

Respondent Obstructs Arbitration and Threatens Arbitrator; AAA-ICDR Administratively Dismisses Case, Depriving Claimant of Arbitral Forum

In *Schorr v. American Arbitration Association Inc.*, 2022 WL 17965413 (S.D.N.Y. Dec. 27, 2022), an otherwise ordinary commercial dispute that was to be resolved through arbitration had an interesting twist. The underlying contract contained an arbitration provision, and the respondent executed the AAA-ICDR's consent forms at the start of the arbitration. Yet, as the arbitration progressed, the respondent refused to pay his share of the fees, obstructed the proceeding, and threatened the arbitrators and administrative personnel. The AAA-ICDR administratively dismissed the matter, leading to the claimant's litigation against the respondent and the AAA-ICDR.

The court summarized the claimant's description of the respondent's conduct as "abusive, disrespectful, and threatening to the AAA-ICDR's personnel, the emergency arbitrator, and the arbitrator who followed." *Id.*, at *5. The respondent also "repeatedly refused" to comply with those officials' orders and directives and sought to subvert the arbitration process." *Id.* Just before the hearing was to begin, the respondent sent a threatening letter to arbitrator with the apparent intent of "scar[ing] the AAA-ICDR and the Arbitrator and disrupt[ing] the proceedings." *Id.*, at *6. Among other things, the letter "warned the arbitrator to 'consider [his] position very carefully,' threatened the AAA-ICDR with 'unspecified consequences' if the arbitration were completed, and accused the arbitrator of bias, committing fraud and ethics violations, and turning the AAA into a 'kangaroo court.'" *Id.*

The respondent also refused to pay his share of the forum and arbitrator fees in accordance with the AAA Commercial Rules. As a result, the AAA-ICDR collected those fees from the claimant. Although the claimant expected the arbitrator to apportion the fees in a final award at the end of the hearing, the AAA-ICDR administratively dismissed the case before the arbitrator issued the final award.

Schorr raises (at least) two points that should be considered when preparing an agreement to arbitrate: (1) the value of including an "inquest clause"; and (2) whether the counterparty is sufficiently reliable that it will properly participate in an arbitration and allow the arbitration to achieve its intended purpose.

First, the arbitration agreement included the AAA's sample "inquest clause:"

The parties agree that failure or refusal of a party to pay his/her required share of the deposits for arbitrator compensation or administrative charges shall constitute a waiver by that party to present evidence or cross-examine witness[es]. In such event, the other party shall be required to present evidence and legal argument as the arbitrator(s) may require for the making of an award. Such waiver shall not allow for a default judgment against the non-paying party in the absence of evidence presented as provided for above.

Id., at *2. Although the AAA Commercial Rules allow the parties to modify the rules by the terms of their contract, and allow the arbitrator to limit a party's participation in the arbitration as a sanction for failing to pay its share of the fees, Rule 59(b) states: "In no event ... shall a party be precluded from defending a claim or counterclaim." AAA Commercial Rules 59(b). In *Schorr*, the arbitrator resolved the conflict between the Inquest Clause and Rule 59(b) by allowing the respondent to continue participating in the proceeding. Although the arbitrator did not enforce the inquest clause in *Schorr*, a different arbitrator might do so. Consult with counsel about whether to include a similar provision in your next agreement to arbitrate.

Second, practitioners frequently tout arbitration as a faster and more cost-efficient mechanism to resolve disputes. In *Schorr*, it was not. As the court noted: "Far from facilitating the efficient resolution of claims, the AAA-ICDR's decision here to abort the arbitration denied [claimant] the forum to which she was contractually entitled, forced her to bear the costs incurred to that point by both sides, and rewarded [respondent] for his contumacy." *Schorr*, 2022 WL 17965413, at *2. Having refused to pay his share of the arbitral forum costs, and having threatened the arbitrators and administrative staff, the respondent mounted an effective defense. By obstructing the process, the respondent was able to delay (and, potentially, avoid) adjudication of the dispute on the merits and impose a financial burden on the claimant.

Although the respondent's approach to the arbitration was effective in *Schorr*, it is an extremely high-risk approach. A more likely outcome is that the arbitrator issues a final award that granting the claimant's the requested relief, attorneys' fees (if available), and 100% of the forum costs.

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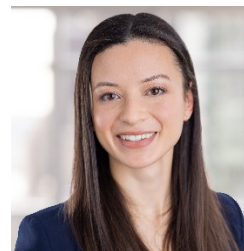
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