult to achieve a post-dispute mediation agreement with a party that has not mediated before because it has no reason to have confidence in the process. Other convenient excuses not to enter into a mediation agreement after a dispute has arisen include differences in the parties' culture, language and legal systems.

The Solution—A Concurrent Clause

To remove some of the impediments to reaching an agreement to mediate, the ICDR developed the "concurrent arbitration/mediation clause." This clause provides for mediation to "start" automatically after the demand for arbitration is filed. This means that the parties need not reach a separate mediation agreement. Moreover, the simultaneity of the concurrent arbitration/ mediation clause removes the need to decide when to mediate. While the parties are involved in selecting the arbitrator(s) and participating in pre-hearing arbitration conferences, they can, if they wish, also select their mediator(s) and decide on the best time to schedule their mediation. If the parties do not wish to select the mediator at this time, they can do so later.

Parties who have arbitrated with the ICDR already know that the Centre is keen to encourage all who are contractually obligated to arbitrate to try to mediate the dispute first. The reason is that mediation works. Eighty percent of the ICDR

cases that use mediation come to a full or partial resolution. In the cases that do not settle during mediation, the parties sometimes decide to use the mediator's services later on. For example, the mediator might help the parties structure a settlement payment after transmission of the arbitration award.

The concurrent clause is unique in that it allows the parties to agree to mediate before a dispute arises, eliminating the need to negotiate a separate mediation agreement at a later time or to address the timing of the mediation vis-à-vis the arbitration. This means that the mediation process does not slow down the arbitration process but proceeds on a parallel track.

The concurrent clause gives the parties enormous flexibility. They could decide to mediate in a different location from the arbitration, and to hold mediation whenever they believe it would be most productive, as long as it is prior to the issuance of the award.

Should the parties settle during the concurrent mediation, the concurrent clause allows the arbitral tribunal to incorporate the parties' settlement in an award pursuant to Article 29(1) of the ICDR International Arbitration Rules.

The Mediation/Arbitration Concurrent Clause

The concurrent clause provides as follows:

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules. Once the demand for arbitration is initiated, the parties agree to attempt to settle any controversy or claim arising out of or relating to this contract, or a breach thereof by mediation, administered by the International Centre for Dispute Resolution under its International Mediation Rules. Mediation will proceed concurrently with arbitration and shall not be a condition precedent to any stage of the arbitration process.

Because this clause provides that the parties agree to begin to mediate once the arbitration has been initiated, there is no need for either party to separately request the mediation to start.

Alternative Concurrent Clause

The ICDR also prepared an alternative version of the Mediation/Arbitration Concurrent Clause for parties who do not want the mediation to start automatically. This clause calls for one party to request that the process begin. This gives the parties the option of foregoing mediation if both parties believe that it would not be effective in resolving their dispute. It only takes one party to start the mediation. The clause is as follows:

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules. Once the demand for arbitration is initiated, the parties agree to attempt to settle any controversy or claim arising out of or relating to this contract, or a breach thereof by mediation, administered by the International Centre for Dispute Resolution under its International Mediation Rules at the request of either party. Mediation may proceed concurrently with arbitration and shall not be a condition precedent to any stage of the arbitration process.

Other Considerations

Concurrent arbitration/mediation clauses raise the question of whether arbitrators may serve as mediators in the concurrent mediation (and mediators serve as arbitrators). The answer is generally "no." The ICDR intends for the parties to engage in separate processes with separate neutrals. Thus, the ICDR presumes that arbitrators could not be mediators and that mediators could not be arbitrators in this same case unless the parties expressly agree otherwise after full disclosure of the risks involved. The parties could also remove any doubts about this by including this express language:

> Absent agreement of the parties, no mediator appointed pursuant to this agreement shall serve as an arbitrator and no arbitrator shall serve as a mediator.

Because it is likely to take extra time and money to resolve disagreements between the parties about the number of arbitrators and mediators, the language of these processes, and the situs of the arbitration and mediation, the parties are advised to add clauses addressing these issues. Here is a non-exhaustive list of provisions that could be added to a concurrent arbitration/mediation clause:

> **Number of Neutrals**
>
> The number of arbitrators shall be (one or three).
>
> The number of mediators shall be (one or two).
>
> **Language of Proceedings**
>
> The language(s) of the arbitration shall be__________.
>
> The language(s) of the mediation shall be__________.
>
> **Location of Proceedings**
>
> The place of arbitration shall be (city and/or country).
>
> The place of mediation shall be (city and/or country).

Conclusion

The intent of this article is not to expound on the benefits of mediation, but to provide those already in favor of the process with a tool that facilitates the use of mediation by eliminating the need to agree on a time limit or when to mediate. The concurrent clause also alleviates the concern that a party can use mediation as a tactic to delay arbitration.

The concurrent clause should

enable parties to international transactions to benefit from the mediation process when they become embroiled in international business disputes, regardless of the stage of the dispute. ■

Endnotes

[1] Mediation, conciliation and amicable dispute resolution are the same processes for purposes of this article.

[2] Some attorneys worry that the integrity of an arbitration award might be weakened if the parties bypass the mediation provisions and go immediately to arbitration.

[3] Parties wishing to have the ICDR administer their mediation but have not entered into a pre-dispute mediation agreement must enter into a submission agreement after the dispute arises. The ICDR's standard Mediation Submission Agreement provides:

> The parties hereby submit the following dispute to mediation administered by the International Centre for Dispute Resolution in accordance with its International Mediation Rules.

[4] The ICDR offers every party in its arbitration cases the opportunity to consider mediation.

READER MAIL

Recently I was successful in vacating a post-hearing award of attorney's fees that was issued by an arbitrator based on a post-hearing submission without giving my client an opportunity to be heard on the issue.

This case, *Application of Inyx, Inc. v. Bartke* (No. 600 828/08, Sup. Ct., N.Y. County, *N.Y.L.J.*, Nov. 6, 2008, at 28, col. 1), should interest readers of John Fellas' article, "A Fair and Efficient International Arbitration Process" (Feb.-April 2004 *DRJ*), which discussed the issue of deciding an arbitration without an oral hearing, and Carolyn M. Chave's letter to the *DRJ* (Nov. 2004-Jan. 2005 *DRJ* at p. 6), in which she wrote: "I agree that this is an option that arbitrators should always consider. I think it unlikely that a court would overturn an arbitration decided without an oral hearing if all parties had consented in advance in writing to such a decision." Ms. Chave was the arbitrator whose award of attorney's fees was vacated in my case.

N.Y. Supreme Court Justice Charles Ramos vacated the award, concluding that the "arbitrator failed to comply with Section 10(a)(3) of the FAA [Federal Arbitration Act] in that she refused to hear evidence pertinent and material to the issue of attorney's fees after she permitted [claimant] to submit post-hearing evidence."

The court stated there was merit in our contention that the arbitrator "had a predisposition against an evidentiary record because she is a vocal proponent of determining arbitration without holding an oral hearing." The court concluded, "[T]his arbitrator's action of refusing [petitioner] both an oral hearing or written opposition on the issue of attorney's fees is not sustainable, in light of the fundamental rights involved and the AAA Rules which require submissions on notice and an opportunity to respond." The court therefore left "to the AAA the question of assigning a substitute arbitrator more sensitive to the rights of the parties and its own Rules, to finally hear and resolve the issue of attorney's fees."

Arbitrators and parties should heed this decision before embracing the practice of tacking on legal fee applications as an addendum to a proceeding without providing a hearing on the fee issue—an all too tempting shortcut that if handled improperly would bypass the dispute resolution process and result in an unsustainable award.

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Carolyn Chave replies:

In Bartke v. Inyx, *the underlying agreement contained an arbitration clause which made an award of attorney's fees to the prevailing party mandatory, thereby preempting the discretion ordinarily held by an arbitrator with respect to the award of attorney's fees under AAA rules. There was a full oral hearing; and the award was rendered at the conclusion of the hearing. Under those facts I have no idea why Justice Ramos would have ruled as he did.*

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