The Future Is Now: New 2019 CPR Arbitration Rules Incorporate Best Practices for Fast and Efficient Administered Arbitrations

By Olivier P. André and Kenneth B. Reisenfeld

On March 1, 2019, the International Institute for Conflict Prevention & Resolution (CPR) released significant updates to its 2013 CPR Rules for Administered Arbitration and its 2014 CPR Rules for Administered Arbitration of International Disputes.[1] While CPR may be best known for its rules for non-administered or *ad hoc* arbitrations, CPR began offering administered arbitration services five years ago. The just-released 2019 Administered Arbitration Rules not only incorporate innovations from its 2018 Non-Administered Arbitration Rules,[2] but also feature best practices from arbitral institutions and case developments around the world. This article will focus on four notable improvements to enhance speed and efficiency and three innovations to further protect the security, integrity and long-term viability of CPR administered arbitrations.

A. Improvements to Enhance Speed and Efficiency

Users of arbitral services have made clear their desire for efficient, cost-effective and fair resolution of commercial disputes. The 2019 International Administered Rules offer new tools to satisfy these concerns, including the following innovations:

- *Sole arbitrator*: establish a $3 million monetary threshold for appointment of a three-arbitrator Tribunal, absent the parties' agreement on the number of arbitrators or CPR's decision based upon complexity or other considerations;
- *Early Disposition*: provide express authority and a defined process for responding to requests for early disposition of claims, counterclaims, defenses and other issues;
- *Settlement or Concurrent Mediation*: provide express authorization for the Tribunal to inquire about settlement and for CPR to contact the parties about potential mediation opportunities at any point during the arbitration;
- *Expected Completion Deadlines*: clarify that the parties, Tribunal and CPR shall use their "best efforts" to complete the oral and written submissions of a case within nine (9) months after the initial prehearing conference and issue the final award in most circumstances within two (2) months after the close of the proceedings;[3] and
- *Emergency Arbitrators*: rename its "special arbitrators" as "emergency arbitrators" in conformity with broader practice developments since CPR first introduced this category of arbitrator in its 2007 Rules for Non-Administered Arbitration and consistent with an emphasis on the required urgency necessary to support an application to appoint an emergency arbitrator and to adopt emergency measures of protection.[4]

This article will discuss only the first three developments, although these changes, in their totality, could significantly enhance the speed and efficiency of CPR-administered arbitrations.

1. Higher Threshold for Appointment of Three-Arbitrator Tribunal

The number of arbitrators forming the Tribunal can have a significant impact on the cost and scheduling of an arbitration. While parties are encouraged to agree upon the number of arbitrators and the selection process in their arbitration agreement, if the number is not agreed, under the 2019 International Administered Rules the Tribunal will consist of a sole arbitrator if the stated claims or counterclaims do not exceed $3 million. CPR retains discretion to appoint three arbitrators even for lower valued cases if the complexity of the case or other considerations so warrant. The higher monetary threshold for three-arbitrator cases is designed to decrease costs and shorten time schedules for smaller disputes.[5]

2. Early Disposition of Issues

In 2011, CPR issued its *Guidelines on Early Disposition of Issues in Arbitration*.[6] The *Guidelines* are intended to streamline the dispute resolution process by narrowing, sequencing and, where appropriate, disposing of claims,

Olivier P. André is CPR's Senior Vice President, International. Mr. André is responsible for CPR's international activities, as well as CPR international arbitration and mediation matters. He is involved in all aspects of the proceedings, including neutral selection, challenges, clause drafting assistance and procedural questions. He served on the CPR Working Group that drafted the 2019 Administered Arbitration Rules. **Kenneth B. Reisenfeld** is a Partner in the Washington, DC office of BakerHostetler and a leader of its International Arbitration and Litigation Practice. Mr. Reisenfeld is a recognized advocate and arbitrator with over forty (40) years' experience in international commercial and investment treaty arbitrations. He served on the CPR Working Group that drafted the 2019 Administered Arbitration Rules.

counterclaims, defenses or factual or legal questions at an early stage. Early disposition is thought to be appropriate for issues such as jurisdiction and standing, claims or legal theories of recovery, defenses or limitations on damages where a prompt, early review could lead to significant efficiencies or winnowing out of issues, but not delay the ultimate disposition of the case.[7] The *Guidelines* are "designed to strike a balance between, on the one hand, eliminating early on claims that do not justify full-blown hearings and, on the other hand, not providing encouragement to non-meritorious applications for early disposition."[8]

The subject of early disposition has generated lively discussions in the arbitral community, including raising questions whether a tribunal has inherent authority to dispose of issues early in a proceeding and whether providing explicitly for such a procedure might result in more applications, unnecessary additional expense and delays and open up opportunities for tactical abuse. Since the *Guidelines* were first issued, several arbitration institutions have adopted rules on early disposition. The Stockholm Chamber of Commerce (SCC), for example, adopted a "summary procedure" in its 2017 Arbitration Rules[9] and the Singapore International Arbitration Centre (SIAC) added a narrower rule in 2016 permitting early dismissal of claims or defenses.[10]

The 2019 International Administered Rules take the *Guidelines* approach one step further. In new Rule 9.3.b, the parties and Tribunal are encouraged during the initial pre-hearing conference to address the possibilities for early identification and narrowing of the issues in the arbitration, including the possibility of scheduling briefing(s) and hearing(s) to allow early disposition of any claims, counterclaims, defenses or other legal and factual questions in furtherance of the principles described in the *Guidelines* and in new Rule 12.6.[11] New Rule 12.6 expressly affirms the Tribunal's authority to structure the arbitration to advance efficient resolution of the overall dispute, with due recognition of its responsibility to provide "each party a fair opportunity to present its case and accord[] the parties equality of treatment."[12]

Rule 12.6 establishes a process for a party to file a preliminary application to the Tribunal if it wants to file a motion for early disposition of issues. The preliminary application must identify (i) the issue(s) to be resolved; (ii) the basis for the proposed motion and relief requested; (iii) how early disposition of the issue(s) "will advance efficient resolution of the overall dispute"; and (iv) the applicant's proposal as to the procedure for resolving the motion.[13] The Tribunal will then promptly review the application and determine:

> whether there is a reasonable likelihood that hearing the motion for early disposition may result in increased efficiency in resolving the overall dispute while not unduly delaying the rendering of a final award.[14]

The Tribunal will decide the motion expeditiously (generally within 60 days). To deter possible tactical abuse, the Tribunal is expressly authorized to apportion the costs of early disposition proceedings.[15]

CPR's explicit grant of authority to the Tribunal and adoption of an expedited process for disposing of requests for early disposition are designed to enhance the overall efficiency and cost-effectiveness of proceedings, while simultaneously discouraging dilatory or obstructionist conduct.

3. Expanded Opportunities for Settlement or Mediation

Tiered dispute resolution clauses typically establish a set sequence for resolving disputes: first, negotiation with senior managers, then mediation and if not settled, final resolution through binding arbitration. This inflexible step-by-step process may or may not yield a meaningful opportunity for settlement. In practice, many disputes require exchanges of claims and defenses by counsel, disclosures by the parties or development of the evidentiary record before the parties are sufficiently prepared to entertain serious settlement discussions. The 2019 International Administered Rules, like their 2014 predecessor rules, recognize this practical reality by expressly authorizing a Tribunal (1) to inquire at the initial pre-hearing conference whether the parties have engaged in settlement negotiations[16] and, if appropriate, (2) to suggest to the parties "at such times as the Tribunal may deem appropriate" that the parties might want to explore settlement.[17]

The 2019 International Administered Rules introduce additional new mechanisms to encourage amicable resolution of the dispute. New Rule 21.3 provides that "at any point in the proceeding," CPR *sua sponte* may invite the parties to mediate under the CPR International Mediation Procedure[18] or under any mediation procedure acceptable to the parties.[19] In order not to delay the arbitration, "[a]ny such mediation shall take place concurrently with the arbitration."[20] In addition, the Tribunal is encouraged to raise at the initial pre-hearing conference not only whether the parties have engaged in settlement negotiations, but also whether they would like to set a date in the procedural timetable when CPR would query the parties as to their desire to mediate the dispute.[21] By putting a firm date on the calendar for the CPR case manager to contact the parties about potential mediation—perhaps, for example, immediately after the exchange of pleadings or disclosures—the parties might be prompted to revisit whether the dispute can be settled with or without the assistance of a mediator.

B. Innovations to Protect the Integrity of the Proceeding and Promote Development of Less Experienced Practitioners

The 2019 Administered Rules incorporate three innovative features to protect the integrity and security of CPR administered proceedings and to support development of the next generation of arbitration counsel.

1. Screened Selection of Party-Designated Arbitrators Is Now the Default Procedure

The 2019 International Administered Rules provide that where a Tribunal is to consist of three arbitrators, a "screened selection" procedure will be used to select the arbitrators absent the parties' agreement on a different procedure.[22] "Screened selection" permits each party to nominate an arbitrator, but the process hides from the appointed arbitrators the identity of the party that has nominated each of them. This form of "blind" appointment is thought to protect against any inherent bias or favoritism toward a party if the arbitrator were informed of the nominating party.[23]

2. Discretion to Permit Junior Lawyers to Examine Witnesses and Present Argument

New Rule 12.5 authorizes a Tribunal, in its discretion, to encourage lead counsel to permit more junior lawyers "with significantly less arbitration experience" to examine witnesses at a hearing and to present argument under the supervision and with the assistance and support of lead counsel. The rule expressly leaves the ultimate decision of who speaks on behalf of a party to that party and its counsel. The goal is to facilitate the development of the next generation of arbitration lawyers. This feature was embodied in the 2018 Non-Administered Rules and was nominated for "Best Innovation" for the 2018 GAR Awards.

3. Steps to Address Cybersecurity

Carrying forward an innovation first introduced in the 2018 Non-Administered Rules, Rule 9.3.f identifies and encourages discussion during the initial pre-hearing conference of cybersecurity threats and measures, if any, to be adopted by counsel, the parties and Tribunal for the protection of information exchanged or stored during an arbitration.[24] Careful attention to these security measures is increasingly critical to preservation of the integrity of the arbitration.[25]

C. Conclusion

The 2019 International Administered Rules carry forward the innovations of the 2018 Non-Administered Rules. The new rules also introduce several new features enhancing the speed, efficiency and integrity of CPR administered arbitrations. These features reflect and will contribute to best practices around the world.

Endnotes

1. With release of the new 2019 rules, CPR now offers the following four sets of arbitration rules: 2018 Rules for Non-Administered Arbitration (March 1, 2018); 2018 Rules for Non-Administered Arbitration of International Disputes (March 1, 2018) (hereinafter "2018 Non-Administered Rules"); 2019 Rules for Administered Arbitration (March 1, 2019); and the set reviewed in this article, 2019 Rules for Administered Arbitration of International Disputes (March 1, 2019) (hereinafter "2019 International Administered Rules"). CPR's rules are accessible at https://www.cpradr.org/resource-center/rules/arbitration. To account for the legal, cultural and linguistic differences that may distinguish arbitration of an international dispute, CPR has promulgated separate sets of rules for domestic and international disputes. Where parties have provided for CPR arbitration generally without specifying which set of CPR rules would apply, the International Administered Rules would apply "where the parties reside in different countries or where the contract involves property or calls for performance in a country other than the parties' country of residence." 2019 International Administered Rules at Rule 1.1. CPR makes the final decision as to which set of CPR rules apply. This article will focus on the 2019 International Administered Arbitration Rules, but we note that there are only small differences between the domestic and international sets of administered rules, none of which implicates the features addressed in this article.
2. CPR Rules for Non-Administered Arbitration of International Disputes (2018), https://www.cpradr.org/resource-center/rules/international-other/arbitration/2018-International-Non-Administered-Arbitration-Rules.
3. Rule 15.8. All citations reference the 2019 International Administered Rules, unless otherwise stated.
4. The 2007 CPR Rules for Non-Administered Arbitration were among the first rules to provide for appointment of a special arbitrator to consider applications for interim relief before the constitution of a Tribunal. To conform with subsequent usage and practice, Rule 14 of the 2019 International Administered Rules now substitutes the term "emergency arbitrator" for "special arbitrator" and "emergency measures" for "interim measures."
5. CPR has issued Fast Track rules for non-administered arbitrations. https://www.cpradr.org/resource-center/rules/arbitration/fast-track-rules-of-procedure.
6. https://www.cpradr.org/resource-center/protocols-guidelines/guidelines-on-early-disposition-of-issues-in-arbitration.
7. Guidelines at ¶ 2.3.
8. *Id.* at Introduction.
9. Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (2017), Article 39.
10. Arbitration Rules of the Singapore International Arbitration Centre (2016), Rule 29.
11. Rule 9.3.b.
12. Rule 9.1.
13. Rule 12.6.b.
14. Rule 12.6.c.
15. Rule 12.6.f.
16. Rule 9.3.e.
17. Rule 21.1.
18. https://www.cpradr.org/resource-center/rules/international-other/mediation/cpr-international-mediation-procedure.
19. Rule 21.3.
20. *Id.*

21. Rule 9.3.e.

22. Rules 5.1.c and 5.4.

23. This procedure was incorporated as an option in the 2014 Non-Administered Rules. The 2019 International Administered Rules make "screened selection" the default selection process for a panel of three arbitrators unless the parties agree otherwise. CPR's screened selection process was awarded the Global Arbitration Review (GAR) Award for "Best Innovation" in 2016.

24. Rule 9.3.f.

25. The launch of a Working Group on Cybersecurity in International Arbitration jointly formed by the International Council on Commercial Arbitration (ICCA), the International institute for Conflict Prevention & Resolution (CPR) and the New York City Bar Association received the GAR Award for Best Development in 2018. In April 2018, the Working Group released a draft set of principles to guide parties in an arbitration to assess cybersecurity risks and to adopt, if necessary, cybersecurity measures to protect the information exchanged in the arbitration. *See* https://www.arbitration-icca.org/projects/Cybersecurity-in-International-Arbitration.html.

Welcome New Dispute Resolution Section Members

The following members joined the Section between November 1, 2018 and February 25, 2019:

First District
Hon. Richard T. Andrias
Peter A. Bellacosa
Robert M. Brill
Norman Feit
Anna Pia Felix
Jonathan Honig
Robert J. Jossen
Alexa Lauren Klein
Leona Krasner
Luis Manuel Martinez
Carter Michael Nelson
Miles Douglas Orton
Prof. Mark R. Patterson
Barry J. Peek
Jill Pilgrim
Thomas A. Rawlinson Esq.
Robert L. Savino
Ailie L. Silbert
Michael B. Smith
Frank T. Spano
Tina L. Stark
Marc H. Supcoff
Anastasia Sarantos Taskin
Bryana L. Turner
Mira B. Weiss
L.B. Wright
Xuefeng Wu

Second District
Orna Zvia Artal
Eric Shawn Landau
Susan J. Panepento
Stephanie C. Seto
Giulio Zanolla

Third District
Gary S. Bowitch
Matthew Capezzuto
Daniel W. Coffey
Kristina Maldonado
David P. Miranda

Fifth District
Gregory Michael Brown
Mitchell J. Katz
James E. Sparkes

Seventh District
Joseph C. Dole

Eighth District
Kasey K. Barrett
James D. Donathen

Ninth District
Marc Victor Ayala
Leslie A. Baum
Brooke Carrillo
Samantha Feroce
Jennifer Fineman
Harry D. Frisch
Ross Keiser
Jonathan I. Lyons
Leah L. Murphy
Hon. Alfred J. Weiner

Tenth District
Robin S. Abramowitz
Eileen M. Breslin
Michael W. Emerson
Andrew T. Garbarino
Loretta Mae Gastwirth
Thomas P. Gorton
Olga Anna Pettigrew
David A. Shargel
Harriette M. Steinberg

Eleventh District
Frank Bruno, Jr.

Twelfth District
William Chen
Roshni Ghosh

Out of State
Christian Paul Alberti
Kathy E. Ames Valdivieso
Varuni Balasubramaniam
Aseel Barghuthi
Laura Robinson Brathwaite
Hoi Yan Joyce Chow
Stephanie Chow
Richard D. Deutsch
Monica Effio Tapia
Marcel Nico Philipp Gade
Morgane Marie Guyonnet
Laura Hellwig
Andrew J. Kurtz
John William Leardi
Nadine Mbu-Akamentuku
Michael Mikulic
Serhiy Moshak
Jesus Agustin Noriega Loya
Cem Cagatay Orak
Sara Rosano
Dave Singh
Thomas W. Snook
Eric M. Tant
Tirza S. Wahrman
Mia Yugo
Seokchun Yun
Junchi Zhou