



International Centre
for Dispute Resolution

Richard W. Naimark
Senior Vice President

May 8, 2008

Re: ICDR Guidelines for Arbitrators Concerning Exchanges of Information

Dear ICDR Panel:

I am pleased to announce the release of a new set of guidelines for the document disclosure process. These constitute a comprehensive set of guidelines for the disclosure of information in international commercial arbitrations that will be applicable for use by all ICDR neutrals, and may be used in more than 600 such arbitrations a year.

The guidelines were drafted by a broad task force of arbitrators, attorneys and business people over a period of many months, with the goal of bringing predictability to the process of document disclosure, including the issue of e-discovery. Careful attention was given to the varied expectations of those from both civil law and common law legal traditions. It is anticipated that the next revision of the ICDR International Arbitration Rules will include the guidelines as a Rule.

It is important to note that unless the parties agree otherwise in writing, these guidelines will become effective in all international cases administered by the ICDR commenced after May 31, 2008, and may be adopted at the discretion of the tribunal in pending cases.

We believe that these guidelines improve the clarity on the issue of arbitrator authority in managing the proceedings, as well as the role of the parties. They are intended to offer the best and most advanced thinking on the subject of disclosure in international arbitrations. We hope you will find the guidelines useful, practical and thoughtful. If you have any questions, please let any one of us in ICDR know of your concerns.

Best regards,

Richard Naimark

ICDR GUIDELINES FOR ARBITRATORS CONCERNING EXCHANGES OF INFORMATION

Introduction

The American Arbitration Association (AAA) and its international arm, the International Centre for Dispute Resolution® (ICDR) are committed to the principle that commercial arbitration, and particularly international commercial arbitration, should provide a simpler, less expensive and more expeditious form of dispute resolution than resort to national courts.

While arbitration must be a fair process, care must also be taken to prevent the importation of procedural measures and devices from different court systems, which may be considered conducive to fairness within those systems, but which are not appropriate to the conduct of arbitrations in an international context and which are inconsistent with an alternative form of dispute resolution that is simpler, less expensive and more expeditious. 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.

The purpose of these guidelines is to make it clear to 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. Unless the parties agree otherwise in writing, these guidelines will become effective in all international cases administered by the ICDR commenced after May 31, 2008, and may be adopted at the discretion of the tribunal in pending cases. They will be reflected in amendments incorporated into the next revision of the International Arbitration Rules. They may be adopted in arbitration clauses or by agreement at any time in any other arbitration administered by the AAA.

1. In General

- a. The tribunal shall manage the exchange of information among the parties in advance of the hearings with a view to maintaining efficiency and economy. The tribunal and the parties should endeavor to avoid unnecessary delay and expense while at the same time balancing the goals of avoiding surprise, promoting equality of treatment, and safeguarding each party's opportunity to present its claims and defenses fairly.
- b. The parties may provide the tribunal with their views on the appropriate level of information exchange for each case, but the tribunal retains final authority to apply the above standard. To the extent that the Parties wish to depart from this standard, they may do so only on the basis of an express agreement among all of them in writing and in consultation with the tribunal.

2. **Documents on which a Party Relies.**

Parties shall exchange, in advance of the hearing, all documents upon which each intends to rely.

3. **Documents in the Possession of Another Party.**

- a. In addition to any disclosure pursuant to paragraph 2, the tribunal may, upon application, require one party to make available to another party documents in the party's possession, not otherwise available to the party seeking the documents, that are reasonably believed to exist and to be relevant and material to the outcome of the case. Requests for documents shall contain a description of specific documents or classes of documents, along with an explanation of their relevance and materiality to the outcome of the case.
- b. The tribunal may condition any exchange of documents subject to claims of commercial or technical confidentiality on appropriate measures to protect such confidentiality.

4. **Electronic Documents.**

When documents to be exchanged are maintained in electronic form, the party in possession of such documents may make them available in the form (which may be paper copies) most convenient and economical for it, unless the Tribunal determines, on application and for good cause, that there is a compelling need for access to the documents in a different form. Requests for documents maintained in electronic form should be narrowly focused and structured to make searching for them as economical as possible. The Tribunal may direct testing or other means of focusing and limiting any search.

5. **Inspections.**

The tribunal may, on application and for good cause, require a party to permit inspection on reasonable notice of relevant premises or objects.

6. **Other Procedures.**

- a. Arbitrators should be receptive to creative solutions for achieving exchanges of information in ways that avoid costs and delay, consistent with the principles of due process expressed in these Guidelines.
- b. Depositions, interrogatories, and requests to admit, as developed in American court procedures, are generally not appropriate procedures for obtaining information in international arbitration.

7. Privileges and Professional Ethics.

The tribunal should respect applicable rules of privilege or professional ethics and other legal impediments. When the parties, their counsel or their documents would be subject under applicable law to different rules, the tribunal should to the extent possible apply the same rule to both sides, giving preference to the rule that provides the highest level of protection.

8. Costs and Compliance.

- a. In resolving any dispute about pre-hearing exchanges of information, the tribunal shall require a requesting party to justify the time and expense that its request may involve, and may condition granting such a request on the payment of part or all of the cost by the party seeking the information. The tribunal may also allocate the costs of providing information among the parties, either in an interim order or in an award.
- b. In the event any party fails to comply with an order for information exchange, the tribunal may draw adverse inferences and may take such failure into account in allocating costs.