

ICDR Canada Guide to Drafting Dispute Resolution Clauses

Introduction

Arbitration, mediation and other alternatives to litigation are frequently accessed by including a dispute resolution clause in a commercial contract. The following “Standard” dispute resolution clauses and short commentary are intended to assist contracting parties in drafting alternative dispute resolution (ADR) clauses.

All references to arbitration rules in this guide, except the reference to ICDR Canada administration under UNCITRAL Rules, are to the Canadian Arbitration and Mediation Rules of ICDR Canada. ICDR Canada also administers cases under International Centre for Dispute Resolution® (ICDR®) International Arbitration and Mediation Rules and various American Arbitration Association® (AAA®) Rules where all Canadian parties in a dispute have provided for those Rules in their contract.

This guide is intended to address clause drafting in connection with Canadian domestic disputes nationwide.

Parties with questions regarding drafting an ICDR Canada clause should email ICDR Canada at info@icdrcanada.org or contact ICDR Canada directly at 1.844.859.0845.

Institutionally Administered Arbitration with a Standard Clause

The standard arbitration clause below addresses the key elements of an arbitration agreement. It incorporates by reference a modern set of procedural rules designed to strike the appropriate balance between respecting the autonomy of the parties and enabling effective process management by the arbitral tribunal, aided by administrative support. The standard clause serves as a starting point for the drafter, with additional language that can be added if necessary to address particular needs of the parties. Incorporation of the ICDR Canada standard clause provides the following administrative services and rule provisions:

- Dedicated administrative team for ICDR Canada cases;
- Structure, requirements and timelines for all claims and counterclaims;
- Automatic incorporation of expedited procedures for cases below USD \$250,000;
- Presumption of decisions based upon written materials only on cases below USD \$100,000;
- Early administrative conference call with parties initiated by Case Counsel to discuss arbitrator selection and process efficiencies;
- Facilitation of the appointment of a mediator if desired by parties;
- Access to a special emergency arbitrator for urgent measures of protection within three business days of filing;
- Ability to request joinder of other parties or consolidation of other cases;

- Structure to resolve disputes concerning place, locale, language and number of arbitrators;
- Access to lists of arbitrators to facilitate arbitrator appointment;
- Arbitrator availability as part of arbitrator appointment process;
- Appointment of the arbitral tribunal and facilitation of all potential arbitrator disclosures;
- Arbitrator challenges handled between parties and institution without the direct involvement of challenged arbitrator;
- Overseeing, reviewing and managing all arbitrator compensation and costs;
- Assisting tribunal and parties with scheduling conference calls and hearings;
- Rules controlling scope of document and electronic document requests;
- Tribunal authority to manage, limit or avoid litigation-style discovery practices;
- Structure for proceedings in the absence of a party's participation;
- Structure to review the form and effect of the final award;
- Final Award is due to parties within 30 days of the closing of hearings;

ICDR Canada Arbitration Clause

Standard ICDR Canada arbitration clause:

"Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by ICDR Canada in accordance with its Canadian Arbitration Rules."

The parties should consider adding:

"The number of arbitrators shall be (one or three)";

"The place of arbitration shall be [city, (province or territory)]";

"The language(s) of the arbitration shall be (English or French)."

Expedited Arbitration Clause

The Expedited Procedures provide parties with an expedited and simplified arbitration procedure designed to reduce the time and cost of an arbitration. The Expedited Procedures apply automatically in any case under the ICDR Canadian Arbitration Rules in which no disclosed claim or counterclaim exceeds USD \$250,000 exclusive of interest and the costs of arbitration. Parties may, however, choose to apply the Expedited Procedures to cases of any size.

Features of the Expedited Procedures:

- Comprehensive filing requirements;

- Expedited arbitrator appointment process with party input;
- Appointment of experienced arbitrators ready to serve on an expedited basis;
- Early preparatory conference call with the arbitrator requiring participation of parties and their representatives;
- Presumption that cases up to USD \$100,000 will be decided on written submissions only;
- Expedited schedule and limited hearing days, if any; and
- An award within 30 calendar days of the close of the hearing or the date established for the receipt of the parties' final statements and proofs.

Where parties intend that the Expedited Procedures shall apply regardless of the amount in dispute, they may consider the following clause:

"Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by ICDR Canada in accordance with its Canadian Expedited Procedures."

The parties should consider adding:

"The place of arbitration shall be [city, (province or territory)];"

"The language(s) of the arbitration shall be (English or French)."

Dispute Resolution "Step-Clauses"

Contracting parties may wish to include a provision requiring negotiation or mediation before arbitration is initiated. Such clauses, which are often referred to as "step-clauses," are particularly appropriate where the parties have a long-standing and on-going commercial relationship, and where there may be factors to consider other than the narrow scope of a particular dispute. While those factors are missing in a commercial relationship arising out of a single transaction, it is the rare case that would not benefit from settlement discussions.

A legitimate concern about the use of "step-clauses" is the potential for a party to try to take advantage of the stepped process merely to delay an adverse decision on the merits. However, this problem can be addressed by providing time limits for each step. Alternatively, the clause might be drafted to allow each party to demand arbitration without recourse to the previous step(s), or by permitting mediation and arbitration to proceed concurrently. Otherwise, having agreed to a series of conditions precedent, parties should be prepared to go through each required dispute resolution process.

There are various examples of "step-clauses." They may require parties to seek resolution of the dispute by negotiation and/or mediation before resorting to arbitration.

For the benefit of parties drafting commercial contracts who wish to include an express obligation to seek resolution of disputes by negotiation and/or mediation prior to arbitration, ICDR Canada offers the following model Negotiation-Arbitration, Mediation-Arbitration, and Negotiation-Mediation-Arbitration "step" clauses:

Negotiation-Arbitration Clause

ICDR Canada Standard “Step-Clause” for negotiation-arbitration is as follows:

“In the event of any controversy or claim arising out of or relating to this contract, or the breach thereof, the parties hereto shall consult and negotiate with each other and, recognizing their mutual interests, attempt to reach a satisfactory solution. If they do not reach settlement within a period of [60] days, then, upon notice by any party to the other(s), any unresolved controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by ICDR Canada in accordance with its Canadian Arbitration Rules.”

The parties should consider adding:

“The number of arbitrators shall be (one or three)”;

“The place of arbitration shall be [city, (province or territory)]”;

“The language(s) of the arbitration shall be (English or French).”

The model negotiation-arbitration clause above provides a single negotiation “step.” Parties sometimes provide multiple steps, by way of an “issue escalation” clause, in an attempt to encourage the surfacing and resolution of problems quickly during an ongoing project. Again, parties in those circumstances should be careful to provide time frames for moving the negotiation to the next level to avoid delay.

Mediation-Arbitration Clause

Use of mediation is growing globally. In mediation, parties are free to negotiate business solutions not constrained by law or contract. The mediator acts as a neutral facilitator to such negotiations. Parties to administered mediations have historically enjoyed a settlement rate exceeding 85%.

Increasingly, parties perceive that mediation is more effective if an unresolved dispute is to be followed, and resolved, by arbitration. Since the requirement to mediate may be seen as a condition precedent to arbitration, a deadline should be established allowing parties to move from mediation to arbitration if necessary to avoid delay.

ICDR Canada Standard “Step-Clause” for mediation-arbitration is as follows:

“In the event of any controversy or claim arising out of or relating to this contract, or the breach thereof, the parties hereto agree first to try and settle the dispute by mediation, administered by the ICDR Canada under its Canadian Mediation Rules. If settlement is not reached within [60] days after service of a written request for mediation, any unresolved controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by ICDR Canada in accordance with its Canadian Arbitration Rules.”

The parties should consider adding:

- "The number of arbitrators shall be (one or three)";*
- "The place of mediation shall be [city, (province or territory)]";*
- "The place of arbitration shall be [city, (province or territory)]";*
- "The language(s) of the arbitration shall be (English or French)."*

It should be noted that parties could agree to mediate at any time, even in the absence of a future disputes clause providing for mediation. Indeed, disputing parties frequently find that mediation is particularly effective when conducted against the deadline of a pending arbitration hearing.

Negotiation-Mediation-Arbitration Clause

Parties to commercial contracts, most particularly those involving strategic commercial relationships, will sometimes provide for both negotiation and mediation as precursors to arbitration. The intent is that the parties should try to solve the problem themselves first, and, if that proves difficult, utilize the services of a third party mediator, before resorting to a third party decision-maker/arbitrator.

Once again, time limits or an opt-out provision should be considered to avoid delay.

ICDR Canada Standard "Step-Clause" for Negotiation-Mediation-Arbitration is as follows:

"In the event of any controversy or claim arising out of or relating to this contract, or the breach thereof, the parties hereto shall consult and negotiate with each other and, recognizing their mutual interests, attempt to reach a satisfactory solution. If they do not reach settlement within a period of [60] days, then any party may, by notice to the other party and ICDR Canada, request mediation under the Canadian Mediation Rules of ICDR Canada. If settlement is not reached within [60] days after service of a written request for mediation, any unresolved controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by ICDR Canada in accordance with its Canadian Arbitration Rules."

The parties should consider adding:

- "The number of arbitrators shall be (one or three)";*
- "The place of mediation shall be [city, (province or territory)]";*
- "The place of arbitration shall be [city, (province or territory)]";*
- "The language(s) of the arbitration shall be (English or French)."*

Model Concurrent Arbitration-Mediation Clause

Some parties prefer not to obligate themselves to mediate as a condition precedent to the filing of arbitration. They could be concerned that early mediation will not allow them sufficient time to understand the case, making negotiation more perilous. That said, not providing for mediation in the dispute resolution clause may result in a lost opportunity to make clear the parties' preference for a negotiated settlement. With those countervailing concerns in mind, ICDR Canada has developed a model "Concurrent Arbitration-Mediation" Clause. The Clause obligates the parties to mediate after the initiation of arbitration, when the parties are presumably more informed regarding both the matters in dispute and their respective needs and interests.

ICDR Canada Standard Concurrent Arbitration-Mediation Clause is as follows:

"Any controversy or claim arising out of or related to this contract, or the breach thereof, shall be resolved by arbitration administered by the ICDR Canada in accordance with its Canadian Arbitration Rules. Once the notice of arbitration is initiated, the parties agree to attempt to settle any controversy or claim arising out of or relating to this contract, or the breach thereof, by mediation administered by the ICDR Canada under its Canadian Mediation Rules. Mediation will proceed concurrently with arbitration and shall not be a condition precedent to any stage of the arbitration process."

The parties should consider adding:

"The number of arbitrators shall be (one or three)";
"The number of mediators shall be (one or two)";
"The place of arbitration shall be [city, (province or territory)]";
"The place of mediation shall be [city, (province or territory)]";
"The language(s) of the arbitration shall be (English or French).";
"The language(s) of the mediation shall be (English or French)."

Stand-Alone Mediation Clause

Parties can of course adopt mediation as a stand-alone dispute settlement procedure. In the event that mediation does not result in settlement, the parties can agree to utilize other dispute resolution procedures or resort to the national courts for the resolution of their dispute.

ICDR Canada Standard Stand-Alone Mediation Clause is as follows:

"In the event of any controversy or claim arising out of or relating to this contract, or the breach thereof, the parties hereto agree first to try and settle the dispute by mediation, administered by ICDR Canada under its Canadian Mediation Rules, before resorting to arbitration, litigation or some other dispute resolution procedure."

The parties should consider adding:

“The number of mediators shall be (one or two)”;

“The place of mediation shall be [city, (province or territory)]”;

“The language(s) of the mediation shall be (English or French).”

Appointment of Arbitral Tribunal—Party-Appointed Arbitrator Clause

For parties and their counsel, the appointment of the arbitral tribunal is arguably the most critical issue in arbitration. Unless parties provide otherwise, ICDR Canada uses a list selection process for arbitrator appointments. The other notable method for arbitrator selection is the party-appointed selection process. ICDR Canada will follow whatever method of appointment is provided by the parties' agreement. *ICDR Canada Canadian Arbitration Rules* require that all arbitrators, regardless of method of appointment, shall be impartial and independent. For cases with multiple claimants or respondents, unless the parties have agreed otherwise, ICDR Canada will make all appointments.

There is no need to mention any arbitrator selection method in the arbitration clause if the parties wish to use ICDR Canada's list-selection process. One advantage of the list selection method is that it eliminates the need for any *ex parte* contact between parties and arbitrators. ICDR Canada begins the list-selection process by consulting with the parties regarding arbitrator qualifications. After consultation, ICDR Canada sends an identical list of names along with their corresponding *curriculum vitae* to the parties with an invitation to strike unacceptable arbitrators, rank the remaining arbitrators in order of preference and return the list to ICDR Canada. ICDR Canada appoints the presiding arbitrator or tribunal based on the closest mutual preference of the parties.

As an alternative to the list-selection process, parties can agree to use the party-appointed method of appointment. The perceived advantage of the party-appointed method is that with direct appointment of an arbitrator each party will have increased confidence in the tribunal. Parties who wish to use the party-appointed method should consider adding the following language to their arbitration clause:

“Within [30] days after the commencement of arbitration, each party shall appoint a person to serve as an arbitrator. The parties shall then appoint the presiding arbitrator within [20] days after selection of the party appointees. If any arbitrators are not selected within these time periods, ICDR Canada shall, at the written request of any party, complete the appointments that have not been made.”

ICDR Canada Arbitrator Appointing Authority Clauses

ICDR Canada recognizes that there are circumstances where, due to the nature of the case, the rules being applied, or the relationship between the parties, more or less flexibility may be available pertaining to case management. ICDR Canada can provide assistance, resources and options that can help move parties toward resolution of their dispute even without a full case administration service. At any time, parties may also agree to submit their matter to the ICDR Canada for the full-service case administration.

Parties can use the ICDR Canada Arbitrator Appointing Authority to help them appoint a single arbitrator or a panel of three arbitrators in an ad-hoc, court ordered or UNCITRAL arbitration process. With the clause below, ICDR Canada can also appoint an arbitrator within just a few days to handle requests for emergency measures of protection. ICDR Canada can act as an appointing authority when parties need assistance in having arbitrator(s) appointed in their case. This service includes:

- Administrative conference call to discuss arbitrator preferences
- Notice of Appointment documentation
- Arbitrator disclosure process
- Confirm arbitrator availability
- Confirm arbitrator payment compensation rates
- Facilitate arbitrator compensation payments
- Arbitrator appointment for emergency measures of protection issues

ICDR Canada Standard Clause Arbitrator Appointing Authority is as follows:

"Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration. The appointing authority shall be ICDR Canada in accordance with its Arbitrator Appointing Authority Rules."

ICDR Canada Standard Clause for Party-Appointed Arbitrators is as follows:

"Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration. The appointing authority shall be ICDR Canada in accordance with its Arbitrator Appointing Authority Rules. Within [30] days after the commencement of arbitration, each party shall appoint a person to serve as an arbitrator. The parties shall then appoint the presiding arbitrator within [20] days after selection of the party appointees. If any arbitrators are not selected within these time periods, ICDR Canada shall, at the written request of any party, complete the appointments that have not been made."

ICDR Canada also offers the following model where parties seek to have ICDR Canada act as the appointing authority under UNCITRAL Arbitration Rules.

"Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules. The appointing authority shall be ICDR Canada in accordance with its Arbitrator Appointing Authority Rules."

The parties should consider adding:

"The number of arbitrators shall be (one or three)";

"The place of arbitration shall be [city, (province or territory)]";

"The language(s) of the arbitration shall be (English or French)."

ICDR Canada Administration under the UNCITRAL Arbitration Rules

Certain parties, including most especially states and state entities, may feel more comfortable in contracting for application of the UNCITRAL Arbitration Rules. ICDR Canada is particularly well suited to providing administrative assistance in connection with the UNCITRAL Arbitration Rules. *ICDR Canada Canadian Arbitration Rules* were drafted using the UNCITRAL Arbitration Rules as a model. Providing for ICDR Canada administration can add significant value, especially as regards the establishment of the tribunal, scheduling and numerous other administrative concerns.

The ICDR Canada offers the following clause for providing administered UNCITRAL Arbitration Rules:

"Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by ICDR Canada in accordance with the UNCITRAL Arbitration Rules."

The parties should consider adding:

"The number of arbitrators shall be (one or three)";

"The place of arbitration shall be [city, (province or territory)]";

"The language(s) of the arbitration shall be (English or French)."

Confidentiality Clause

Certain types of contracts may call for additional language in the dispute resolution clause. So, for example, parties to an exclusive information contract or sensitive technology contract may wish to consider a confidentiality provision in their agreement. Parties to commercial contracts frequently mistake privacy, which is a standard feature of commercial arbitration, for the obligation to maintain confidentiality, which absent party agreement under the *ICDR Canada Canadian Arbitration Rules* will extend only to the arbitrator and ICDR Canada. Parties should also be aware of the limits of party agreement to confidentiality as regards non-signatories to the agreement such as witnesses and the requirements of law otherwise.

ICDR Canada Standard Confidentiality clause is as follows:

"Except as may be required by law, neither a party nor its representatives may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of (all/both) parties."

Other Drafting Considerations

Contracting parties might also consider adding language to address specific procedural or remedial concerns. So, for example, notwithstanding the availability of emergency and interim relief under *ICDR Canada Canadian Arbitration Rules*, parties may wish to underscore their expectation that such relief will be available by providing language to that effect in the dispute resolution clause.

Too often, discussion regarding the dispute resolution clause of the contract is left until the close of negotiation. Best practice is to consider the matter of problem solving and dispute resolution early in the negotiation, in order to provide a positive environment for further negotiation and mitigate the undue pressure of a closing deadline. In any case, each and every commercial relationship is unique. Contracting parties are well advised to seek appropriate guidance when drafting such clauses.

For further information regarding dispute resolution clauses as well as general information regarding ICDR Canada rules and services, email ICDR Canada at info@icdrcanada.org or contact us directly at 1.844.859.0845.