



BRIAN DUNNING

BRIAN DUNNING AND LUIS MARTINEZ DISCUSS THE INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION'S NEW RULES: WHY THEY WERE INTRODUCED; THE DRAFTING AND DEVELOPMENT PROCESS; AND HOW THEY ARE BEING RECEIVED IN PRACTICE.

THEY ALSO TOUCH ON THE ROLE OF MEDIATION IN RESOLVING DISPUTES AND ITS UPTAKE AMONGST PARTIES IN THE AMERICAS.



LUIS MARTINEZ



IN CONVERSATION WITH LUIS MARTINEZ

VICE PRESIDENT OF THE INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

Brian Dunning, Partner at Clyde & Co, discusses the International Centre for Dispute Resolution's (ICDR) new rules with its Vice President, Luis Martínez

CHANGES TO THE ICDR RULES: WHAT AND WHY?

BRIAN Changes to the Centre's rules are currently big news in the arbitration world. Why were the rules amended? Was it in response to specific feedback from parties and the arbitration community? Or were the changes just part of filling gaps and observing best practices in the field?

LUIS Really, all of those points came into play. The American Arbitration Association (AAA) has a long-established tradition of consulting advisory groups which help us to craft rules that target the needs of particular industries. We also rely heavily on the feedback we get from our users.

The last significant amendments were made in 2006, when we became the first arbitration institution to introduce access to an emergency arbitrator, which has been very successful. Then in 2008, we concluded guidelines on the exchange of information in response to the perception that arbitration was becoming overly Americanized, particularly in relation to discovery. Our guidelines dealt with the issue in ways similar to the IBA rules of evidence, although the IBA rules are only guidelines and we have asked arbitrators to treat our guidelines as if they were mandatory. We did this to avoid fishing expeditions, to ensure that document requests were narrowly tailored, and to encourage arbitrators to consider the economy of a given case. The guidelines dealt successfully with electronic discovery and privileges; and didn't even contain the word "discovery."

But, having said that, we knew that at some point we would have to include these concepts in the rules themselves because we were getting pushback from our arbitrators. No arbitrator wants to have an award vacated because he

didn't give a party full opportunity to present its case, even though application of these guidelines has never resulted in a vacatur. In fact, there are two reported cases—one in New York and one in New Jersey—where courts rejected vacatur attempts in cases where arbitrators relied on our guidelines to limit discovery.

As well as our desire to incorporate our discovery guidelines in the Rules, we were also keen to look at user feedback about the Rules over the last five or six years. Common complaints were timing and cost, so we wanted to address those things. We also wanted to promote more mediation. And, of course, we wanted to try to introduce the expedited international procedures which we are very excited about. We felt that they should automatically be in place in cases of USD 250 thousand or less but we also wanted to design them in a way that parties could easily apply them, by agreement, in larger cases. For cases of USD 100 thousand or less the presumption is that the award will be made on the documents alone.

BRIAN That is good news, indeed. As you surely know, there is a serious need for a place to resolve disputes in that range without having to endure massive discovery or spend a fortune on attorneys. My own experience is that the courts are ill-equipped to handle those kinds of cases because the breadth and cost of discovery is often the same for small cases as it is for large cases, and it still takes a lot of time to get those cases resolved.

LUIS And, on that score, the expedited rules establish an accelerated time frame. We've retained the well-known ICDR/AAA strike and rank method for selection of arbitrators (where the ICDR provides a list of names, each party strikes out some names and ranks the remainder in order of preference), but it's a shortened list with accelerated time frames for turn-around.

The arbitrator still has to go through the process of conflicts and disclosures but everything apart from that is fast-tracked. In fact, we anticipate that, provided timeframes are adhered to, awards should be issued in 135 days from the date of filing. Typically in these cases we do not anticipate in-person hearings but the parties can by agreement opt for a hearing day and, of course, more hearing days when used in the larger cases. The process of appointing an arbitrator is aided by the fact that more detail is required in the initial filing to give the arbitrator an idea of likely issues and potential conflicts. [In a regular-track case, users can simply fill out the form, send us the clause, and self-determine how much detail to include.]

After we confirm the appointment of the arbitrators we schedule a preparatory conference call with them within fourteen days. If we're proceeding just on documents the process should be done within sixty days and an award should be issued within thirty days from either the closing of the final hearing or the last filed submission. The whole process, excluding extensions agreed to by the parties, has been targeted to conclude within 135 days.

BRIAN That is great. Have you found parties calling you to inquire about this?

LUIS Yes, we've had questions. Currently, there are three cases already pursuant to these rules, so we are checking them and making sure the timeframe is working. We're planning to interview people after they have gone through the process to see what we can learn about how the rules were applied.

THE TREND FOR MEDIATION AND ITS BENEFITS FOR USERS

BRIAN The new Rules also include new references to mediation. Can you tell us about those?

LUIS Yes, of course. The rules now also contain a formal article that puts parties on notice that they will receive an offer to mediate. You may not know this but, to my knowledge, we are the only institution that actually has a refund schedule that contemplates a mediated settlement, where for example if the parties reach a resolution or settlement in thirty days, we give

back fifty percent of our filing fees. We try to make sure that parties are aware of the benefits of the mediation program and understand that they are going to be offered mediation in every instance. And we hope that the possibility of a fee refund and the savings of time and money all serve to motivate the parties to try to mediate their dispute.

BRIAN I read a statistic that something like eight to twelve percent of ICDR cases opt for mediation and, of those, ninety percent or so are settling. Is that about right?

LUIS Yes, although it does fluctuate somewhat from year to year, it's still not enough in the ICDR's opinion with respect to international cases. We still see parties who refuse it for the usual reasons—they may see it as a delay to the arbitration or they might have tried it before and got nowhere. I still don't know whether people fully value or understand the potential benefits of mediation and how much time it can save. There's a reason why multi-nationals are including mediation as part of their employment dispute resolution processes.

BRIAN In my own practice, I find that mediation is better received now than it was ten years ago, at least with US clients. Clients from other jurisdictions don't always understand and they often reject it. Is this consistent with your experience?

LUIS We aim to have clients as well as their attorneys on the administrative conference call and to make a strong pitch to foreign parties so they understand that it is not mandatory and that the parties have to reach a consensus: it's not binding. We also have a separate website now at mediation.org which is helping. We are also one of the founders of the International Mediation Institute, which vets mediators using third parties and provides details of their qualifications and bona fides.

It takes time but we are seeing changes. In Brazil, for example, there was little interest in talking about mediation ten years ago, but now they are working on a new mediation law.

AMENDING THE RULES: IDENTIFYING PARAMETERS AND FACILITATING CHANGE

BRIAN Tell me a little bit about the process of amending the rules. Was there a consultation period? How did you go about actually identifying the primary areas to amend and how to amend them? How did that process work?

LUIS We sat down a few years ago and identified transparency as one of the primary goals. Related to that, we knew we also had to reflect the lessons we have learned regarding current best practices in relation to administration, saving time and money and of course expediting the processes which led to the expedited procedures.

BRIAN It sounds like the subject areas developed organically over time, so it was not a mystery to anybody. I suppose there was an ongoing dialogue with lawyers and other users about the things that needed tweaking and the things that were working fine.

LUIS That is right. We kept track of ideas generated as a result of that dialogue and we were also keeping track of developments in the area. We have the ICDR's divisional meetings at the end of every year to discuss issues that concern us and we also talk about future growth and key projects. The rules were one of the things that we were tracking. We don't want to change the rules every twelve months, so we were waiting a while for the 2006 emergency relief article to have a good run—we've had thirty-nine cases using those rules, so far all with voluntary compliance and usually done within a month—but we also wanted to have a better feel for the application of the ICDR's Guidelines on the Exchange of Information to see if they were achieving their desired effect and how to best position them in our international arbitration rules.

The ICDR has one standing global international advisory committee. We ran the identified parameters by this committee and then we decided we should have subgroups to focus on particular tasks. The subgroups included the international expedited rules committee, the full arbitration rules committee and the last-best offer rules committee. Much of the information



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on these and other initiatives along with related articles can be found on our website at www.ICDR.org. Our first task was to survey the marketplace, including looking at what our domestic colleagues had done in the fields of commercial, construction and labor arbitrations. We invited extensive commentary from all our international advisory committees and many other users. We finally launched the rules on 1 June 2014.

There were numerous versions over the eighteen-month process and now we are in the process of gathering feedback from the market place.

BRIAN How is that going so far?

LUIS So far the reception has been very positive. As things stand, I haven't heard of any complaints or any tinkering that needs to be done.

THE NEW RULES IN PRACTICE: JOINDER AND CONSOLIDATION, MANAGING THE PROCESS AND TIMEFRAMES FOR AWARDS

BRIAN How are the new rules working in practice? Have you come up against any stumbling blocks or encountered any opposition to the Rules?

LUIS There has been one consolidation request. The clarification that the ICDR's default mechanism for arbitrator appointment is the list method has been helpful and the ICDR rules now expressly state that US discovery procedures are not appropriate for obtaining information pursuant to its international arbitration rules. See Article 21 [10].

BRIAN And depositions are also specifically excluded.

LUIS Yes. We also included, from the ICDR's Guidelines, a rule about privilege and we did so in Article 22 requiring that arbitrators should just apply the highest level of protection to all parties equally.

We included in these changes a new rule, Article 16, that addresses the conduct of party representatives. This rule simply says that party representatives must behave in accordance with such guidelines as ICDR implements on the subject. We have not yet done so, but guidelines are in the works.

Another article that should be interesting deals with the conduct of proceedings, Article 20, which says that the parties must take steps to avoid unnecessary delay. And, under this rule, an arbitral tribunal may allocate costs, draw adverse inferences or take such other additional steps as are necessary to protect the efficiency and integrity of the arbitration—arguably this is very powerful.

We also wanted to address our inability to remove arbitrators as our colleagues on the domestic side always had the power to remove them on their own initiative for any reason that

may have led to frustrate the arbitral process. The ICDR's Rules lacked a similar provision. Our ability to remove an arbitrator was arguably limited to issues of impartiality and independence stemming from a formal challenge. Now, if needed, we can remove an arbitrator who fails or is incapable of performing the duties of an arbitrator or, for any reason, to protect the arbitral process as needed.

BRIAN When you are out talking to people about the new rules, do you feel like you are selling a much improved product?

LUIS Obviously I'm biased, but I get to see what is in the market place. I also know our culture, I know our team, I know our rules, and I know what our users think; so I have a high comfort level in going around and promoting this product. I see my role as educational, so a good deal of my time is spent discussing the use of arbitration and mediation in general. And that is obviously something I believe in wholeheartedly.

We work with companies in developing their ADR policies, and our hallmark is flexibility: you don't have to use the rules in one specified way; we can help you design a clause for your individual needs or industry. It is your process. We have the rules, we have the arbitrators, and we have the case counsel/administrators from all over the world. We also have location facilities and cooperative agreements throughout the world, so I have all the tools needed to go out there and promote the ICDR but also to develop the international arbitration and mediation cultures in the countries that we operate in.



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WITH THANKS TO THE CONTRIBUTORS OF THIS EXCHANGE...

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Luis Martinez is Vice President of the International Centre for Dispute Resolution (ICDR), the international arm of the American Arbitration Association (AAA). As Vice President, Mr. Martinez is a key member of the ICDR's strategy team and leads the business development of ICDR's international arbitration and mediation services in North-East, Central and South America. Mr. Martinez is also an Honorary President of the Inter-American Commercial Arbitration Commission (IACAC). Mr. Martinez received a Bachelor's Degree from Georgian Court College and a Juris Doctor degree from St. John's University School of Law. He has had numerous articles published on international arbitration and has appeared as a speaker in programs throughout the world. Mr. Martinez is admitted to practice law in the State of New York and the State of New Jersey.

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Brian is a Partner based in Clyde & Co's New York office. Brian's practice focuses on advising clients, particularly from Latin America and Southern Europe, facing litigation or arbitration in the United States and other venues.

Brian has an extensive and strong network in Brazil and the wider Latin American region, and is among the few American lawyers whose focus is on advising Spanish and Latin American companies in connection with doing business in the US, and with US-headquartered companies. Correspondingly, he has a deep understanding of complex, cross-border litigation and arbitration processes. He is also familiar with the challenges faced by businesses operating in an international environment, and is a confident advisor on issues arising from this context.

Brian has acted for foreign individuals, businesses and sovereigns in state and federal courts in the United States, as well as in administered and ad hoc domestic and international arbitrations under the rules of various organizations, including AAA, ICDR, ICC, UNCITRAL and ICSID. Brian also acts as the general US counsel for a number of Spanish companies.

