



AMERICAN ARBITRATION ASSOCIATION®

INTERNATIONAL CENTRE  
FOR DISPUTE RESOLUTION®

# SAVING SUBSTANTIAL COST IN COMPLEX COMMERCIAL ARBITRATION

Lessons Learned from  
Emergency Arbitration



**Recorded Webinar**

**October 2020**

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## SPEAKERS



### **Gary L. Benton**

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California



### **Peter L. Michaelson**

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New Jersey





- Are cost savings a priority in complex cases?
- How does cost-efficient arbitration compare to litigation?
- Cost-efficiency, speed and quality – can you get all three?
- Cost-efficiency requires proper case management.

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## WHAT IS EMERGENCY ARBITRATION & HOW DOES IT RELATE TO COST?

- Highly compressed, extremely efficient proceeding for urgently needed relief
- Generally lasts just a few weeks
- Extremely short time frame forces counsel and parties to concentrate on dispositive issues and essential process steps
  - Limited pleadings, no discovery and motion practice
  - Telephonic/video hearing used
- Merits are considered in view of exigency, irreparable harm and balancing of hardships.
- Followed by a full arbitration if dispute is not resolved or settled.



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## EMERGENCY ARBITRATION PROCESS

- AAA Commercial Arbitration Rule R-38 / ICDR International Arbitration Rule Article 6.
- Within one day from AAA-ICDR receipt of a notice, emergency arbitrator is appointed. Any challenge must be made the next day.
- Within two days, arbitrator and parties hold a pre-hearing schedule conference and set a schedule for the entire process, including briefing and any hearing.
- A decision is issued within days or weeks depending on the circumstances.



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## ACTUAL ICDR EMERGENCY ARBITRATIONS

Michaelson—

*Open TLD BV vs. ICANN (2015)*

- Request for immediate stay of an ICANN order suspending OpenTLD's accreditation for registration of domain names.

Benton—

*Namecheap v. ICANN (2020)*

- Request for immediate stay of .Org Registry Agreement pricing changes and proposed transfer of .Org Registry to a private equity firm.

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*OPEN TLD BV VS. ICANN (2015)*

ICANN suspended Open TLD's accreditation due to cybersecurity allegations.

Open TLD sought relief so that it could continue registering domain names.

- The process was expedited: appointment in one day, teleconference and procedural order, limited pleadings, witness statements instead of live testimony, telephonic hearing.
- Decision issued within six weeks.

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*NAMECHEAP V. ICANN (2020)*

ICANN allowed license renewal that removed price caps on the .org domain.

ICANN was considering request to transfer .org to private equity firm Ethos.

Namecheap, a .org registrar, sought to block price increases and .org transfer.

- Process was expedited: appointment in one day, teleconference and procedural order, limited pleadings, witness statements, reply and oral argument on request, telephonic hearing.
- Decision issued within three weeks.

## LESSONS LEARNED #1

Use time to significantly streamline complex arbitrations and lower costs.

- Process time is crucial, reduce it!
- Less time means significantly less legal work & significantly less cost
- Parties should simplify the process as much as possible
- Arbitrator should strongly encourage short timeframes and streamlined procedures





## Fit the process to the fuss:

- Design the process to provide just the essential steps needed to resolve the dispute, nothing more
- Consider circumstances of case in determining essential process steps
  - Motion practice, discovery, experts, hearing days, pre-hearing and post-hearing briefing, etc.
  - Only retain procedural steps that are absolutely required; jettison the rest
  - Ensure due process

## LESSONS LEARNED #3

### Immediately focus on the process -- Do not wait

- Work with AAA-ICDR to have case assigned quickly
- Use one arbitrator not three to significantly save cost and time
- Be reasonable regarding the qualifications you seek in the arbitrator
- Have AAA-ICDR appoint the arbitrator to avoid delay
- To save time, have AAA-ICDR screen candidate arbitrator(s) for potential conflicts while making appointment
  - Minimize, if not eliminate, potential for post-appointment arbitrator disclosures and possible challenges



## LESSONS LEARNED #4

### Select the right arbitrator

- One who can understand the subject matter
  - An arbitrator who understands the fundamentals and can quickly surmount the “learning curve”
  - Tutorials for uninformed arbitrators can be costly, time-consuming, time may not be available for a tutorial) and risky
    - With a shortened process, sufficient time may not be available for a tutorial
- One with good case management skills
  - An arbitrator who is organized, will listen to counsel and is fair but decisive, and can handle the “time crunch”
- One who understands the arbitration process
  - Arbitration is not litigation. Focus on efficiency and proper procedure.



## LESSONS LEARNED #5

### Be ready from Day 1

- Be prepared to discuss all procedural aspects in the first meeting with the arbitrator.
  - As soon as possible after appointment, an arbitrator will hold a pre-hearing scheduling conference and set a full arbitral schedule and hearing dates.
  - Arbitration offers flexibility – know what you want and ask for in the pre-hearing conference.
- Work out proposed procedures, including a schedule, with opposing counsel before the pre-hearing conference.
- The more counsel can agree to, the better. Otherwise, the arbitrator will decide for you.





## Keep submissions brief

- Written submissions should be short and to the point
- Limit arguments to core issues
- Set time limits and page limits
- Arbitrator should accommodate counsel but not let counsel abuse the process

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## LESSONS LEARNED #7

Every day, the arbitrator's understanding of the merits increases.

- Although the focus at the pre-hearing conference is procedure, be ready to answer questions on the merits. From the start, an arbitrator will be thinking about the merits. Start informing the arbitrator about the merits early on.
- Your client purposefully picked arbitration: efficiency, finality, significantly less time and cost.
- Provide quality pleadings and briefs so the arbitrator is properly and efficiently educated and guided.
- Don't posture. Engaging in litigation tactics hurts your case, wastes time and increases cost.
- Do it right from the start - early decisions by the arbitrator may impact the outcome of your case.



## LESSONS LEARNED #8

It's never too early for the parties to talk.

- Follow contract step clause requirements on direct negotiation and mediation.
- An arbitrator will encourage the parties to consider mediation to save time and costs and avoid uncertainty.
- Don't wait to mediate – get the process started up front.
- Think about time windows and “inflection points” (when a key issue may be decided) as useful opportunities to discuss settlement – there are no courthouse steps in arbitration.
- Arbitrator will often accommodate joint scheduling requests for reasonable extensions of time for settlement discussions, including mediation.



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THANKS!

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# QUESTIONS



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