

2016 BCAMI Symposium

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**Effective Advocacy and Management
in Arbitration**

Pre-hearing Preparation

New Institutional Rules

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Why rules?

- Ad hoc arbitrations - parties spent time negotiating procedural agreement
- Original rules designed on court based models
- Arbitration different than litigation
- Purpose of arbitration is to resolve disputes efficiently and cost-effectively

Why rules?

- Institutional rules save the parties time in designing their own
- Rules facilitate party autonomy to design the arbitral process as the parties see fit
- Development of international arbitration has significantly evolved in last 10 years
- Development of rules reflects changes in legislation and best domestic practices

Features of Efficient and Cost-Effective Arbitration

- Early procedural hearing
- Empower arbitrator to manage hearing by specifying times, form, content and length of submissions and conduct of hearings
- Limit document production
- Limit oral discovery
- Limit hearings
- Realistic timing for awards

BCICAC Rules

- *Arbitration Act* BC covers all domestic arbitrations
- Act mandates BCICAC Rules will apply to conduct of domestic commercial arbitrations unless parties otherwise agree
- Rules require that BCICAC administer arbitration

BCICAC New Rules - September, 2016

- Two fundamental changes
- An application arbitrator process
- An appeal process

BCICAC Application Arbitrator Process

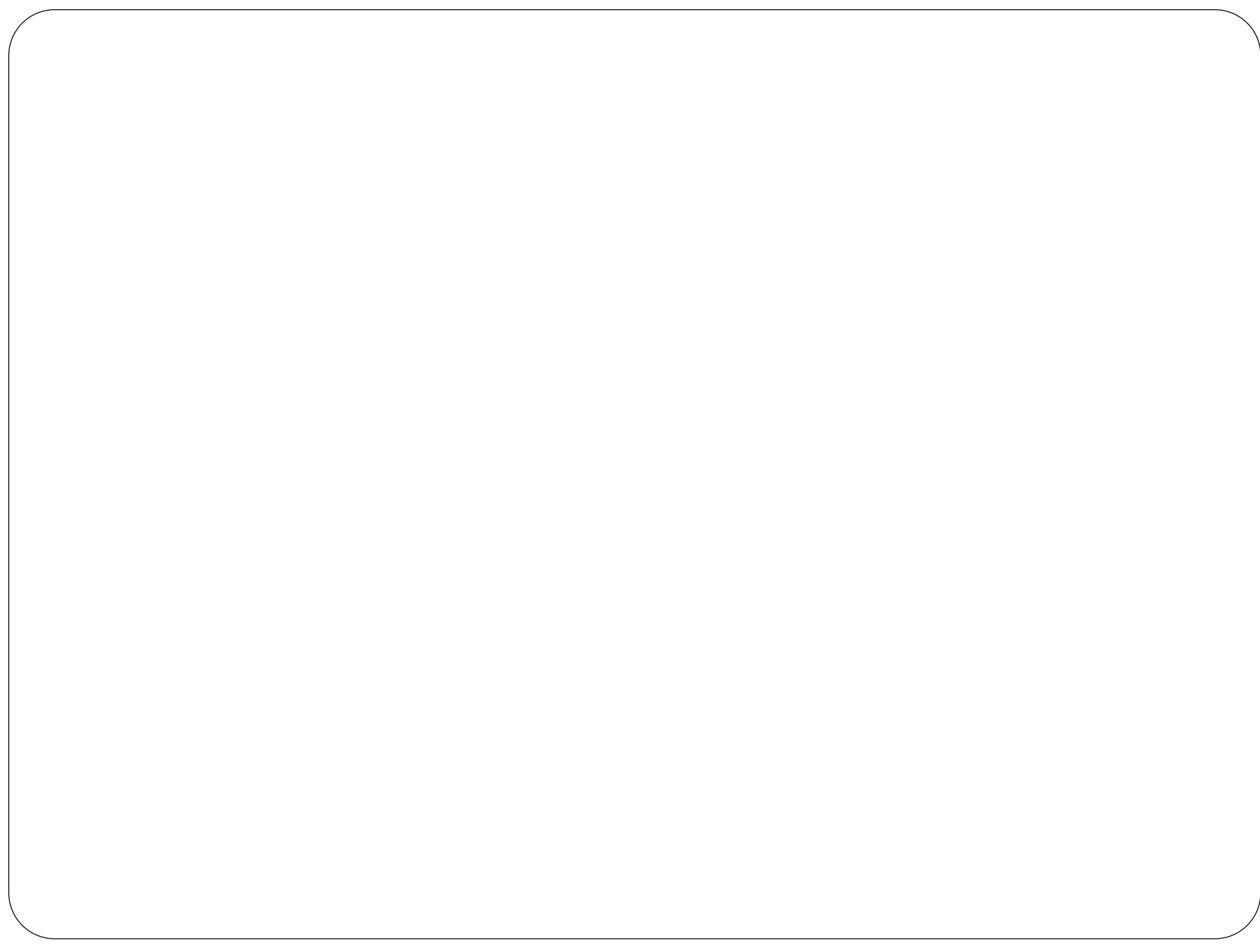
- Rules provide that Centre has certain powers
- Change time limits
- Appoint arbitrator
- Hear challenges to an appointment commitments

BCICAC Application Arbitrator Process

- No mechanism previously given to exercise those powers
- Concern for lack of procedure, perceived lack of transparency, disincentive for parties to trust in the independence of the application of the rules
- Jurisdiction limited to exercising jurisdiction of Centre

BCICAC Application Arbitrator Process

- Advantage of an Application Arbitrator
- Advantage in dealing with issues privately, more expeditiously than the alternative of filing a petition in Court
- Appointed by Centre's Panel Committee



Benefits of BCICAC Appeal Process

- Arbitration remains confidential for one more level
- Does not replace appeal to B.C. Supreme Court
- Parties can define scope of appeal
- Parties have input into selection of adjudicators

ICDR Canada Arbitration Rules

- ICDR is international arm of American Arbitration Association
- Launched in Canada January 1, 2015
- Full ADR services for domestic arbitrations
- Based almost entirely on ICDR International Arbitration Rules
- Moves cases through in efficient, fair, impartial and economic manner

ICDR Expedited Procedures

- Claims up to US\$250,000
- Early preparatory conference call
- Expedited schedule and limited hearing dates
- Award within 30 calendar days of close of hearing
- Cases up to US\$100,000 decided on written submissions

ICDR Mediation

- Administrator may invite parties to mediate at any stage
- Mediation to proceed concurrently with arbitration
- Mediator shall not be an arbitrator appointed to the case

ICDR Emergency Measures of Protection

- Party may apply for emergency relief before constitution of arbitral tribunal
- Short time frames
- Power to order interim or conservancy measures, including injunctive relief
- No further power after arbitral tribunal is constituted
- Interim order - arbitral tribunal may modify or vacate

ICDR Consolidation

- Administrator may appoint a consolidation arbitrator to consolidate two or more arbitrations

ICDR Conduct of Proceedings

- Parties shall exchange all documents upon which each intends to rely
- On application parties required to make other documents available

Experts

- Tribunal may appoint one or more experts

Fees

- Any disputes regarding fees and expenses of arbitrators determined by Administrator

Deposits

- Administrator may require parties deposit advances for arbitrators' fees and expenses
- Failure of claimant or counterclaimant to deposit fees deemed to be withdrawal of claim

Confidentiality

- All matters relating to arbitration and award shall be kept confidential

ICDR Canadian Expedited Procedures

- Parties to present detailed submissions with all evidence they intend to rely on
- Procedural conference call and procedural order within 14 days of appointment
- Submissions within 60 days of procedural order
- Hearing within 60 days of procedural order
- 1 day hearing
- Award within 30 days

2014 ADRIC Rules

- ADRIC established 2000
- Isolated rules amendments in 2008
- 2014 revisions substantial, taking into account current best practices in arbitration
- Purpose - to enable parties in a dispute to reach a just, speedy and cost-effective determination of it, taking into account the values that distinguish arbitration from litigation

ADRIC Rules Committee

- Consulted every region
- Consulted leading practitioners
- Consulted leading arbitration organizations
- Surveyed opinions on specific rules
- Much internal debate
- Used plainer form of English
- Reference to UNCITRAL Rules, familiarity by international arbitrators

ADRIC Significant Rule Changes

- Documents must be relevant and material to the outcome of the dispute
- Parties can opt out of ADRIC administration
- Interim arbitrator mechanism for emergency relief
- Prohibition on examinations for discovery unless tribunal orders
- Expedited arbitration procedures
- List and strike arbitrator choice process

ADRIC Document Production

- Rules prohibit examinations for discovery
- Production of documents early, followed up by requests for more documents
- Provide list of documents upon which party intends to rely, with explanation of how documents relevant and material to outcome
- On request documents to be delivered electronically

ADRIC Interim Arbitrator

- Power to appoint interim arbitrator pending appointment of a tribunal
- Greatly expanded scope of relief
- No inherent jurisdiction
- Previously unclear whether arbitrator could grant interim relief
- Delay in appointment of tribunal made it impossible to obtain urgent relief

ADRIC Interim Arbitrator Process

- Institution must appoint interim arbitrator as soon as possible, normally within 2 days
- Challenge must be made within 24 hours
- Interim arbitrator sets procedure
- Determination is in the form of an order and is binding on parties
- Full authority to grant any interim relief appropriate
- Tribunal may modify, terminate or annul

ADRIC Interim Arbitrator Limitations

- Applies only to parties who are signatory to an arbitration agreement
- Does not apply if parties have agreed to other conservancy or interim measures

ADRIC Other Rule Changes

- Rules now in electronic version as well as pamphlet
- Allows deposits and provides how they are handled by ADRIC
- Security for costs
- Broad range of interim relief

ADRIC Administration

- Full administrative services from beginning to end
- Impartiality in deposit and collection of fees. Takes burden from practitioners
- Offers roster of qualified arbitrators
- Will appoint arbitrators if parties cannot agree
- Handles challenges and replacement of arbitrators

ADRIC Administration

- Promotes and assists with efficient case management
- Monitors and notifies as required tasks are completed
- Delivers copies of all awards and orders
- Maintains complete file of proceedings

ADRIC Fees

- Commencement
- Up to \$10,000 - \$350
- \$10,000 - \$75,000 - \$600
- \$75,000 - \$150,000 - \$1,000
- \$150,000 - \$500,000 - \$2,000
- \$500,000 - \$5,000,000 - \$4,000
- Above \$5,000,000 - \$5,000

ADRIC Fees

- Case Service Fee
- Up to \$10,000 - \$175
- \$10,000 - \$75,000 - \$300
- \$75,000 - \$150,000 - \$500
- \$150,000 - \$500,000 - \$1,000
- \$500,000 - \$5,000,000 - \$2,000
- Above \$5,000,000 - \$3,000