

The International Centre for Dispute Resolution Mediation Practice¹

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In addition to its arbitration services the International Centre for Dispute Resolution (ICDR), which is the international division of the American Arbitration Association² provides parties to disputes extensive options for ADR processes. These include Early Neutral Evaluation (ENE), Fact-Finding, Mini-Trial, Dispute Review Boards (DRB), Partnering, Double-Blind Bid Settlement Process and Non-Binding Arbitration. However the most commonly known and utilized non-binding dispute resolution process is mediation.

In the past parties to contracts that contained dispute resolution clauses that called for the services of the American Arbitration Association or the rules of the AAA often were unaware of the mediation services that the association provided. Much of this was based on the misnomer of the company name. Many were under the misconception that the AAA services were limited to those of arbitration processes. A concerted effort was put forth to educate the Association's current and prospective users as to not only the availability of its mediation services but the benefits of mediation. This

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² About the American Arbitration Association—The global leader in conflict management since 1926, the American Arbitration Association (AAA) is a not-for-profit, public service organization committed to the resolution of disputes through the use of arbitration, mediation, conciliation, negotiation, democratic elections and other voluntary procedures. In 2009 over 113 thousand cases were filed with the Association in a full range of matters including commercial, construction, labor, employment, insurance, international and claims program disputes. The AAA has promulgated rules and procedures for commercial, construction, employment, labor and many other kinds of disputes. It also has developed a roster of impartial expert arbitrators and mediators. Through 30 offices in the United States, and through the ICDR, which has office in Mexico Singapore, and Bahrain through the BCDR-AAA.

challenge was met with great success as today the AAA is known within the United States as a leading provider of mediation services.

The ICDR faced a different challenge in the international arena as it pertained to mediation. Although the ICDR name is inclusive of all dispute resolution services the use of these ADR techniques outside of the common law jurisdictions needed to be broadened. As the largest provider of dispute resolution services in the world, the AAA/ICDR took up the mantle of broadly promoting to the international business and legal community the benefits of mediation and how it could assist its users in reaping those benefits and in managing their conflicts. Over the last 13 years the ICDR has hosted or participated in countless conferences, meetings, private and public programs, and ADR classes throughout Europe, Asia, Latin America and the Middle East where one or more of the topics would cover the components of mediation from drafting the clause to the process and reaching a settlement.

WHY USE MEDIATION AND WHY USE THE ICDR?

There are several main reasons why parties should select mediation as a dispute resolution option before resorting to an arbitration/litigation or even while in the midst of one.

ICDR mediators are impartial third parties trained in conflict resolution with extensive experience in dealing with intractable disputes where the parties have entrenched positions, or have unreasonable expectations where one cannot contemplate a possible resolution of the dispute. ICDR mediators are trained to identify "issues" beyond the central issue and work with the parties to achieve their internal reasonable goals for the settlement of the dispute. Of course, ICDR mediators do not provide legal advice.³

Mediation can save time and money. As opposed to litigation or arbitration, mediation can be completed in a more expedited time frame with a substantially decreased need for the exchange of information (discovery) phase. It is well known that the exchange of information, or discovery process, can be one of the largest expenditures of time and money for a party to a litigation or arbitration. The time spent by a mediator will be less than the hours spent by an arbitrator reviewing the submissions. Similarly the time spent in the actual mediation session is usually less than the hours spent in

³ Martinez and Ventrone from Horacio A. Grigera Naón and Paul E. Mason, *International Commercial Arbitration Practice: 21st Century Perspectives* Chs. 43 and 55 (LexisNexis Matthew Bender).

an arbitration hearing. All of these reductions in time lead to obvious costs savings in terms of the process itself and the investment of counsel.

As with arbitration, mediation is a confidential process.⁴ Nothing that is discussed in the mediation sessions should be disclosed further. It is also the case that a mediator in most jurisdictions is protected from testifying before any subsequent tribunal regarding the matter. This protection gives the parties a comfort level enabling them to be forthright in terms of their position regarding the dispute. They understand that they can make disclosures in a mediation that they would normally not wish to disclose in a public court hearing or even during a private arbitration as it could place the party in a negative light with the decision makers.

Mediation is party-controlled. The only way mediation can be successful is if the parties have the desire to participate in good faith with a genuine intent to try to reach a resolution. Once the mediation has commenced the process is flexible enough so that the parties, with the help of the mediator, can reach a resolution, for some or all of the issues at hand, at times in creative and unique ways. It often results in a win-win situation. Further, since they have a stake by participating in the development of the settlement they usually have more of a "personal" interest in compliance. All of this is in stark opposition to an arbitration award that may be thrust upon the parties by a judge or arbitrator. Lastly a mediated settlement can help the parties preserve and continue a relationship that may have been irreparably damaged by an adversarial action in a court or arbitration.

ICDR Mediation Services provides the parties with highly qualified, skilled mediators along with time tested rules and case management services.⁵ Whether mediation is required by contract or parties simply want to submit an existing dispute to mediation, the ICDR will provide the support needed and the appropriate mediator for an individual dispute. The mediators on the ICDR's international roster are not only well-trained in the mediation process, they are well-respected professional experts in business, industry, and law.

These mediators, who serve on cases administered by the ICDR, must also follow The Model Standards of Conduct for Mediators which was originally prepared in 1994 by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution. A joint committee consisting of representatives from the same successor organizations revised the Model Standards in 2005. Both

⁴ See M-10 of the International Mediation Rules.

⁵ The ICDR's International Dispute Resolution Procedures can be found on the ICDR's web site at WWW.ICDR.ORG.

the original 1994 version and the 2005 revision have been approved by each participating organization. “These Standards are designed to serve as fundamental ethical guidelines for persons mediating in all practice contexts. They serve three primary goals: to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes.”⁶

THE MEDIATION PROCESS

Requests for Mediation

The ICDR will receive a Request for Mediation via mail, e-mail, fax or through our online filing system, WebFile. The mediation provision may be contained in a contract or where there is no mediation provision the parties can agree to mediate by executing a submission agreement to mediate. The administrator will contact the parties immediately using one of the following two options:

1. Via Telephone (*The preferred option*)—The ICDR will immediately (same day in many instances) contact the parties by phone to discuss items outlined below. An attempt will be made to establish a joint conference call with the parties but separate calls may also take place to discuss the following issues.
 - a. Mediator Selection
 - b. Date and Place of the Mediation Conference
 - c. Allocation of Costs
 - d. Preferred Method of Communication
 - e. Nature of the Dispute & Amount of Relief Sought
2. Via Email—As an alternative to contacting the parties by telephone the ICDR may send an email/letter discussing the aforementioned issues and requesting a conference call if needed to finalize any remaining open issues. This call will hopefully take place within a few days of filing.

It is important to note that a signed mediation agreement is not required. The parties may subsequently execute one and forward it if they desire but

⁶ Model Standards of Conduct for Mediators American Arbitration Association, September 2005. Preamble.

the ICDR will proceed with its management of a mediation case without a signed mediation agreement based on their verbal agreement alone.

SELECTING & APPOINTING THE MEDIATOR

Selecting the Mediator

Based on the comments of the parties, and if the parties have not previously mutually agreed upon a mediator, the ICDR will prepare a list of mediators for their consideration and discussion. Normally, the list will consist of five (5) mediators—listed in alphabetical order by last name. The list, along with the mediator's AAA-ICDR profiles, will be sent to the parties. If the list is sent via email or fax, the parties will have three (3) business days to respond. If the list is sent via regular mail, the parties will have seven (7) days to respond. If the parties have provided a specific date when the mediation conference must be held, the mediators appearing on the list will be called or emailed in advance to make sure they are available for that date. The list will be drawn from within the geographical limits (if any) specified by the parties by agreement or in their clause.

Parties Fail to Select a Mediator from the List

If there are no mutual selections for the mediator from the submitted list, or if any mutually selected mediators are unable to serve, the administrator will advise the parties of this development and offer them the option of either using the AAA's online Mediator Profile Search in an attempt to mutually agree on a mediator or having the ICDR submit a supplemental list of mediators. Supplemental lists will contain an additional five (5) names of mediators whenever possible.

Appointing the Mediator

Once the mediator has been selected the ICDR will contact the mediator utilizing either of the following two options:

1. Via Telephone—The ICDR will immediately (same day in many instances) contact the mediator by phone to discuss the items outlined below.

- a. The ICDR will advise the mediator of the names of the parties, the parties' principals, and the parties' representatives, if known.
 - b. The ICDR will determine whether the mediator has any conflicts of interest or disclosures.
 - c. The ICDR will confirm with the mediator that he or she meets any special qualifications specified by the parties.
 - d. The ICDR will determine the mediator's availability if the parties have requested a specific date for the mediation. If the parties have not provided a date for the mediation conference the ICDR will ask the mediator for several dates he or she is available.
 - e. If the parties have not agreed to a place for the mediation, the ICDR will advise the mediator that the mediation will take place in its office unless the mediator has another preference or if the ICDR's offices are not a convenient location.
 - f. The ICDR will ask the mediator if he/she wants to schedule a pre-mediation conference call with the parties.
 - g. The ICDR will ask the mediator if he/she wants the parties to file pre-hearing memoranda and, if so, whether the parties are to exchange the memoranda between/among the parties.
 - h. Based on the parties' estimates of how long the mediation will take, the ICDR will ask the mediator what funds he or she wants the parties to place in deposit, and
 - i. After the telephone conversation with the mediator the ICDR will confirm the appointment of the mediator to the case.
2. Via Email—Mediators may also be invited to serve by sending them an electronic invitation via email which will contain all of the above questions and will require the prospective mediator to respond accordingly. Electronic invitations are currently the preferred method of invitations being used in the ICDR. The process involves the administrator scanning and uploading documents (e.g. Requests for Mediation, Notice of Mediator Appointment, etc.) into WebFile and requires mediators accessing such documents through our Neutrals eCenter®. It is important to briefly mention here that the internal case management database is intricately related to WebFile (Party/Rep. access) and Neutrals eCenter (Neutral access) and all data entered and available on one becomes available on the others.

DISCLOSURES

In every case disclosures take a high priority and are handled expeditiously. Every disclosure, no matter how insignificant it may be perceived, will be communicated to the parties. If the information received from the mediator or another source seems vague or incomplete, the administrator will pursue pertinent facts and probe for details. This includes enquiring as to the exact nature of the relationship (direct or indirect, business, personal, social or with relatives), the extent of the contact & duration of the relationship, the specifics on the contact, such as business meetings, occupation of office space in the same building, consulting work, professional or trade association meetings, committee work, and if the disclosure has any impact on the mediator's ability to act impartially?

If the parties agree to remove the mediator, we will notify the mediator that the parties did not waive their objections to the information disclosed and that the ICDR will be appointing a replacement mediator. In the event the parties disagree as to whether the mediator should serve, the ICDR will appoint a new mediator regardless.

SCHEDULING A MEDIATION CONFERENCE

Once a mediator has been appointed and the date(s), place and time have been set, the ICDR will provide the parties with notice of the conference. If the mediation conference is postponed the ICDR will work with all involved to reschedule for a convenient date.

On occasion, parties may agree to put a case into abeyance. In such instances, the ICDR will confirm this action, notify the mediator and schedule the case for follow up with the parties at regular intervals, e.g. 30, 60, 90 days, as appropriate.

PROCESSING PAYMENT OF THE PARTIES

The AAA/ICDR's new mediation pricing model became effective October 1, 2009. The main elements of the model are as follows:

There is no filing fee to initiate a mediation or a fee to request the AAA to invite parties to mediate. The cost of mediation is based on the hourly or daily mediation rate published on the mediator's AAA profile. This rate

covers both mediator compensation and an allocated portion for the AAA-ICDR's services. There is a four-hour minimum charge for a mediation conference. Expenses referenced in Section M-16 of the International Mediation Rules may also apply. If a matter submitted for mediation is withdrawn or cancelled or results in a settlement after the request to initiate a mediation is filed but prior to the mediation conference the cost is \$200 plus any mediator time and charges incurred. These costs shall be borne by the initiating party unless the parties agree otherwise.

Generally, the ICDR will invoice parties in advance of the mediation conference for the funds the mediator wants on deposit. If the mediation conference has been scheduled on very short notice, an invoice for the parties will be generated and sent via email with instructions to bring payment to the mediation conference. Alternatively, the ICDR can approach the mediator for their approval to allow the parties permission to make payment after the conclusion of the mediation conference.

CLOSING THE MEDIATION FILE

The ICDR will call or email the mediator within 24 to 48 hours after the date of the mediation conference to obtain the disposition of the case, i.e. settled, impasse, or impasse but the parties and the mediator have determined to continue their efforts. Based on the information provided by the mediator, the ICDR may proceed with the most appropriate action from the options below.

1. **Mediation Settled**—When the mediator notifies the ICDR that the parties have reached a mediated settlement, the case manager will do the following:
 - (a) Invoice the parties for additional mediator time, mediator expenses, and miscellaneous expenses (such as AAA conference room rental).
 - (b) Pay the mediator and the AAA.
 - (c) Close the case in the system which will then be reflected on WebFile and Neutrals eCenter.
2. **Impasse**—When the mediator notifies the ICDR that the mediation conference did not result in a settlement of the parties' dispute, the case manager will do the following:
 - (a) Invoice the parties for additional funds or expenses if needed.
 - (b) Pay the mediator and the ICDR.

- (c) Close the case in the system which will then be reflected on WebFile and Neutrals eCenter.
- 3. Impasse/Mediator to Continue Efforts—When the mediator notifies the ICDR that the mediation conference did not result in a settlement, but says he/she is going to continue follow up efforts with the parties for a certain period of time, the case manager will do the following:
 - (a) Schedule the case for follow up with the mediator at the end of the period of time the mediator specified, if any.
 - (b) Pay the mediator and AAA.
 - (c) Follow up with the mediator as to the developments on the matter and of the final disposition of the matter (settlement or definite impasse).
 - (d) Invoice the parties for additional funds and expenses if needed.
 - (e) Close the case in the system which will then be reflected on WebFile and Neutrals eCenter.

HANDLING UNILATERAL REQUESTS FOR MEDIATION

Where there is no pre-existing submission to mediation or contract providing for mediation, a party may request the ICDR to invite another party to join in a submission to mediation. Upon receipt of such a request, the ICDR will contact the other party or parties involved in the dispute and attempt to obtain a submission to mediation. There is no fee charged for this service.

The general procedures followed for this scenario are:

- 1. If a unilateral request comes in written form (U.S. Mail, or email) the ICDR will immediately contact the requesting party by telephone and go over the following information.
 - (a) The ICDR will advise the party that mediation is a voluntary process and, as such, all parties must agree to participate in order for the ICDR to be involved. Without the agreement of all parties, the ICDR cannot administer a mediation.
 - (b) The ICDR will inquire as to whether the parties have talked about mediating the dispute and, if so, what was the outcome of the discussion. If the requesting party says that the other party was just not interested in mediating, we ask the party if they can articulate the responding parties' objections.
 - (c) If not indicated in the written request the ICDR will ask the requesting party to give a brief statement of the nature of the dispute and the monetary amounts involved (if any),

- (d) If not indicated in the written request the ICDR will ask the requesting party for the names, regular mail addresses, email addresses (where applicable), telephone and fax numbers of all parties to the dispute or for the parties' representatives.

Once we make contact with the opposing party(s) we will attempt to explain the mediation process to them and outline what will be required on their part and determine their desire to proceed with mediation.

MEDIATION IS OFFERED IN ALL ICDR CASES

As has been the procedure throughout the American Arbitration Association, the ICDR continues the tradition of offering and discussing the above described benefits of mediation in all arbitration cases filed within the Centre. This conversation takes place as part of our administrative conference call which is scheduled soon after the initiation of the arbitration. Although mediation can be initiated at any time during a dispute, the benefits are maximized if the process is introduced in the early stages. However, mediation can still prove beneficial in the later stages of the resolution of a dispute. It has been determined that some parties wish to proceed with the arbitration first, so that they can review the information that is exchanged in the arbitral process. Having the benefit of this information may often lead to a more informed client who would now be more willing to talk settlement as they have a better idea of other side's case. In this regard the ICDR has begun to approach the parties a second time at the conclusion of the exchange of information (discovery) stage to gauge their interest in attempting mediation. Since the time between this point and the actual hearing may sometimes be several weeks or more, there is sufficient time to select a mediator and conduct a session without ever having to disrupt the arbitration schedule. Parties may also consider mediation as a condition precedent to the arbitration or concurrently as they draft their arbitration agreement.

THE ICDR MEDIATION CLAUSES

If the parties want to adopt mediation as a part of their contractual dispute settlement procedure, they can insert the following mediation clause into their contract in conjunction with a standard arbitration provision:

If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation for a period of

30-days, the parties agree first to try in good faith to settle the dispute by mediation in accordance with the International Mediation Rules of the International Centre for Dispute Resolution for a period of 60-days before resorting to arbitration, litigation or some other dispute resolution procedure.

If the parties want to use a mediator to resolve an existing dispute, they can enter into the following submission:

The parties hereby submit the following dispute to mediation administered by the International Centre for Dispute Resolution in accordance with its International Mediation Rules. (The clause may also provide for the qualifications of the mediator(s), method of payment, locale of meetings and any other item of concern to the parties.)

The parties may decide to schedule the mediation concurrently with the arbitration to avoid the potential for any delay. The following clause can be inserted in to their agreement.⁷

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.

The parties may wish to consider adding:

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

⁷ For further reading on the Mediation Concurrent Clause See, Steve Andersen, ICDR Offers Concurrent Mediation/Arbitration Clause, *Dispute Resolution Journal*, vol. 63, no. 4 (November 2008-January 2009).

The International Mediation Institute

In further pursuit of ICDR's continuing effort to promote credible mediation and, in response to users and the international mediation communities, the ICDR/AAA became a founding institution of the International Mediation Institute (IMI). Its web site is www.imimediation.org. IMI's purpose is to generate enhanced confidence in mediators and to improve the understanding of international mediation processes among businesses and other disputants by encouraging high standards of training and certifying mediator's qualifications worldwide. IMI will aid users to find suitable, competent mediators quickly and easily and will certify registered mediators using independent assessors and testing to ensure the accuracy and proficiency of all mediators placed on the IMI roster. IMI will additionally strive to have its certification accepted as a global mediator competency standard and will contribute to the further development of the mediator's professional standards in the field.

ICDR STATISTICS

Over the past several years the ICDR has managed the following number of mediations:

2005-68
2006-74
2007-74
2008-94

The 94 cases from 2008 included 39 cases involving European parties, 28 case involving Asian parties and 10 cases involving Latin American parties. They accounted for approximately 13% of the entire international caseload. This is slightly higher than historic figures which said that anywhere from 8%-10% of arbitrations attempt mediation. What doesn't deviate is that approximately 85% of the mediations managed result in settlements.

CONCLUSION

As mentioned the mediation process is confidential and provides greater control over the outcome of disputes by allowing parties to be creative in their assisted negotiations and their attempts to settlement. The benefits are

multiple but not least of which include the savings of time and money along with the real possibility to preserve important business relationships and to provide parties with an opportunity to better evaluate their case and risks of non-settlement. As the parties are involved in the process and the ultimate resolution there is typically a heightened level of satisfaction with mediation—the Win-Win scenario. Mediation offers the speed, economy and justice that is sought in alternative dispute resolution processes and should be considered a valuable tool as part of any conflict management strategy.⁸

⁸ For any questions regarding the Article or the ICDR's international mediation services, please contact Luis Martinez at MartinezL@adr.org.