

Anti-Arbitration: Coming Soon to a Commercial Dispute Near You? Inexpensive On-Line Mediation and Arbitration

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British legal thinker Richard Susskind famously hypothesized in his book, *End of Lawyers?*, that the practice of lawyering will not actually end so much as gravitate towards extremes of “commoditized” legal work at one end and “bespoke” work on the other. The commoditization of some dispute resolution work has already begun to occur via the process of “legal process outsourcing” of certain tasks to low-cost providers in India. The review of voluminous documentation required in some legal proceedings is just one example of what has been off-shored as a low-cost commodity.

“Bespoke” legal services, on the other hand, which to us Americans would be “customized”, is the sort of work for which clients are prepared to pay a premium. The category used to encompass virtually the entirety of law practice, but increasingly it applies only to special expertise. It is more expensive because it is harder to find. One would think that of all types of legal services, mediating or arbitrating are tasks that will always fall on the “bespoke” end of lawyering.

One would think wrongly.

At GE Oil & Gas's operations in Italy, we're piloting the ICDR's on-line system in which settlements can be achieved for \$500 via a form of on-line mediation called "Cybersettle" without any human hands (or minds) ever having touched the dispute. If no settlement is reached in the electronic mediation, it gets bumped into on-line arbitration, for an additional charge of \$1,000, decided by engineers who are tightly focused on the disputed technical issue and make their determinations on the basis of documents only (no witnesses). This is pretty close to a commoditized version of arbitration, which is about the only way to get an award for an industrial dispute delivered at a total, all-in cost of \$1,500, within a maximum time frame of three months from the filing of the claim.

Below is the ICDR's model dispute resolution clause, a version of which has been incorporated into our purchasing contracts in Italy.

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 Dispute Resolution Procedures, as modified by the ICDR Online Protocol for Manufacturer/Supplier Disputes then in effect

(please find the International Dispute Resolution Procedures and the ICDR Online Protocol for Manufacturer/Supplier Disputes at <http://www.icdr.org>).

Before I get any protests from the Arbitrators Union about modernization depriving deserving arbitrators of needed work, let me be clear that, at least for the moment, this system has only been rolled out in Italy, and then only industrial disputes under € 50,000 in total claim amount. And the present implementation is not taking work away from anyone. It's actually injecting resolution services where claims weren't getting resolved at all.

A large factory operation like ours can have literally thousands of micro-disputes each year, extending from problems with delayed deliveries ("you were a week late with those bolts") to non-conformities in the supply ("we rejected your shipment and invoice of € 10,000 because the bolts were defective"). Factories don't have the resources (people) that they can allocate to pursue legal outcomes, and likely our suppliers don't have the resources or desire either. So claims (and invoices) just sit on the books of manufacturer and supplier, impairing

working capital, waiting for someone to give them attention. The Cybersettle/ODR system offers a means of accelerating this closure, likely in a way that will be fairer than what we can achieve with our limited resources at present. In fact, we think the process may actually improve our supplier relationships, although it is too soon to tell whether our suppliers will embrace the system, and what success we will have in practice.

So far, five disputes have gone through this new on-line mediation/arbitration system, and all settled early in the mediation stage, so we have yet to test the quality of the on-line arbitration. But we are not excessively worried since the current situation – in which parties are unable to pursue claims legally because the cost would be too high – is not much of an alternative. In fact, our decision to draw the line at €50K was rather arbitrary. In principle there's no reason this approach could not be used for larger cases where parties avoid asserting their rights because the cost of doing so would be prohibitive.

Is this – digitization and commoditization – the future of arbitration? You decide.

But first, below are comments from two of the key stakeholders in the process we're using: the provider institution and, more importantly for me, my own internal client who interfaces with commercial teams involved in our manufacturing disputes.

Mark Appel, Senior Vice President, ICDR: “ICDR’s challenge was to create a speedy, technology-based process to encourage negotiated solutions between strategic partners. Failing party agreement, the goal was to produce a rapid, document-driven decision. The resulting process was made possible by the marriage of innovative technology to ICDR systems and administration.”

Georgia Magno, GE Oil & Gas Supply Chain Counsel: “The ability to resolve disputes on-line through a speedy and cost-effective process is especially helpful for disputes where – as it is often the case with our suppliers – both sides have an ongoing commercial relationship. We will sometimes have small disputes, but we also have an interest in preventing them from growing into lengthy and contentious legal battles. The ODR system we've adopted provides a lean platform for each side to effectively resolve disputes where the real issue at stake is the amount of damages (quantum) rather than the liability (an)”.

Below is the full ICDR protocol.

ICDR Protocol for Manufacturer/Supplier Disputes:

1. The dispute shall be filed utilizing AAA WebFile <<https://apps.adr.org/webfile>> using the Notice of Arbitration form provided at <<http://www.adr.org/si.asp?id=3849>>. Along with the Notice of Arbitration, the filing party ("claimant") will submit via AAA WebFile copies of the supporting documents the claimant wishes to enter into evidence. The filing fee of 500 USD shall be advanced by the claimant by wire transfer. The responding party ("respondent") will be notified of the filing by email and have twelve (12) days to file a statement of defense and/or counterclaim utilizing AAA WebFile and attaching copies of the supporting documents the respondent wishes to enter into evidence. If a counterclaim is made, no additional fee will be required by the respondent. The claimant shall have twelve (12) days to file a statement of defense to any counterclaim utilizing AAA WebFile and attaching copies of the supporting documents the claimant wishes to enter into evidence. When no statement of defense is filed to a claim or counterclaim, such claim or counterclaim shall be deemed as denied by the opposing party. All communications will be by email unless otherwise agreed by the parties or as directed by the arbitrator.

2. Once the statement of defense and/or counterclaim is received or after twelve (12) days have passed without a statement of defense and/or counterclaim or statement of defense to counterclaim, ICDR will invite the parties to participate in online negotiation. The fee for online negotiation will be advanced by the claimant. Should the case settle that fee shall be split equally between the parties, unless otherwise agreed by the parties. If a negotiated settlement has not been reached within twelve (12) days after the parties are invited to negotiate, the case will proceed with online arbitration. Claimant will advance an additional 1000 USD by wire transfer for the administrative and arbitrator fees.

3. ICDR will proceed with online arbitration by appointing a single arbitrator and notifying the parties of the arbitrator's name and any disclosures by email. The parties may object to the arbitrator's appointment within forty-eight (48) hours of the arbitrator's appointment. If no objection has been received by ICDR within forty-eight (48) hours, the arbitrator will be reaffirmed. In the event of an objection, ICDR will invite comments from the other party and then either reaffirm the arbitrator or appoint a new arbitrator.

4. The arbitrator shall make a determination based upon the documents submitted by the parties. In extraordinary circumstances the arbitrator may request additional evidence from the parties. After review of the documents submitted, the arbitrator will file the award on AAA WebFile.

5. The award of the arbitrator shall specify the invoice numbers at issue, the amounts in dispute, the arbitrator's determination on the merits, and shall allocate the fees and expenses of the ICDR and the fees and expenses of the arbitrator. The award shall state the reasons upon which the award is based.

6. The arbitration shall be completed by settlement or award within thirty (30) days of the arbitrator's appointment or, in case of a challenge, his/her reaffirmation. Failure to adhere to this time limit shall not constitute a basis for challenging the award.

7. The place of arbitration shall be (insert place of arbitration here). In arriving at his/her decision, the arbitrator shall consider the pertinent facts and circumstances and be guided by the terms and conditions of this contract; and, if a solution is not found in the terms of this contract, the arbitrator shall apply the Governing Law of the Contract. The language of the arbitration shall be determined by the arbitrator.

8. The award of the arbitrator shall be final and binding upon the Parties and shall constitute a duly executed award for purposes of enforcement.