A GUIDE TO THE ICDR INTERNATIONAL ARBITRATION RULES
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A GUIDE TO
THE ICDR
INTERNATIONAL
ARBITRATION RULES

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FOREWORD

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There is an unresolved tension about rules in the world of arbitration. Those who believe that arbitration has become too much like litigation are concerned that rules contribute to that trend, and that the end result of adding more and more rules will be to make arbitration as rule-bound, rigid, and complex as litigation has become. There is much to be said for this view, especially when, as happens too frequently, one encounters a new set of rules, or a proposed code, or recommended guidelines, that suggests nothing so much as that some committee of lawyers has run out of more constructive ways to spend its time.

Before rejecting all arbitration rules as pernicious, however, one should pause to consider that a system based on informality and flexibility, as arbitration historically has been, is perpetually in danger of becoming a closed system. Without rules to guide the newcomer, such a system can become a preserve of the initiated, speaking only its own arcane language, and inaccessible to outsiders who don’t know how to play the game. A set of rules, available to and binding on everyone, allows someone new to the process to embark on an arbitration with reasonable confidence that at least the biggest stones in the stream have been mapped.

The International Arbitration Rules of the International Centre for Dispute Resolution (ICDR), the international arm of the American Arbitration Association (AAA), serve as just such a map. These rules, specifically designed for international arbitrations administered by the ICDR, offer a structure for and guideposts to the process that are clear and comprehensive enough for someone engaged in his or her first international arbitration to follow, while remaining faithful to the AAA’s determination to keep arbitration simple and flexible.

The ICDR Rules encourage flexibility in the arbitration process in two key ways. First, the parties are free to adopt almost any variation on the basic procedures set forth in the rules that all parties can agree upon, so that sophisticated participants can tailor the process to their specific needs without complicating the process for first-time users. And, second, the rules give the arbitrators significant power and

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Foreword

discretion—and an affirmative mandate—to manage the process so as to make it work economically and efficiently.

Because the *ICDR Rules* were devised specifically for international arbitrations, those who use these rules—both parties and counsel—tend to be among the most sophisticated users of arbitration. This has led the AAA to use the *ICDR Rules* as a sort of laboratory for innovations, on the theory that sophisticated users, advised by the professional administrative staff of the ICDR, are likely to adapt more quickly and more cheerfully to new ideas and procedures than less sophisticated users. This permits the AAA to try out improvements in the *ICDR Rules*, and to incorporate those that work into some or all of the many other sets of arbitration rules administered by the AAA.

One result of the AAA’s use of the *ICDR Rules* to test new ideas is that they have evolved much more rapidly than most sets of arbitration rules. The original rules were issued in 1991, revised in 1993, and significantly re-written in 1996–7. Major changes were then made in 2003 to introduce mediation procedures, in 2006 to introduce provisions for emergency relief, and in 2008 to impose limits on pre-hearing discovery-type procedures that had become unacceptably expensive and time consuming. This rapid development has mostly been welcomed by close observers, but it can pose a challenge to those coming back to the *ICDR Rules* after a long absence, not to mention those using the rules for the first time. All types of user, from a neophyte drafting a first demand for arbitration, to a veteran of many arbitrations encountering a new set of circumstances, to a regular user confronted with a new rule, should therefore welcome enthusiastically this *Guide to the ICDR International Arbitration Rules*.

The *Guide* has been written by three highly skilled and experienced practitioners, all of whom still pass for young in a field known for grey hair. Martin Gusy, James Hosking, and Franz Schwarz each had the advantage of starting his work in the field of international arbitration at a young age, and each had the advantage of learning the business from one of the acknowledged masters in the field. The authors have among them worked on arbitrations conducted under every major set of international rules, and the breadth of their experience is evident in the extensive cross-referencing to other rules that is one of the features of the *Guide*. Indeed, it is a tribute to the international prominence and acceptance that an American set of rules has achieved that this first detailed explication of the *ICDR Rules* has been written by three authors who collectively embody the concept of international practice: not one of them is American by birth, and not one of them practises in the country in which he was born.

The *Guide* addresses the *ICDR Rules* on a rule-by-rule basis, making it readily accessible to anyone working with the rules and wondering what a particular provision means. It devotes a chapter to each article of the *ICDR Rules*, first quoting the rule, and then discussing each sentence or phrase in detail. It provides, for the first time,
an explanation of the historical context that led to the adoption of each rule, and also explains how each rule relates to the overall arbitration process.

In addition to comparing the provisions of the ICDR Rules to the parallel provisions of the rules of other major arbitration institutions, the Guide’s discussions of each rule include extensive references to how the subject dealt with by each rule is treated in the most widely used treatises in the field, and in an impressive array of more specialized articles. Indeed, these references alone would provide a comprehensive reading list for any course in international arbitration.

One of the most helpful features of the Guide, especially for American practitioners, is the extensive annotation of each rule to judicial decisions. This annotation includes, as one might expect, references to the numerous judicial decisions that discuss and apply the rules, reinforcing the sense that far too many American arbitration proceedings end up at one stage or another of their existence in the courts. More impressive than these annotations, however, are the explanations provided by the authors of how various provisions of the ICDR Rules developed from prior judicial decisions. For example, the authors correctly point out that Article 15 of the ICDR Rules, which deals with the power of arbitrators to rule on their own jurisdiction, has its origins in the United States Supreme Court’s 1995 decision in First Options of Chicago v Kaplan.

Messrs Gusy, Hosking, and Schwarz have gone beyond collecting learned commentary and case law, however. At many points in the Guide, they include valuable information about the actual practice of the ICDR in administering cases. Chapters 1 and 27, for example, explain the role of the ICDR in reviewing awards before they are issued. While that role is far more restrained than the scrutiny of awards by the Court of Arbitration under the ICC Rules, it is more extensive than would appear from simply reading the ICDR Rules. By explaining the practice of the ICDR as well as its rules, the authors of the Guide have provided practitioners with insight that is not available from any other published source. And they have done so in clear, elegant, and well-organized prose. Many of us have shelves laden with books on arbitration, but few of them promise to be of as much practical use as Gusy, Hosking, and Schwarz’s A Guide to the ICDR International Arbitration Rules.
PREFACE

Alone of all the great agencies for human happiness and public welfare, arbitration has no official publication. Much of the history of arbitration and of its development has already been lost, due to this omission; much of its important current history goes unchronicled and its significance is being lost. Without an official publication it is impossible to organize the thought on arbitration or to stimulate constructive ideas and profitable discussion.

The above quote is from the 1926–1936 Decennial Report of the American Arbitration Association on the Progress of Commercial Arbitration. This is some 50 years before the American Arbitration Association (AAA) took its first tentative steps in developing a set of rules designed specifically for international arbitration and some 60 years before the creation of the International Centre for Dispute Resolution (ICDR), the AAA’s international division.

In the meantime, a plethora of texts and commentaries have been published on every facet of international arbitration—with one notable exception. To the authors’ surprise, 20 years after the introduction of what was first called the AAA International Arbitration Rules but today is known simply as the ICDR Rules, there is still no stand-alone commentary on them. Our primary motivation in writing this book was to remedy this omission.

The void is perhaps explained by the fact that the first iteration of the AAA International Arbitration Rules was heavily influenced by the then-applicable UNCITRAL Arbitration Rules, and thus a separate commentary may not have seemed necessary. But if this were ever true, it is no longer. As this book discloses, the UNCITRAL Rules are the genesis of only certain of the current ICDR Rules and only to some extent. Today, the ICDR Rules are shaped by several international sources and, on issues like pre-appointment emergency relief and document disclosure, the ICDR has crafted its own innovative solutions. Further, over time, the ICDR has developed important institutional practices on the interpretation and application of its Rules that should be shared with practitioners. In this last respect, we have had the benefit of access to the ICDR’s senior management and to published ICDR awards.

In addition to filling a gap in the market, we were also motivated to write this book by our own relationships with the management and staff of the ICDR. We first were able to learn about the inner workings of the institution several years ago when we were honoured to serve as the founding co-chairs of the ICDR’s young practitioners group. As our respective practices as counsel and arbitrators in the international arbitration field have grown, ICDR arbitration has remained a constant.
This book is a joint project of all three authors, although each of us took primary drafting responsibility for a specific part: Martin Gusy has addressed Articles 1–4; Franz Schwarz Articles 5–19; and James Hosking Articles 20–37.

The authors are jointly indebted to many friends and colleagues at their firms, at the ICDR, and in the wider arbitration community, who helped this book along. In particular, we would like to thank the ICDR, including William K Slate II, Richard Naimark, Luis Martinez, Steve Andersen, Tom Ventrone, Christian Alberti—and particularly Mark Appel for his counsel and friendship over many years. Amongst our respective firms, we must mention the fantastic contributions from colleagues such as Noelle Berryman, Yasmine Lahlou, David Lindsey, Iris Spitzwieser, Erin Valentine, and Carl van der Zandt. Of course, we also must thank the team at OUP—especially Vicky Pittman and Amanda George—for their advice and patience. Their understanding is outdone only by that of our family members. Of course, all mistakes remain our own.

We hope that our Guide to the ICDR International Arbitration Rules will go some way towards ‘chronicling’ the development of the ICDR Rules and ‘stimulating constructive ideas and profitable discussion,’ as the AAA forebears of international arbitration advocated some 75 years ago.

Martin Gusy
James Hosking
Franz Schwarz

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LIST OF ABBREVIATIONS

AAA American Arbitration Association
ABA American Bar Association
ADR alternative dispute resolution
ADR Currents Alternative Dispute Resolution Currents
AFMA American Film Marketing Association
Am Rev Intl Arb American Review of International Arbitration
Arb Arbitration
Arb Intl Arbitration International
Aus LJ Australian Law Journal
BCDR-AAA Bahrain Chamber of Dispute Resolution
Bus L Intl Business Law International
CAMCA Commercial Arbitration and Mediation Centre for the Americas
CANACO Mexico City National Chamber of Commerce
CAS Court of Arbitration for Sports
CEPANI Belgian Centre for Arbitration and Mediation (Centre Belge d’Arbitrage et de Médiation)
CIA Chartered Institute of Arbitrators
CIETAC China International Economic and Trade Arbitration Commission
Col J Transnl L Columbia Journal of Transnational Law
CPR International Institute for Conflict Prevention and Resolution
DIS German Institution of Arbitration (Deutsche Institution für Schiedsgerichtsbarkeit)
Disp Res J Dispute Resolution Journal
Disp Resol Mag Dispute Resolution Magazine
ECHR European Convention on Human Rights
ECJ European Court of Justice
FAA US Federal Arbitration Act
Ford Urb LJ Fordham Urban Law Journal
Forum Intl Forum International
Global Arb Rev Global Arbitration Review
Harvard Intl LJ Harvard International Law Journal
Hofstra L Rev Hofstra Law Review
IACAC Inter-American Commercial Arbitration Commission
IBA International Bar Association
ICANN Internet Corporation for Assigned Names and Numbers
ICC International Chamber of Commerce
ICC Ct Bull ICC Court Bulletin
ICC Ct Bull Spec Supp ICC Court Bulletin Special Supplement

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List of Abbreviations

ICC Intl Ct Arb Bull — ICC International Court of Arbitration Bulletin
ICDR — International Centre for Dispute Resolution
ICDR Y&I — ICDR Young and International
ICJ — International Court of Justice
ICSID — International Centre for Settlement of Investment Disputes
Ind ALR — International Administrative Law Review
Intl and Comp LQ — International and Comparative Law Quarterly
Intl Arb L Rev — International Arbitration Law Review
Intl Trade and Bus L Rev — International Trade and Business Law Review
ITA — Institute for Transnational Arbitration
J Intl Arb — Journal of International Arbitration
JCAA — Japan Commercial Arbitration Association
LCIA — London Court of International Arbitration
Mealey’s Int Arb Rep — Mealey’s International Arbitration Report
Mich J Intl L — Michigan Journal of International Law
Minn J Intl L — Minnesota Journal of International Law
NAI — Netherlands Arbitration Institute
NASD — US National Association of Securities Dealers
Natl LJ — National Law Journal
PCA — Permanent Court of Arbitration
Rev Arb — Revue de l’Arbitrage
RMA — US Rice Millers’ Association
SCC — Stockholm Chamber of Commerce
SIAC — Singapore International Arbitration Centre
Sing Acad LJ — Singapore Academy of Law Journal
Stan J Intl L — Stanford Journal of International Law
Transnl Disp Mgmt — Transnational Dispute Management
U Ill L Rev — University of Illinois Law Review
UNCITRAL — United Nations Committee on International Trade Law
UNSW Law J — University of New South Wales Law Journal
VIAC — Vienna International Arbitral Centre
VJ — Vindobona Journal
WIPO — World Intellectual Property Organization
Ybk Arb Inst SCC — Yearbook of the Arbitration Institute of the SCC
Ybk Comm Arb — Yearbook of Commercial Arbitration
ZPO — German Code of Civil Procedure (Zivilprozessordnung)
ARTICLE 1—INTRODUCTION TO ICDR ARBITRATION

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Article 1

1. Where parties have agreed in writing to arbitrate disputes under these International Arbitration Rules or have provided for arbitration of an international dispute by the International Centre for Dispute Resolution or the American Arbitration Association without designating particular rules, the arbitration shall take place in accordance with these rules, as in effect at the date of commencement of the arbitration, subject to whatever modifications the parties may adopt in writing.

2. These rules govern the arbitration, except that, where any such rule is in conflict with any provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

3. These rules specify the duties and responsibilities of the administrator, the International Centre for Dispute Resolution, a division of the American Arbitration Association. The administrator may provide services through its Centre, located in New York, or through the facilities of arbitral institutions with which it has agreements of cooperation.

I. Introduction to ICDR arbitration

1.01 This book is a guide to the International Centre for Dispute Resolution (ICDR) International Arbitration Rules (hereinafter referred to as the ‘ICDR Rules’ or the ‘Rules’). The ICDR is the international arm of the American Arbitration Association (AAA) and one of five currently existing AAA divisions.

1.02 While the bulk of this book is devoted to an article-by-article analysis of the ICDR Rules, some understanding of the institutional background to the Rules is important. Section I of this chapter will, first, give a brief overview of the long history of the AAA, and outline the creation of its international division in 1996 and its subsequent expansion, as well as provide a snapshot of statistics relating to the AAA’s and ICDR’s caseload. This chapter will also summarize the genesis of the ICDR Rules and major changes in the ICDR Rules. Section II of this chapter will provide

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1 This book has benefited from comments and suggestions made by management at the ICDR. The authors wish to express their gratitude.

2 The AAA’s divisions include: International; Commercial; Construction; Labour/Employment/Elections; and State Insurance Alternative Dispute Resolution (ADR).
I. Introduction to ICDR arbitration

A textual analysis of Article 1 of the ICDR Rules, including a discussion of the AAA’s and ICDR’s administrative practices.

Statistics and information on the ICDR’s standard administrative practices stated herein, unless indicated otherwise, are drawn from various AAA and ICDR public communications, material available on the AAA website, and/or discussions with ICDR senior management. The ICDR administrative practices will be discussed in detail in the textual commentary to Article 1(3). Importantly, note that the ICDR is not bound by these administrative practices and may deviate from them to apply a different case management strategy where the parties’ particular agreement and/or the specific circumstances of the case so require.

A. The American Arbitration Association (AAA)—An historic foundation

1. The AAA’s history

The AAA was founded as a not-for-profit public service organization in 1926 and is the result of a merger of three pioneering arbitration groups active in New York in the early 1920s.

Inspired by Julian Cohen’s treatise, Commercial Arbitration and the Law, the New York Chamber of Commerce and the New York State Bar Association co-sponsored arbitration legislation resulting in the state of New York’s enactment of a first modern arbitration statute in 1920. The New York arbitration statute in turn inspired the formation of the Arbitration Society of America in 1922, instrumental in effecting the passage of the 1925 Federal Arbitration Act, the formation of the Arbitration Foundation in 1924, and the formation of the Arbitration Conference in 1925. The AAA is the result of a merger of the Arbitration Society of America, Arbitration Foundation, and Arbitration Conference in 1926.

2. The AAA’s case management approach

On both the domestic level and the international level, the AAA’s historic foundation was built with the ambition to be sufficiently adaptable to serve the evolving and ever-changing needs of its users and of interstate and international commerce.

The AAA’s stated mission is to guide the parties fairly and equitably through the arbitral process in the most efficient manner while staying impartial as to the outcome of the dispute. The institution has had to develop its rules and its administrative procedures against a backdrop of what was once open hostility by the

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courts, legislators, and others towards arbitration. The general perception of, and attitude towards, arbitration has now greatly improved. Nevertheless, the AAA has always had to be very sensitive to ensuring that it does not get ahead of public sentiment. In this respect, it can point to a very strong record of US and non-US courts upholding AAA awards and rejecting claims of institutional excess of power. Accordingly, the AAA and ICDR Rules should be understood as the product of careful incremental changes in response to developing international norms and incorporating provisions that have been tested in US and foreign courts, so as to provide a high degree of quality assurance.

1.08 With its long history and experience in the field of alternative dispute resolution (ADR), the AAA developments continue to be driven by user demand. The AAA provides individuals, businesses, and governmental entities with services related to arbitration and other forms of dispute resolution.

1.09 The AAA’s work extends beyond administering arbitrations. The institution plays an important role in various initiatives to promote the use of arbitration, to encourage the enactment of modern arbitration legislation, to develop procedures for the conduct of arbitral proceedings, and to implement educational programmes for users and neutrals to gain a greater understanding of arbitration practice.

1.10 The AAA administers cases for individuals and organizations that wish to resolve conflicts out of court. The AAA’s administrative services include assisting in the appointment of mediators and arbitrators, setting hearings, and providing users with information on dispute resolution options, including settlement through mediation. Ultimately, the AAA aims to move cases through arbitration or mediation in a fair and impartial manner from filing until completion.

1.11 Additional AAA services include the design and development of ADR systems for corporations, unions, government agencies, law firms, and the courts. Various US government entities have turned to the AAA to assist in the resolution of disputes through over 300 state and federal statutes and regulations. The AAA also provides

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4 See IR Macneil, RE Speidel, and TJ Stipanowich, Federal Arbitration Law: Agreements, Awards, and Remedies under the Federal Arbitration Act (Aspen, New York, 1999) ss 4.3 and 5 (addressing the development of arbitration in the USA), and 6.2 (addressing the AAA).

5 See discussion of Art 36 below at paras 36.02–36.07.

6 As will be discussed in detail herein, the ICDR Rules have been developed in reliance on several seminal international arbitration instruments, most noticeably the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), the United Nations Committee on International Trade Law’s Arbitration Rules first promulgated in 1976 (1976 UNCITRAL Rules), and the UNCITRAL Model Law on International Commercial Arbitration first promulgated in 1985 (UNCITRAL Model Law).

7 See generally <http://www.adr.org/about>.

I. Introduction to ICDR arbitration

election services, as well as education, training, and publications for those seeking a broader or deeper understanding of ADR.

Headquartered in New York, the AAA maintains 29 offices worldwide, including four case management centres\(^9\) and 23 regional offices in the USA.\(^10\) Since 2009, all of the AAA’s cases, regardless of the type of case or the geographical location, are to be filed with the AAA Case Filing Center in Voorhees, New Jersey.

The AAA has continued to adjust its service portfolio to provide products to different industries requiring ADR services. It has also remained sensitive to its users’ demands for organizational improvements. In 2010, the AAA created a customer-focused alignment of its resources through five divisions. The divisions consist of: Commercial; Construction; International; Labour/Employment/Elections; and State Insurance ADR disputes. Each division encompasses expertise in the nuances of its specific industry-driven caseload.

3. Principal AAA arbitration and mediation procedures

AAA arbitrations and mediations address a variety of industry-specific situations through general commercial and also industry-specific rules. These rules and procedures detail the steps in the resolution process, and ensure that all parties to a case are treated fairly and equitably.

The AAA’s principal sets of applicable rules and procedures comprise:\(^11\)

- the Commercial Arbitration Rules and Mediation Procedures (including Procedures for Large, Complex Commercial Disputes) (the ‘Commercial Rules’);
- the Construction Industry Arbitration Rules and Mediation Procedures;
- the Employment Arbitration Rules and Mediation Procedures; and

The calculus used for deciding which set of rules applies to a specific dispute in an international context is discussed in this chapter in detail below. In general, however, the AAA Commercial Rules are commonly used for the AAA’s administration of US domestic commercial cases, but may also be applied in international cases. Cases involving claims exceeding US$500,000 are subject to the Supplemental Procedures for Large, Complex Commercial Disputes, included with the Commercial Rules.

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\(^9\) The case management centres are located in: Fresno, California; Dallas, Texas; Atlanta, Georgia; and East Providence, Rhode Island.

\(^10\) See para 1.34 below for the ICDR locations.

\(^11\) A list of all arbitration rules appearing on the AAA website is set out as Appendix 9.
In addition, the AAA applies the Supplementary Procedures for Consumer-Related Disputes—a supplement to the Commercial Rules that includes a glossary of ADR terms—when arbitration clauses exist in agreements between individual consumers and businesses in which the business has a standardized, systematic application of arbitration clauses with customers, and where the terms and conditions of the purchase of standardized, consumable goods or services are non-negotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices.

Since 2003, the AAA also administers class action arbitrations in accordance with the Supplementary Rules for Class Arbitrations. On 8 October 2003, in response to the ruling of the US Supreme Court in Green Tree Financial Corp v Bazzle, the AAA issued its Supplementary Rules for Class Arbitrations to govern proceedings brought as class arbitrations. In Bazzle, the Supreme Court held that, where an arbitration agreement was silent regarding the availability of class-wide relief, an arbitrator, and not a court, must decide whether class relief is permitted. Accordingly, the AAA administers demands for class arbitrations if the underlying agreement specifies that disputes arising out of the parties’ agreement shall be resolved by arbitration in accordance with any of the AAA’s rules and the agreement is silent with respect to class claims, consolidation, or joinder of claims.

Demands for class arbitration will not be administered where the underlying agreement prohibits class claims, consolidation, or joinder, unless a court orders the parties to the underlying dispute to submit any aspect of their dispute involving such issues to an arbitrator or to the AAA.

4. AAA early dispute resolution options

In addition to industry-specific arbitration and mediation procedures, the AAA offers a portfolio of tools that help lead to early dispute resolution. The AAA has developed a set of procedures for these scenarios including:

- ‘early neutral evaluation’ by means of expert assessment—neutral evaluations provide parties with an assessment of the merits of their case based on assessments by neutral third parties with industry-specific expertise;
- ‘fact-finding’ by means of an independent third-party fact investigation commonly referred to as ‘expert determination’ outside of the AAA context; and
- ‘mini-trials’, which, in their most common form, involve representatives from each company presenting the evidence in its case to a panel made up of an AAA neutral or panel chair and senior executives from each of the companies in the dispute.

I. Introduction to ICDR arbitration

5. The AAA’s arbitration policy initiatives

More than a clearing house for arbitration, mediation, and early dispute resolution rules, the AAA also monitors the ADR legislative climate and intervenes where deemed appropriate to uphold the laws that support the enforcement of arbitration clauses and awards. While most of this is in the domestic US policy arena, as discussed below, the AAA/ICDR is actively involved in international policy initiatives, from judicial training to United Nations Committee on International Trade Law (UNCITRAL) Working Group meetings.

Most prominently in the US domestic sphere, in 2007, the AAA filed an amicus brief in Hall Street Associates v Mattel, arguably the seminal decision of the US Supreme Court in recent arbitration history. In Hall Street, the question presented was whether parties may expand the standards of judicial review of arbitration awards beyond those specifically provided for in the US Federal Arbitration Act (FAA).

The AAA viewed the case as one that was important with respect to the development of arbitration law in the USA and also believed that the AAA’s views would be of interest to the Court. The AAA’s amicus brief was filed in support of the prevailing view that the text of the FAA itself did not permit parties’ agreements for expanded judicial review, and that if such agreements were permissible, they would detract from the finality normally afforded to arbitration awards. In addition, the AAA emphasized that expanding judicial review of arbitration awards would result in the diminishment of the benefits of the arbitration process. The Supreme Court’s decision in Hall Street essentially embraced the positions advanced by the AAA.13

6. The AAA’s educational activities

The AAA does not decide any cases itself. Accordingly, it is dependent on fostering and strengthening knowledge of arbitration amongst judges, arbitrators, lawyers, and commercial users of its services. Its various initiatives take many forms.

Most obviously, the AAA invests in its panels of arbitrators and mediators. AAA arbitrators and mediators are carefully screened and trained, and are required to possess years of industry-specific knowledge and experience. As of 2010, the AAA’s panel of neutrals includes more than 7,000 individuals located throughout the world. The AAA’s international division maintains a worldwide panel of about 400 arbitrators and mediators. Members of the panel of neutrals are required to undergo continued arbitrator and mediator training offered by the AAA in order to maintain an active status on the panel.

In addition to the guidelines provided in the relevant arbitration rules, arbitrator conduct is guided by the AAA's Code of Ethics for Arbitrators in Commercial Disputes, co-authored with the American Bar Association (ABA).

Another example of the AAA’s educational outreach is its sponsorship of various projects aimed at students or younger arbitration practitioners. Besides its annual sponsorship of the Willem C Vis International Commercial Arbitration Moot in Vienna, Austria, two noteworthy initiatives in this respect include the establishment of ICDR Young and International (ICDR Y&I) and the A Leon Higginbotham Jr Fellows Program. In 2004, ICDR Y&I was created with the ambition to provide a professional development organization for international dispute resolution practitioners under the age of 40. More than a young arbitrator group, ICDR Y&I membership is open to attorneys in the field of international dispute resolution, in-house counsel involved primarily in cross-border work, government employees involved in dispute resolution, and academics and graduate students with an interest in the field. As at publication, it has more than 1,600 members from 81 countries and has held more than 40 events in over 20 cities.

In 2009, the AAA also created the A Leon Higginbotham Jr Fellows Program in order to provide training, mentorship, and networking opportunities to up-and-coming diverse ADR professionals who have historically not been included in meaningful participation in the field of ADR.

B. The International Centre for Dispute Resolution (ICDR)—The AAA’s division focused on international disputes

1. The ICDR’s history

As international trade and commerce grew in the 1980s, so did international disputes. With this came a realization that international disputes present unique institutional challenges to those involved in providing dispute resolution services. These challenges may extend from overcoming the complexities created by different languages to bridging different legal cultures.

In an effort to provide a framework for resolving international disputes, but within the structure of arbitration rules designed for largely domestic commercial matters,

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14. The AAA Higginbotham Fellows Program is a one-year programme designed to offer the full breadth of the AAA resources to up-and-coming diverse professionals who are interested in pursuing a future career in alternative dispute resolution (ADR), and to allow the participants to immerse themselves in all aspects of ADR.

the AAA introduced its Supplement for International Commercial Arbitration in 1986. This set of additional rules, addressing issues such as the language of the proceedings, was designed as an add-on to the AAA Commercial Rules. The AAA continued to administer these ‘international cases’ together with US domestic cases. As discussed below, it took until 1991 for the introduction of the first set of rules entitled ‘International Arbitration Rules’.

Meanwhile, the magnitude of international trade and international economic disputes merited a different institutional approach from the traditional industry-specific strategies applied by the AAA in US domestic settings. Having administered both US domestic and international cases for several years, in 1996, the AAA established its International Centre for Dispute Resolution (ICDR)—a new division, the name of which did not contain the word ‘American’.

Following a revision of the International Arbitration Rules in 1996–97, the ICDR was charged with all of the AAA’s international services. In its first year of existence, the ICDR already administered 194 cases. Fifteen years later, the ICDR’s expertise in the administration of international arbitrations is well recognized.

2. The ICDR’s case management approach

As stated on the ICDR’s website, the ICDR’s international case management system is:

premised on its ability to move matters forward, facilitate communications, ensure that qualified arbitrators and mediators are appointed, control costs, understand cultural sensitivities, resolve procedural impasses, and properly interpret and apply its International Arbitration and Mediation Rules.

The Fee Schedule further states:

Where the applicable arbitration agreement does not reference the ICDR or the AAA, the ICDR will attempt to obtain the agreement of the other parties to the dispute to have the arbitration administered by the ICDR.

While the ICDR received 884 notices of arbitration in 2009, it administered only 836 of these cases.

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17 In November 2010, the Internal Revenue Service (IRS) entered into an agreement with the ICDR to provide administrative services in support of arbitration under the ‘mutual agreement procedure’ article of US income tax treaties concluded with Belgium, Canada, and Germany. See AAA Press Release, ‘ICDR Selected by IRS to Arbitrate International Tax Cases’, 4 November 2010.
3. ICDR New York headquarters and overseas locations

1.34 For its case management, the ICDR maintains specialized administrative facilities in New York, where a staff of 24 multilingual attorneys fluent in at least 12 languages supervises the administration of international cases.

1.35 Not only because of the AAA's long ties to New York, but also because of New York's prominence as a seat for international arbitration, New York was chosen as the ICDR's main administrative base. New York is by far the leading venue for cases administered by the ICDR, both by number of cases and by amount in dispute.\(^{18}\) Approximately one in four ICDR cases filed each year designate New York as the place of arbitration.\(^{19}\)

1.36 In May 2001, the ICDR opened its first office outside the USA in Dublin, Ireland, to serve the growing number of users in Europe, the Middle East, and Africa. In 2009, the ICDR decided to transition its European operation ‘from the Dublin-based bricks-and-mortar presence to remote-based service for Ireland and Europe. The AAA/ICDR learned over time that it can be highly effective and mobile in its international operations’.\(^{20}\)

1.37 In February 2006, the ICDR opened an office in Mexico City through a joint venture with the Mediation and Arbitration Commission of the Mexico City National Chamber of Commerce (CANACO).

1.38 In October 2007, the ICDR also opened an office in Singapore through a joint venture with the Singapore International Arbitration Centre (SIAC). The affiliation resulted from the ICDR's increasing Asian caseload and in recognition of Singapore's growing role as a leading arbitration centre in Asia. As a direct effect of this growth, in August 2009, ICDR Singapore relocated its Asia Centre to Maxwell Chambers in Singapore.\(^{21}\)

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\(^{20}\) AAA Annual Report 2009. In furtherance of continuing engagements and activity in Ireland, the ICDR announced an emerging affiliation with Trinity College Dublin, which will include a regular joint international conference and an AAA/ICDR award for excellence in international conflict management.

\(^{21}\) Maxwell Chambers is a state-of-the-art hearing facility in Singapore that also houses leading international ADR institutions.
I. Introduction to ICDR arbitration

In December 2008, the AAA/ICDR signed a memorandum of understanding with Bahrain’s Ministry of Justice and Islamic Affairs to establish the Bahrain Chamber for Dispute Resolution (BCDR-AAA), the first ADR services provider in Bahrain. The BCDR-AAA developed its own rules based on the ICDR’s International Dispute Resolution Procedures. The BCDR-AAA formally opened in January 2010. The ICDR was closely involved in this initiative and has relocated an ICDR supervisor to Bahrain to establish the centre’s case management system, training, and outreach. The centre administers arbitrations and mediations of regional and domestic commercial cases, including insurance, construction, financial services, and energy disputes. Arbitrations and mediations are conducted in Arabic, English, or any other language required by the parties.

4. International cooperative agreements

Beyond its own offices and immediate network, the ICDR also has access to hearing facilities and other services by means of 64 cooperative agreements with arbitral institutions and chambers of commerce in 46 countries.

Confidential in nature, the AAA’s and the ICDR’s cooperative agreements form the basis for educational relationships, as well as cooperation in the administration of arbitration proceedings. Organizational cooperation may range from making available hearing room facilities, to cooperation in developing and maintaining lists of arbitrator candidates.

The first cooperative agreement concluded by the AAA was reached with the Manchester Chamber of Commerce in the UK in 1946. Notable cooperative agreements include the AAA’s agreement with the Court of Arbitration for Sports (CAS) by which the ICDR serves as one of CAS’s decentralized offices on a permanent basis. The annual AAA/ICDR/International Chamber of Commerce (ICC)/International Centre for Settlement of Investment Disputes (ICSID) Joint Colloquium in November of each year is also based on cooperative agreements between the respective organizations.

In 2009 alone, the ICDR expanded its global reach by entering into cooperative agreements with the Chamber of Commerce in Bogotá, Colombia, and the Chamber of Commerce in Lima, Peru.

5. Scope of the ICDR’s services

The ICDR is responsible for administering ‘international disputes’, the definition of which is discussed in detail below. Importantly, the ICDR is empowered to apply any one of several sets of rules and procedures. By far the most common applicable set of rules is the ICDR Rules, closely followed by the AAA Commercial Rules. However, the ICDR might also be asked to administer an arbitration governed by one of the industry-specific sets of rules. Other sets of rules administered by the
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ICDR include the ICDR Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process and the ICDR Protocol for Manufacturer/Supplier Disputes.

1.45 The ICDR also administers ad hoc arbitrations pursuant to the Commercial Arbitration and Mediation Centre for the Americas (CAMCA) Rules and the Inter-American Commercial Arbitration Commission (IACAC) Rules.

1.46 For ad hoc arbitrations under the UNCITRAL Arbitration Rules, the ICDR applies its Procedures for Cases under the UNCITRAL Rules.22

1.47 Since the 1996/1997 revision, the ICDR Rules are part of the ICDR’s so-called International Dispute Resolution Procedures,23 combining in one publication the ICDR Rules with the ICDR’s International Mediation Rules.24 The inclusion of the International Mediation Rules underscores the ICDR’s commitment to promoting all forms of ADR. The International Mediation Rules provide a set of standardized procedures for conducting mediation, as well as offer the ICDR administrator an opportunity to encourage disputing parties facing an arbitration to try mediation. Parties often respond favourably to inquiries by the ICDR regarding their interest in mediation. According to ICDR statistics, in about 8–10 per cent of all arbitrations administered by the ICDR, parties settle through mediation. The Institution’s records show that the three points in time most likely to facilitate settlement in an ICDR case are after the administrative conference, at the end of document disclosure, and at the preliminary hearing. Historically, about 85 per cent of domestic and international commercial cases submitted to mediation settle.25

6. ICDR Guidelines for Arbitrators Concerning Exchanges of Information

1.48 All international cases initiated and administered by the ICDR after 31 May 2008 are governed by the ICDR Guidelines for Arbitrators Concerning Exchanges of Information.26

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22 A copy of the Procedures for Cases under the UNCITRAL Rules is provided as Appendix 8.
23 Available online at <http://www.adr.org/spasp?id=33994>; for a full list of the AAA’s sets of rules applicable in international cases, see <http://www.adr.org/sp.asp?id=28819>.
24 The International Mediation Rules provide the means of initiating and terminating mediation, a method for appointing the mediator, the authority of the mediator, and extend confidentiality to the process.
25 M Appel, Taking Your Case to the International Centre for Dispute Resolution, ICDR paper on file with the authors.
I. Introduction to ICDR arbitration

The Guidelines require parties to exchange in advance of the hearing all documents upon which they intend to rely. Parties may request the arbitral tribunal to order other parties to produce documents in the party’s possession, which are not otherwise available to the party seeking the documents, which are reasonably believed to exist, and which are believed to be relevant and material to the outcome of the case. Such document production requests need to contain a description of specific documents or classes of documents, along with an explanation of their relevance and materiality to the outcome of the case.

The Guidelines provide the general statement that ‘depositions, interrogatories, and requests to admit, as developed in American court procedures, are generally not appropriate procedures for obtaining information in international arbitration’. The Guidelines also seek to place limitations on discovery of electronic information, but do not foreclose such disclosure. Requests for documents maintained in electronic form should be narrowly focused and structured to make searching for them as economical as possible. A requesting party may be required by the arbitral tribunal to justify the time and expense that its request may involve, and the arbitral tribunal may condition the granting of a request on the payment of part or all of the costs by the party seeking the information. Finally, the Guidelines specify that where the parties come from jurisdictions in which different privilege rules apply, to the extent possible, the arbitral tribunal should apply the same rule to both sides, giving preference to the rule providing the highest level of protection.

C. Statistics on AAA and ICDR arbitration

1. AAA arbitration

The AAA claims to maintain the world’s largest caseload of any arbitration institution. In its 85-year history, the AAA has administered over 2 million cases in a wide range of subject areas.

On average, the AAA provides dispute resolution services in more than 150,000 cases annually: 230,000 cases in 2002; 173,000 in 2003; 159,000 in 2004; 142,000 in 2005; 137,000 in 2006; nearly 128,000 cases in 2007; more than 138,000 cases in 2008; and more than 113,000 cases including arbitrations (of any sort), mediations, and other ADR processes in 2009.

27 See discussion in paras 19.08 ff (Evidence) and paras 20.12–20.13 (on privilege) below.
28 See Richard Naimark’s testimony, above n 8.
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2. ICDR arbitration

1.53 As a reflection of the globalization of the economy, the ICDR continues to see its international caseload grow year after year. Based on statistics provided by the ICDR, the Institution recorded an increase in its caseload from 194 international cases in 1996 to 510 in 2000. From 2001 until 2007, the ICDR reported an average of more than 600 administered cases annually, involving total claims and counterclaims in excess of US$35 billion and parties and arbitrators from about 75 nations.

1.54 In 2001, the ICDR administered 649 cases, involving more than US$10 billion in claims and counterclaims, almost half of which involved claims of more than US$1 million or undisclosed amounts; in 2002, it administered 672 cases involving US$3.4 billion in claims and counterclaims, involving parties from more than 70 countries; in 2003, 614 cases involving arbitrators and parties from 69 nations; and in 2004, 646 cases with parties and arbitrators involved from 72 countries. In 2005, 580 cases were filed involving US$3.25 billion and 1,225 parties from 79 countries.

1.55 In 2005, hearings were held in 26 countries, including such cities as New York, London, Geneva, Zurich, Tokyo, Stockholm, Rio de Janeiro, Panama City, and San Salvador. There was an increase of over 50 per cent in requests for locales outside of the USA. More than one third of the newly filed cases exceeded US$1 million in dispute.

1.56 In 2006, the ICDR administered 586 cases involving US$6.2 billion and parties from 76 countries, and in 2007, 621 cases, involving US$4.7 billion and parties from 65 countries.

1.57 In 2008, the milestone of 700 cases was achieved, with 703 new case filings involving US$4 billion and 75 countries. International case filings exceeded 800 for the first time in 2009, with 884 cases filed that year. Of the 884 cases files, 836 were administered by the ICDR. In 2009, the ICDR saw its highest amount in dispute at US$4,000 billion; parties in ICDR arbitrations originated from 87 countries. The number of cases not involving any US party more than doubled from 32 in 2008 to 65 in 2009.

1.58 The ICDR calculates that the average time per proceeding from commencement of the case through to submission of the final award is approximately 12 months. Calculated from the time of the constitution of the tribunal to the final award, this amounts to only some nine to ten months. According to the ICDR’s records, the

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30 See ICDR, The ICDR International Arbitration Reporter, 1 June 2011.
average time period between the close of the proceeding and the issue of the award is approximately 35–45 days.

D. History of the ICDR Rules

As described above, the AAA’s first tentative steps into specialized international dispute resolution procedures was the 1986 Supplement for International Commercial Arbitration, designed as an annex to the AAA Commercial Rules. It took until 1991 for the introduction of the first set of rules actually entitled ‘International Arbitration Rules’. The 1991 AAA International Arbitration Rules were very closely modelled on the UNCITRAL Arbitration Rules of 1976 (1976 UNCITRAL Rules). The 1976 UNCITRAL Rules provided an internationally accepted set of provisions that would help to overcome the perception that the AAA (as it then was) was ‘too American’. As discussed herein, while the 1991 Rules represented an historic departure from some uniquely American aspects of the AAA Commercial Rules, they were not adopted unchanged. The AAA made certain modifications to the UNCITRAL Rules in an attempt to tailor them to their caseload and their existing experience with the AAA Commercial Rules.

Several revisions and amendments followed. Major revisions will be discussed here below, while additional changes will be addressed in the commentary to the respective Articles changed.

1. The 1993 revision

A first revision took place in 1993. As a jurisdictional matter, the 1993 International Arbitration Rules stated that they would apply only where the parties agreed to apply them, while the Commercial Rules provided that they would apply either when specifically chosen or when the parties have provided generally for arbitration by the AAA. This inevitably slowed the growth of the cases covered by the International Arbitration Rules.

2. The 1996/1997 revision

As described above, 1996 saw the introduction of the ICDR. In anticipation of this development, the AAA substantially restructured the manner in which it administered international arbitrations. Today’s ICDR Rules are substantially based on this 1996 version.

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31 William K Slate II, President and CEO of the AAA, appointed a task force to revise the 1993 International Arbitration Rules under the guidance of late AAA General Counsel, Michael F Hoellering. Task force members were David W Rivkin (chair), Charles A Beach, James H Carter, Dana H Freyer, Robert Layton, and John M Townsend. The task force considered other commercial arbitration rules, including the WIPO Rules, and those of the Commercial Arbitration and Mediation
The 1996 revised ICDR Rules continued to reflect the model of the UNCITRAL Rules, but contained some important innovations that led to an increase in use of the ICDR Rules. Perhaps most importantly, as a result of the revision, the ICDR was charged with the exclusive administration of all of the AAA’s international arbitrations. Under the 1996 ICDR Rules, and subsequent versions, a case is administered by the ICDR in two scenarios: if the parties have chosen the ICDR Rules; and (2) if the arbitration is international and the parties have chosen the ICDR or AAA without designating particular rules. The revised ICDR Rules became effective on 1 April 1997.

3. Introduction of the International Dispute Resolution Procedures in 2003

The ICDR Rules were amended in 2003 again. On 1 July 2003, the ICDR released the International Dispute Resolution Procedures to combine in one publication the ICDR Rules with the ICDR’s International Mediation Rules.

The International Arbitration Rules themselves were changed in Article 27 with the addition of paragraph 8. In an effort to further the study of international arbitration, the publication of ICDR awards was made possible while not compromising the confidentiality of the proceedings. Unless the parties override Article 27(8), the ICDR may publish awards that have been edited to conceal the names of the parties and other identifying details, or that have been made publicly available in the course of enforcement proceedings or otherwise. Today, Westlaw offers a database through which ICDR awards have been published in accordance with Article 27(8).

4. Addition of Article 37 in 2006

On 1 May 2006, the ICDR amended the ICDR Rules again and included procedures for emergency relief prior to the formation of the arbitral tribunal. The resulting new Article 37 is based on the AAA’s Optional Rules of Emergency Measures of Protection, which had been in existence since 1999. While the Optional Rules of Emergency Measures of Protection could always be expressly adopted in writing by the parties, Article 37 makes pre-tribunal emergency relief automatically

Centre for the Americas, and conducted discussions with Robert B von Mehren and Howard H Holtzmann, chairs of the AAA Arbitration Law Committee and International Arbitration Committee respectively. The draft revised rules were sent to more than 100 experts in the field and responses were received from about 25 per cent. See American Arbitration Association Task Force on the International Rules, ‘Commentary on the Proposed Revisions to the International Arbitration Rules of the American Arbitration Association’, 2(1) ADR Currents (1996/1997).

32 See <http://www.westlaw.com> (database ICDR–ARB Award). See paras 27.09–27.11 below (discussing the publication of awards).

available to all parties to ICDR arbitration agreements entered into on or after 1 May 2006.\textsuperscript{34}

5. Additional changes to the Fee Schedule

Additional changes to the ICDR Rules took place with effect from 1 June 2009, 1 January 2010, and 1 June 2010. In addition to the Standard Fee Schedule, a Flexible Fee Schedule was introduced affording lower up-front filing fees and reduced overall costs if disputes are resolved before arbitrator appointment. The Fee Schedule currently in force is discussed within Article 2.

Consistent with the diversity of users and parties involved in ICDR arbitration, the Rules are now available in Spanish, French, Portuguese, Chinese, and most recently in German, in addition to the official English version.\textsuperscript{35}

II. Textual commentary

Within its three paragraphs, Article 1 introduces the ICDR’s mandate, sets the boundaries for the institutional jurisdiction, prescribes the ICDR Rules’ scope of application, declares their subordinance to mandatory laws, and provides for the ICDR to be the exclusive administrator of all international arbitrations under the auspices of the AAA.

A. Scope of application of the ICDR Rules (Article 1(1))

Article 1(1)

Where parties have agreed in writing to arbitrate disputes under these International Arbitration Rules or have provided for arbitration of an international dispute by the International Centre for Dispute Resolution or the American Arbitration Association without designating particular rules, the arbitration shall take place in accordance with these rules, as in effect at the date of commencement of the arbitration, subject to whatever modifications the parties may adopt in writing.

1. Institutional arbitration (Article 1(1))

Article 1(1) provides that the ICDR Rules will be applied in either of two ways: (i) with an agreement to arbitrate ‘under these International Arbitration Rules’; or

\textsuperscript{34} As of 1 November 2010, Art 37 has been applied in 14 cases. The average emergency relief procedure completion time is three weeks.

\textsuperscript{35} These are available online at <http://www.adr.org/sp.asp?id=28819>.
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(ii) if the parties have provided ‘for arbitration of an international dispute by the [ICDR] or the [AAA] without designating particular rules’.

1.71 In either scenario, the parties agreed to institutional as opposed to ad hoc arbitration.36 In practice, arbitration clauses sometimes contain non-existent institution names or are otherwise ‘pathological’. If confronted with such clauses, the ICDR may solicit party clarification, and ask the parties to complete and file its ‘submission to dispute resolution’ form prior to the initiation of its case administration procedures. The Fee Schedule now expressly provides:

Where the applicable arbitration agreement does not reference the ICDR or the AAA, the ICDR will attempt to obtain the agreement of the other parties to the dispute to have the arbitration administered by the ICDR.

1.72 The ICDR also complies with court orders referring parties to ICDR or AAA arbitration even though the parties’ agreement asked for ad hoc arbitration. When presented with applications to enforce arbitration agreements by means of motions to compel arbitration under section 2 of the FAA or similar procedures under US state laws, US courts often order parties to bring their arbitration to the AAA or ICDR even though the parties’ agreement did not provide for institutional arbitration.37

2. ‘Where parties have agreed in writing to arbitrate disputes’ (Article 1(1))

1.73 The cornerstone of the arbitral process is the parties’ agreement in writing to arbitrate a dispute. This principle is incorporated in the text of the ICDR Rules at their very start. Without an agreement in writing to arbitrate a dispute, there is no ICDR arbitration.38 While, in most cases, the parties’ agreement to arbitrate will be memorialized in a pre-dispute contract, the agreement may also be made by means of both parties’ completion and filing of the ICDR’s submission to dispute resolution form39 or some other form of submission agreement.

1.74 The requirement of an ‘agreement in writing’ is obviously based on the seminal international instruments—mainly, Article II of the New York Convention. The

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37 See eg Supreme Court of the State of New York County of New York, Case No 107131/06, Order dated 23 June 2006 (‘The parties may bring their arbitration before the American Arbitration Association in New York City, although the parties’ agreement provided ‘Any dispute arising . . . will be arbitrated under the laws of the State of New York’ only).

38 In contrast, the ICDR’s International Mediation Rules allow parties to request the ICDR to invite another party to participate in mediation by voluntary submission, in which case the ICDR will attempt to obtain a submission to mediation from the other side.

39 Available online at <http://www.adr.org/si.asp?id=3812>. The ICDR offers the opportunity for parties to take part in telephone conferences prior to the submission of a dispute to the ICDR. As a result of such calls, parties may choose to complete and file the submission to dispute resolution form and thereby initiate the appropriate dispute resolution procedure.
ICDR Rules themselves do not contain any definition of what constitutes an agreement ‘in writing’. Whether an arbitration agreement is in writing will depend on the applicable national or international laws. With respect to those national laws, note that the 2006 addition of Article 7(3) to the UNCITRAL Model Law\textsuperscript{40} is testament to a change to a more liberal approach in international arbitration practice. Under the revised UNCITRAL Model Law, parties are allowed to agree upon arbitration orally, by conduct, or by other means as long as they record it thereafter in any form in order to satisfy the writing requirement.\textsuperscript{41}

3. ‘[U]nder these International Arbitration Rules’ (Article 1(1))

The first scenario in which the ICDR will have jurisdiction requires the parties to have mentioned ‘these International Arbitration Rules’. This requirement is met either by agreeing on the ‘AAA International Arbitration Rules’ or the ‘ICDR International Arbitration Rules’ in their agreement to arbitrate. Alternatively, provided that the parties’ intent to arbitrate disputes is clear, the parties may cite ‘these International Arbitration Rules’ as the ‘ICDR Rules’ or ‘AAA International Rules’. Note that according to ICDR terms of management, if referred to the ICDR, it is ICDR policy to administer the dispute even if the arbitration provides for the application of the ICDR Rules but specifically state that the ICDR shall not be the administrator.

In addition, an arbitration clause may provide for the AAA or the ICDR to act as the appointing authority for the appointment of one or more arbitrators in accordance with its International Arbitration Rules. In such a case, the ICDR will act as an appointing authority only, unless the parties agree separately and in writing that the ICDR should also act as the case administrator.


\textsuperscript{41} In relevant part, Art 7 of the UNCITRAL Model Law provides:

(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; “electronic communication” means any communication that the parties make by means of data messages; “data message” means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.
4. ‘[O]r have provided for arbitration of an international dispute by the International Centre for Dispute Resolution or the American Arbitration Association without designating particular rules’ (Article 1(1))

1.77 The second scenario in which the ICDR will obtain jurisdiction was introduced in the 1996/1997 amendments. The ICDR Rules will apply if the arbitration is international and if the parties chose to have their arbitration administered by the ICDR or the AAA without designating particular rules.

1.78 In this respect, section R-2 of the Commercial Rules is complementary. It provides the AAA with the discretion to assign the administration of an international case to the AAA’s international division, the ICDR (‘The AAA may, in its discretion, assign the administration of an arbitration to any of its offices’).42

(a) ‘International dispute’

1.79 ICDR jurisdiction may thus hinge upon the epithet ‘international’, a term intrinsically difficult to define. The key issue is what constitutes an ‘international dispute’ under Article 1(1) of the ICDR Rules. The descriptions of what defines something as being ‘international’ are open to all sorts of interpretations.43

1.80 Provided that there is no ambiguity as to the parties’ choice of institutional arbitration and there is no ambiguity that the parties chose the AAA or the ICDR to administer the case, the ICDR will act as the case administrator in all cases that it deems ‘international’ in accordance with these ICDR Rules.

1.81 What the ICDR deems as ‘international’ has its roots in Article 1 of the UNCITRAL Model Law.44 When starting to administer a case, the ICDR commonly sends a notice to the parties stating:

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42 Section R-2 of the Commercial Rules:

R-2. AAA and Delegation of Duties When parties agree to arbitrate under these rules, or when they provide for arbitration by the AAA and an arbitration is initiated under these rules, they thereby authorize the AAA to administer the arbitration. The authority and duties of the AAA are prescribed in the agreement of the parties and in these rules, and may be carried out through such of the AAA’s representatives as it may direct. The AAA may, in its discretion, assign the administration of an arbitration to any of its offices.

43 The same could be said of something as simple as the colour of the sea: Homer’s was ‘wine-dark’ in the *Iliad*; James Joyce’s simply ‘snot-green’ in *Ulysses*.

44 See AAA Press Release, ‘ICDR Opens Office in Mexico City: International Division of AAA Reaches Cooperative Agreement with CANACO’, 16 February 2006:

Both institutions will promote the services of CANACO for all domestic cases in Mexico and the ICDR’s services for all international cases. When the party agreement allows, any case that only includes parties from Mexico will be administered by CANACO; in turn, when party agreement allows, international cases will be administered by ICDR. Both institutions have agreed to apply Article 1 of the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Model Law as the definition of an international case.
II. Textual commentary

There are two main criteria which may be used either alone or in conjunction, in defining the term international. The first requires analyzing the nationality or residence of the parties and the second focuses on the nature of the dispute. This may also include the case of a corporation that is incorporated in the United States but is a subsidiary of a foreign corporation.

This statement of the ICDR’s understanding of its jurisdiction is revealing. It means that, depending on the circumstances of the case, the ICDR may deem a case as being ‘international’ solely because of one of the US parties being controlled by a non-US entity. However, such an expansive approach is not at all out-of-step with the approach taken to defining ‘international arbitration’ under various national laws and in international instruments.

In addition to the two criteria identified by the ICDR, account can also be taken of several other indicia of ‘internationality’. One definition of international arbitration is offered by French law. Article 1492 of the New Code of Civil Procedure provides that ‘[a]n arbitration is international when it involves the interests of international trade’. This economic view of internationality places emphasis on the disputed relationship rather than on the means of resolving it.

The attachment to ‘international trade’ is incorporated in the 1961 European Convention expressly concerned with international commercial arbitration. The Convention applies to arbitration agreements, and resulting arbitral proceedings and awards (Article I(1)(b)), entered into ‘for the purpose of settling disputes arising from international trade between physical or legal persons having . . . their habitual place of residence or their seat in different Contracting States’ (Article I(1)(a)). As international trade is not defined, it must be considered to include all exchanges of services or assets, whether in the form of debt or equity, involving the economies of at least two countries.45

Even disputes between parties resident of the same country could be genuinely or intrinsically international. This will be the case of a dispute between two companies from the same jurisdiction relating to a contract performed abroad, such as an international freight contract, or a subcontract for a foreign construction project.

Other circumstances guaranteeing that the dispute is genuinely or intrinsically international include the series of alternative criteria contained in Article 1(3) of the UNCITRAL Model Law. In its revised version, as amended in 2006, the UNCITRAL Model Law provides:

An arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

1.86 The vast majority of situations commonly regarded as international will meet these criteria. The UNCITRAL Model Law broadens the notion of ‘internationality’ to ‘cases where the place of arbitration, the place of contract performance, or the place of the subject-matter of the dispute is situated outside the State where the parties have their place of business’, or cases in which the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country. Article 1 thus recognizes the freedom of the parties to submit a dispute to the legal regime established pursuant to the UNCITRAL Model Law.⁴⁶

1.87 Thus the expansive definition of what constitutes an ‘international’ dispute for purposes of the UNCITRAL Model Law provides a broad mandate for the AAA/ICDR to determine that a particular dispute should be administered by the ICDR. Note also that the parties can agree that a dispute is international in nature and thus the ICDR is bound to accept this stipulation.

(b) Change of residence while case is pending

1.88 Not only pre-dispute stipulations will make a case international; a change of residence after the dispute has commenced can also lead to the same result. Where a party changes residence after the initiation of an arbitration, this may prompt a change in the applicable set of rules including the application of the ICDR Rules ex post facto.

1.89 In this scenario, the ICDR may send a notice of change in administrator to the parties, which in turn can be understood as a change of the applicable rules upon which the case is being administered. This is best illustrated by Malecki v Long.⁴⁷

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⁴⁶ Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration, as amended in 2006, para 11. This note was prepared by the Secretariat of UNCITRAL for informational purposes only; it is not an official commentary on the Model Law. A commentary prepared by the Secretariat on an early draft of the Model Law appears in document A/CN.9/264 (reproduced in UNCITRAL Yearbook, Vol XVI, 1985, United Nations publication, Sales No E87.V.4).

In the Malecki case, pursuant to a contract entered into with the Longs, the Maleckis had filed a request for arbitration against the Longs with the AAA in Philadelphia under its then existing Commercial Rules. Shortly after the constitution of the tripartite panel, the Maleckis informed the AAA that their counsel had been dismissed and that they had moved to France, requesting all future communications to be sent to their new address in France. The AAA applied section R-2 of the AAA Commercial Rules and transferred the case to the ICDR. Inviting the parties’ comments, the ICDR in New York, rather than the AAA in Philadelphia, informed the parties that it had taken note of the changes and that the arbitration would thereafter be administered by the ICDR in accordance with the International Rules. The ICDR invoked the definition of ‘international arbitration’ in Article 1(3) of the UNCITRAL Model Law. No party commented. Subsequently, the arbitrator appointed by the Maleckis resigned and an award was rendered by the remaining two arbitrators. While the Paris Court of Appeal refused to recognize the award in the end based on the arbitrator’s behaviour, it found that the Maleckis were barred from relying on the Commercial Rules because they had ‘carefully refrained from enquiring’ as to the meaning and consequences of the change in administrator, and could not therefore allege before the Paris Court of Appeal that they did not understand the implications of that change.  

5. ‘[S]ubject to whatever modifications the parties may adopt in writing’ (Article 1(1))

Party control is a guiding principle of international arbitration. The ICDR Rules incorporate this principle by offering that the parties’ adoption of the ICDR Rules is ‘subject to whatever modifications the parties may adopt in writing’. The limitations to party autonomy through mandatory laws are contained in Article 1(2) and will be discussed below. 

In contrast, the ICC Rules do not allow the parties to derogate from certain core procedural characteristics of ICC arbitration—for example, entry into the terms of reference under Article 18 of the ICC Rules and that the award be subject to the

48 See Arts 10 and 11 of the ICDR Rules on truncated tribunals (discussed at ss10.1 ff below).

49 See D Bensaude, op cit, criticizing the decision on the basis that the place of arbitration was not in an UNCITRAL Model Law jurisdiction, that no provision in the UNCITRAL Model Law provides that a change of residence of a party in the course of an arbitration procedure entails a change of status in an ongoing arbitration, and that international arbitrations with parties residing in, or moving to, different countries may be administered under the AAA Commercial Rules.

Section R-16 of the Commercial Rules provides:

Where the parties are nationals or residents of different countries, the AAA, at the request of any party or on its own initiative, may appoint as a neutral arbitrator, a national of a country other than that of the parties. The request must be made prior to the time set for the appointment of the arbitrator as agreed by the parties or set by these rules.

50 See also para 28.03 ff below (relating to applicable law under Art 28).
scrutiny of the ICC International Court of Arbitration (the ICC Court) under Article 27 of the ICC Rules.

B. ICDR Rules to apply except for mandatory rules of law (Article 1(2))

**Article 1(2)**

These rules govern the arbitration, except that, where any such rule is in conflict with any provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

1. ‘These rules govern the arbitration’ (Article 1(2))

1.93 Article 1(2) establishes that ‘these rules govern the arbitration’. Similar language can be found in Article 1(3) of the 2010 UNCITRAL Rules (‘These Rules shall govern the arbitration’). Unlike Article 15(1) of the ICC Rules, the ICDR Rules do not make reference to being bound by ‘rules of procedure of a national law’.

1.94 On first sight, Article 1(2) might be read as limiting the arbitration’s scope of applicable laws to ‘these rules’. However, in addition to the procedural laws at the place of arbitration, Articles 16 and 28 respectively allow for the tribunal’s discretion in choosing the applicable procedure and the parties’ influence.

2. ‘[L]aw applicable to the arbitration from which the parties cannot derogate’ (Article 1(2))

1.95 While Article 28 recognizes the parties’ freedom to choose the applicable national substantive law or rules of law, the parties’ freedom to agree on the applicable law to the merits is not without limits. Article 1(2) recognizes that the ICDR Rules and the parties’ power to choose their own applicable law may be over-ridden by any applicable mandatory laws. This is consistent with international arbitration practice, as evidenced, for example, in the New York Convention.

1.96 An often-cited decision in the context of mandatory laws applicable in international arbitration is *Mitsubishi v Soler Chrysler*, decided by the US Supreme Court in 1985.\(^{51}\) In *Mitsubishi*, the Court acknowledged the important interest of both the public and the litigants in the proper application of US antitrust laws, stating that the arbitral tribunal ‘should be bound to decide that dispute in accordance with the national law giving rise to the claim’. But the Court also stressed that the courts ‘will have the opportunity at the award enforcement stage to insure that the legitimate

\(^{51}\) *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc*, 473 US 614 (1985), YCA XI (1986) 555 ff (also ruling in favour of the extension of arbitrability to antitrust claims).
interest in the enforcement of the antitrust laws has been addressed’. In a case in which the anti-competitive effects occurred in the USA, at the enforcement stage, US courts could thus exercise *a posteriori* control over the arbitrator’s application of US antitrust laws and overwrite the parties’ choice of Swiss law in the underlying agreement.

Parties cannot deviate from the effects of the laws of their incorporation or legal residence (in the case of a company) or their nationality (in the case of a physical person) with respect to their capacity to enter into an arbitration agreement (New York Convention, Article V(1)(a)). In the absence of party agreement upon the law applicable to the arbitration agreement, the law of the country in which the award is made will govern the validity of the arbitration agreement and become a mandatory law. In the absence of a clear definition of what constitutes a ‘law applicable to the arbitration from which the parties cannot derogate’, it might even be argued that the legal norms of the likely place of enforcement should be observed.

C. Duties and responsibilities of the administrator and other parties involved (Article 1(3))

**Article 1(3)**

*These rules specify the duties and responsibilities of the administrator, the International Centre for Dispute Resolution, a division of the American Arbitration Association. The administrator may provide services through its Centre, located in New York, or through the facilities of arbitral institutions with which it has agreements of cooperation.*

Article 1(3) is unambiguous in that the ICDR is the administrator of all international cases. Central to the ICDR’s case management system is the assignment of the case to a case manager. The ICDR also assigns a supervisor to each case. The primary point of contact for the parties is the case manager. The case manager remains involved throughout the proceeding. The case manager coordinates the logistics of the arbitration, conducts the administrative conference call, and serves as a link between the parties and the tribunal in issues such as the arbitrator selection, challenges, and compensation, as well as the delivery of the final award to the parties.

Under the ICDR’s case management system, case management is organized into three specialized teams: the European/African Desk; the Americas Desk; and the Middle East/Asian Desk. A supervisor oversees each team and is responsible for quality control.

The case manager’s administrative duties may vary depending on the different stages of the arbitration. In general, the parties will have the most contact with the case administrator before the arbitral tribunal is appointed. Thereafter, the case manager’s duties shift from a dispute management administrative role to a focus
more on administering the financial side of the case—that is, to ensure that the arbitrator’s compensation is secured for by means of party advances and that excessive charges are avoided, and to deal with the collection of the deposits and other such tasks.

1.101 There are, however, various roles that the administrator can play that bear specific mention.

1. Emergency relief

1.102 After submission of the notice of arbitration, the parties’ first contact with the ICDR’s case manager may be for the appointment of an emergency arbitrator to handle requests for interim arbitral relief prior to the formation of the arbitral tribunal. The ICDR can appoint an emergency arbitrator within one business day after receipt of the notice of arbitration (Article 37).

2. Administrative conference

1.103 In the absence of requests for emergency relief, according to comments from ICDR senior management, the ICDR’s standard administrative procedure requires that an administrative conference be conducted in all international cases within ten business days after the notice of arbitration has been submitted; the international logistics permitting, it may be conducted as soon as 48 hours after the submission thereof.

1.104 The administrative conference is organizational—as opposed to judicial—in nature, and must not be confused with the possible hearing(s) between the arbitrators and the parties. Except for extensions of time under Article 3(4) and decisions on the challenge of an arbitrator (Article 9), the arbitral tribunal is the ultimate decision maker on all legal issues throughout the arbitration. For example, there is no requirement that jurisdictional objections be filed prior to the administrative conference.

1.105 The administrative conference, usually conducted by telephone, affords the parties an opportunity to take control of the management of the case and to reach agreements on administrative issues. Administrative issues that may lend themselves to early discussion include: the means of communication between the ICDR and the parties; scheduling issues; establishing the approximate length of the proceeding; handling time extension requests; the need for interim measures; and the parties’ preferences regarding the number of arbitrators, their qualifications,

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52 See discussion in Chapter 37.
53 On the contrary, jurisdictional objections need to be filed no later than the filing of the statement of defence and only further participation in the arbitration without raising jurisdictional objections in the responsive statement may constitute waiver of the right to register such objections at a later date (Art 15(3)). See paras 15.25–15.26 below.
II. Textual commentary

compensation, and method of appointment. Depending on the complexity of the case, and familiarity of both sides with the factual and legal issues, the administrative conference may also permit an opportunity to arrive at stipulations of uncontested facts, identify potential witnesses, provide for advance exchange of information, and consider the possibility of utilizing a documents-only process. However, such issues are more often left for the tribunal.

At the administrative conference, the ICDR is also likely to invite the parties to consider mediation. The ICDR may encourage the parties to reconsider mediation closer to the hearing date.

3. *Ex parte* communication and arbitrator selection, disclosure, and challenge procedure

The next milestone involving the case administrator may be the arbitrator selection, disclosure, and challenge procedure.

The selection of the arbitrator is rightly regarded as one of the most important decisions in an international arbitration. For this reason, pre-appointment interviewing of a party’s prospective arbitrator has become increasingly common in many jurisdictions. Under the ICDR Rules, as with most other institutions, the parties and their counsel are prohibited from engaging in any *ex parte* communications with the arbitrator(s) except to advise the arbitrator candidate of the general nature of the controversy and the anticipated proceedings, and to discuss the candidate’s qualifications, availability, or independence.

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54 The standard ICDR administrative procedure asks each party to disclose the witnesses whom it expects to present on its checklist for conflicts, which is customarily attached to the ICDR’s letter acknowledging receipt of the notice of arbitration. This list is confidential, should only be sent to the case manager, and helps the case manager to select arbitrators free from conflicts. Having said this, not all cases may be at a stage at which witnesses can be readily identified.

55 Although subject to interpretation, Art 20(1) does not explicitly require that there be an oral hearing on the merits. See also Memorandum and Order of 9 December 2009 in *Matthew v Papua New Guinea Case No 09 Civ 3851 (SDNY, 2009)*:

Petitioner’s argument that the arbitrator committed misconduct by refusing to hear evidence pertinent and material to the controversy also fails. As an initial matter, ICDR Rules Art. 16.1 permit the arbitrator to ‘conduct the arbitration in whatever manner [he] considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.’ Evidence may be presented in the form of written witness statements. *Id.* at Art. 20.5. There is no rule requiring that an oral hearing be held.

56 See ICDR Rules, Art 7(2), discussed at paras 7.37–7.40 below. See also AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes (2004), Canon III, para B(1):

When the appointment of a prospective arbitrator is being considered, the prospective arbitrator: (a) may ask about the identities of the parties, and the general nature of the case; and (b) may respond to inquiries from a party or its counsel designed to determine his or her suitability and availability for the appointment. In any such dialogue, the prospective arbitrator may receive information from the party or its counsel disclosing the general nature of the dispute but should not permit them to discuss the merits of the case.
1.109 Once appointed, the arbitrator determines whether a limited direct exchange of communications between the parties, the ICDR, and himself or herself is acceptable. Otherwise, all correspondence should be submitted to the case manager for transmittal to the arbitrator, copying the other parties (Article 12). Beyond the checklist for conflicts and the arbitrator ranking list (if applicable), only financial documents such as invoices are permitted ex parte communications between the parties and the ICDR.

1.110 The ICDR Rules provide the parties with an opportunity to agree upon the member(s) of the arbitral panel within 45 days from the commencement of the case (Article 6). The ICDR Rules do not require any of the arbitrators to be of a different nationality than the parties.\(^{57}\)

1.111 Should party agreement prove impossible, in the absence of party agreement on another method of appointment, the ICDR’s default administrative practice is to propose to use the list method for the appointment of the sole and presiding arbitrator, as well as the party-appointed arbitrators. Under the ICDR list method, the ICDR proposes a list of ten names for a sole arbitrator and 15 names for a tripartite panel, all of which are drawn from the ICDR’s international roster, and asks the parties to return the list with their choices within seven to 15 days. On a confidential basis, the parties are invited to submit their ranking of the arbitrators included on the list. If a party does not return the list, all names are deemed to be accepted as far as that party is concerned. Although the ICDR invites the parties to make only a limited number of pre-emptory strikes, there is no limit that could conceivably result in the parties striking the entire list. In that event, and if both sides agree, a second list can be provided. Unless the parties strike the entire list, the parties are asked to list the acceptable arbitrators in the order of their preference. The ICDR will appoint the arbitrator with the closest common preference. If the parties do not ultimately arrive at an agreement on the arbitrators from the list(s) within 45 days, the ICDR will make the appointment.

4. Preliminary hearing, evidence, and party submissions

1.112 While involved throughout the proceedings, the administrator’s duties and responsibilities are reduced to the logistical facilitation of the arbitral process after the arbitrators have been designated. Once constituted, the arbitral tribunal takes control and routinely holds a preliminary hearing to facilitate the organization and management of the arbitral proceedings.

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\(^{57}\) See Art 9(5) of the ICC Rules and Art 6 of the LCIA Rules.
5. Award

The ICDR case administration is concluded with the delivery of the arbitral award to the parties and the payment of the arbitral tribunal. The arbitral award is authored by the arbitral tribunal alone. Although significantly more limited in scope than the review conducted by the ICC Court, as provided for in Article 27 of the ICC Rules, the ICDR does review the tribunal’s award for clerical, typographical, or computation errors, and ensures that the award addresses all claims presented in the arbitration.\(^{58}\) According to ICDR senior management, the case managers are instructed to review the draft award regarding the form and to verify that all of the necessary elements have been implemented. In particular, this includes ensuring that the award contains a preamble citing the arbitrators’ source of authority, has a chronology of key procedural steps that meet due process expectations, contains applicable New York Convention enforcement language, and has an accurate caption. The case manager is typically responsible for inserting the financial information concerning the ICDR's administrative and the tribunal's fees. The draft award is then checked by the supervisor before being scrutinized by ICDR senior management. Thereafter, the award is sent back to the members of the tribunal for final review, approval, and signature.\(^{59}\) The ICDR advises that, depending on the size and nature of the case, the institution completes its internal review process in one to four days of receipt of the draft award.

\(^{58}\) See Art 30(1) (permitting the parties to seek correction for ‘any clerical, typographical or computation errors or make an additional award as to claims presented but omitted from the award’). See Chapter 30.

\(^{59}\) See also para. 27.02 below (discussing the ICDR’s role in reviewing awards).
ARTICLE 2—NOTICE OF ARBITRATION AND STATEMENT OF CLAIM

I. Introduction

II. Textual commentary

A. Party definitions and commencement of a case (Article 2(1) and (2))

B. Content requirements (Article 2(3))

1. ‘[D]emand that the dispute be referred to arbitration’ (Article 2(3)(a))

2. Names, addresses, and telephone numbers of the parties (Article 2(3)(b))

3. Reference to ‘the arbitration clause or agreement that is invoked’, ‘any contract out of or in relation to which the dispute arises’, and ‘a description of the claim and an indication of the facts supporting it’ (Article 2(3)(c), (d), and (e))

4. Relief or remedy sought, amount claimed (Article 2(3)(f)), and relevance for ICDR administrative fees

5. Optional contents (Article 2(3)(g))

C. Administrator’s acknowledgement of commencement (Article 2(4))

D. Deficient claim filing fee

E. ICDR Fee Schedules

1. The Standard Fee Schedule

2. The Flexible Fee Schedule

3. Non-payment of administrative fees and abeyance

Article 2

1. The party initiating arbitration ("claimant") shall give written notice of arbitration to the administrator and at the same time to the party against whom a claim is being made ("respondent").

2. Arbitral proceedings shall be deemed to commence on the date on which the administrator receives the notice of arbitration.

3. The notice of arbitration shall contain a statement of claim including the following:

(a) a demand that the dispute be referred to arbitration;

(b) the names, addresses and telephone numbers of the parties;

(c) a reference to the arbitration clause or agreement that is invoked;

(d) a reference to any contract out of or in relation to which the dispute arises;

(e) a description of the claim and an indication of the facts supporting it;

(f) the relief or remedy sought and the amount claimed; and

(g) may include proposals as to the means of designating and the number of arbitrators, the place of arbitration and the language(s) of the arbitration.
Chapter 2: Article 2—Notice of Arbitration and Statement of Claim

4. Upon receipt of the notice of arbitration, the administrator shall communicate with all parties with respect to the arbitration and shall acknowledge the commencement of the arbitration.

I. Introduction

2.01 Article 2, together with Articles 3 and 4, fall under the overall heading in the ICDR Rules of ‘Commencing the Arbitration’. Together, they set out the provisions for filing a claim or counterclaim, and the basic initial pleadings to be made in respect of the claim or counterclaim and defences thereto. Because payment of filing fees also occurs during this period, they are also dealt with within this chapter.

2.02 Under the ICDR Rules, the initial pleading is called a ‘notice of arbitration’. Article 2 of the ICDR Rules asks for the notice of arbitration to contain a statement of claim. In accordance with general practice in institutional international arbitration, the standard for the initial pleading set by Article 2(3) is more comprehensive than a mere notice of intent to arbitrate, the ‘demand for arbitration’ under the AAA Commercial Rules, or the notice of arbitration under Article 3 of the 1976 and 2010 UNCITRAL Arbitration Rules.

2.03 As it is called in Articles 3 of the 1976 and 2010 UNCITRAL Rules, the drafters of the ICDR Rules maintained the title ‘notice of arbitration’ as the title for the initial pleading. While the 1976 and 2010 UNCITRAL Rules treat the notice of arbitration and the statement of claim as two distinct pleadings and leave it to the party to elect treating its notice of arbitration as the statement of claim in case the notice of arbitration already fulfils the statement of claim’s pleading requirements, the ICDR Rules require that the notice of arbitration shall already contain a statement of claim.

2.04 Similar to the ‘request for arbitration’ under Article 4 of the ICC Rules asking for ‘a description of the nature and circumstances of the dispute giving rise to the claim(s)’ and Article 1 of the London Court of Arbitration (LCIA) Rules requiring ‘a brief statement describing the nature and circumstances of the dispute, and specifying the claims’, the notice of arbitration under the ICDR Rules must contain a ‘description of the claim and an indication of the facts supporting it’.

2.05 The ICDR notice of arbitration needs to be prepared before the appointment of any of the arbitrators. Article 2 does not require the claimant to nominate its arbitrator within the notice of arbitration. Article 6(3) affords 45 days from the

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1. See Arts 3 and 18 of the 1976 UNCITRAL Arbitration Rules, and Arts 3 and 20 of the 2010 UNCITRAL Rules.
II. Textual commentary

A. Party definitions and commencement of a case
(Article 2(1) and (2))

**Article 2(1)**

The party initiating arbitration ("claimant") shall give written notice of arbitration to the administrator and at the same time to the party against whom a claim is being made ("respondent").

**Article 2(2)**

Arbitral proceedings shall be deemed to commence on the date on which the administrator receives the notice of arbitration.

An ICDR arbitration starts with the filing of the notice of arbitration. The ICDR website contains a form in aid of the preparation of the notice of arbitration. However, the claimant(s) are at liberty to apply a more elaborate style and format so long as the content requirements of Article 2(3) are fulfilled.

A preliminary issue when drafting the notice of arbitration might be in what language it should be submitted. Guidance may be taken from Article 14. Subject to the power of the tribunal to determine otherwise based upon the contentions of the parties and the circumstances of the arbitration, Article 14 stipulates that the language shall be that of the documents containing the arbitration agreement.

Although Article 2(1) uses the word ‘party’ in the singular and defines the party initiating the arbitration as the ‘claimant’, while the party against whom a claim is being made is defined as the ‘respondent’, ICDR arbitrations may involve more

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2 See discussion of Art 6 at paras 6.22–6.25.

3 Available online at <http://www.adr.org/si.asp?id=3849>.
than one claimant and/or more than one respondent. In fact, the ICDR Rules are commonly used in multi-party arbitrations, and in the introduction to the International Dispute Resolution Procedures, it is stated that ‘[w]henever a singular term is used in the rules, such as “party”, “claimant” or “arbitrator”, that term shall include the plural if there is more than one such entity’.

2.10 Article 2(1) requires the party initiating arbitration to serve the notice of arbitration upon the opposing party/parties at the same time as it is served upon the ICDR administrator.

2.11 Making available one of the advantages of institutional arbitration over ad hoc arbitration to users of ICDR arbitration, and corresponding with other major institutional arbitration provisions such as Article 4(2) of the ICC Rules and Article 1.2 of the LCIA Rules, arbitration proceedings under the ICDR Rules are deemed to commence on the date on which the administrator receives the notice of arbitration (Article 2(2)).

2.12 Article 2(4) provides that the ICDR will confirm receipt of the notice of arbitration. Importantly, under the ICDR Rules, commencement of the arbitration does not require successful service of the notice of arbitration upon the respondent(s). For the commencement of the arbitration, the ICDR Rules require only service of the notice of arbitration upon the ICDR.

2.13 Despite the unconditional presumption in Article 2(2) that the arbitration ‘shall be deemed to commence on the date on which the administrator receives the notice of arbitration’, at the same time, it is the claimant that bears the ultimate responsibility for serving the respondent and, for that matter, also for securing proper addresses for service upon the respondent. In addition to personal service, the ICDR Rules allow for the notice of arbitration to be served by airmail, air courier, fax, telex, telegram, or other written forms of electronic communication addressed to the party or its representative at its last known address, unless it is otherwise agreed by the parties or ordered by the tribunal (Article 18(1)). Since the ICDR Rules address the means of service directly, in an ICDR arbitration, the tribunal’s first procedural order does not need to address what means of service are admissible.

2.14 In the unsatisfactory scenario of a non-delivery of the notice of arbitration on the respondent, the claimant will have to bear the risk of proceeding with the arbitration while assuming the risk of non-enforcement. However, if the notice of arbitration was successfully served upon the ICDR’s case administrator, the arbitration has still been commenced as per Article 2(2). This presumption may be

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4 Compare Art 3(2) of the 1976 and 2010 UNCITRAL Rules, which provides for the arbitral proceedings to commence on the date on which the notice of arbitration is received by the respondent. Commonly, the UNCITRAL Rules are used in ad hoc arbitrations administered by the Tribunal or the Tribunal’s Secretary.

5 See Art 23 (discussing default proceedings), para 23.01 ff below.
II. Textual commentary

particularly helpful when having to toll any relevant statute of limitations or contractual limitation period while experiencing difficulties in effecting service of the notice of arbitration on the proper respondent.

In addition to the tolling of the statute of limitations, the commencement date establishes the date from which deadlines flow for the filing of a responsive pleading (Article 3(1) and 3(2)), for responding to a claimant’s proposal for the appointment of arbitrators and the method of their selection (Article 6(3)), and for the venue and language of the arbitration (Article 3(3)).

The commencement date will also be used to calculate any available refund of the initial filing fee if the claimant had elected the Standard Fee Schedule over the Flexible Fee Schedule. The refund schedule on filing fees is available for the Standard Fee Schedule only. No refunds are available under the Flexible Fee Schedule.

For cases with claims of up to US$75,000, a minimum filing fee of US$350 will not be refunded. For all other cases, a minimum fee of US$600 will not be refunded. Subject to the US$350/$600 minimum filing fee requirements, refunds will be calculated as follows:

- 100 per cent of the filing fee, above the minimum fee, will be refunded if the case is settled or withdrawn within five calendar days of filing;
- 50 per cent of the filing fee, above the minimum fee, will be refunded if the case is settled or withdrawn between six and 30 calendar days of filing;
- 25 per cent of the filing fee, above the minimum fee, will be refunded if the case is settled or withdrawn between 31 and 60 calendar days of filing; and
- no refund will be made once an arbitrator has been appointed (this includes one arbitrator on a three-arbitrator panel). No refunds will be granted on cases in which an award is issued.

B. Content requirements (Article 2(3))

Article 2(3)

3. The notice of arbitration shall contain a statement of claim including the following:

(a) a demand that the dispute be referred to arbitration;
(b) the names, addresses and telephone numbers of the parties;
(c) a reference to the arbitration clause or agreement that is invoked;
(d) a reference to any contract out of or in relation to which the dispute arises;
(e) a description of the claim and an indication of the facts supporting it;

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6 See para 2.40 ff.
(f) the relief or remedy sought and the amount claimed; and
(g) may include proposals as to the means of designating and the number of arbitrators,
(h) the place of arbitration and the language(s) of the arbitration.

1. ‘[D]emand that the dispute be referred to arbitration’ (Article 2(3)(a))

2.18 The key word of Article 2(3)(a) is ‘arbitration’. While the development of modern-day dispute resolution has led to a multitude of sophisticated procedures to end a dispute—including, but not limited to, mediation under the ICDR International Dispute Resolution Procedures—an ICDR arbitration is only started if the parties’ will can unequivocally be determined for the dispute to be submitted to ICDR arbitration. A mere request for a decision or resolution will arguably not suffice to initiate arbitration under the ICDR Rules. In order to fulfill the pleading requirements of Article 2(3)(a), the claimant must unequivocally announce its election that the dispute be referred to arbitration.

2. Names, addresses, and telephone numbers of the parties (Article 2(3)(b))

2.19 Article 2(3)(b) secures proper identification of the party (or parties) against whom the claimant(s) wish(es) to proceed. In most cases, the information stated for the respondent on the agreement containing the arbitration agreement may suffice.

2.20 For natural persons, it is essential to state both first and last name(s), as well as the postal address and telephone number of the party/parties. Where known, inclusion of distinguishing information such as the date of birth or US social security number may assist the identification of the party.

2.21 In case of legal persons, in addition to the name and resident office, the legal nature of the party should not be omitted. If available, a commercial register excerpt or a certificate of good standing might be added.

3. Reference to ‘the arbitration clause or agreement that is invoked’, ‘any contract out of or in relation to which the dispute arises’, and ‘a description of the claim and an indication of the facts supporting it’ (Article 2(3)(c), (d), and (e))

2.22 As the notice of arbitration represents the first opportunity to advocate the claimant’s case and to educate the arbitrators about it, the art of persuasion knows no boundaries in articulating ‘a description of the claim and an indication of the facts supporting it’. In the absence of strict pleading requirements, the ICDR Rules encourage presentation of a claim in narrative style. Although Article 2(3)(c) and (d) requires a mere ‘reference’ to the arbitration clause or agreement and the

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contract out of or in relation to which the dispute arises, attaching these documents as complete copies has become common practice and explaining them may further the claimant’s cause.

A well-pled notice of arbitration containing a statement of claim may deal with a description of the contractual/legal situation underlying the dispute and provide a historical account of the events leading up to the dispute. It may also deal with the anticipated opposition arguments, while not losing focus on the claimant’s own arguments.

While the ICDR Rules require only an ‘indication’ of the supporting facts, at this early stage, a claimant may even produce any document on which it wishes to rely in support of its claims with the notice of arbitration. Of course, a well-thought-out plan for winning a case cannot be conceived without understanding the facts and the applicable law from the beginning, but the notice of arbitration is only the starting point for articulating a theory of the case. Inherent in the facts are the equities of the case: the human sense of fairness or unfairness when examining the parties’ acts or omissions; the wrongs that were committed by one party against another; and the injury that was suffered by one or more parties as a result.

Persuasiveness and overall case management might be well served by the inclusion of causes of action and legal argument in support thereof. However, the notice of arbitration under Article 2(3) requires only ‘a description of the claim’. The inclusion of a full presentation of all causes of action and an account of all plausible legal arguments in support thereof are optional.

Notwithstanding the tribunal’s powers under Article 16(3) to ‘direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case’, the ICDR Rules do not provide for motions for judgment on the pleadings or to dismiss for a failure to state a case in the notice of arbitration.  

At least in case of the place of arbitration being located within the USA, respondents have introduced a similar motion in ICDR arbitrations by means of a ‘request for award’. However, such requests have been entertained by tribunals only at later stages of the arbitration after the claimant has had an opportunity to present its case, as required under Article 16. Most often, this will have required the claimant to submit witness statements deemed direct testimony of the claimant’s witness(es).  

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8 Compare Rules 12(6), 12(c) and 56 of the Federal Rules of Civil Procedure in the US federal legal system.

9 See Memorandum and Order of 9 December 2009, Matthew v Papua New Guinea, Case No 09 Civ 3851 (LTS) (SDNY, 2009) (discussing an arbitrator’s treatment of a request for award as a ‘directed verdict in a non-jury case for failure to prove one essential element of the claim’).
4. Relief or remedy sought, amount claimed (Article 2(3)(f)), and relevance for ICDR administrative fees

2.28 Beyond the relief or remedy sought (payment of money, specific performance, permanent injunction, declaratory judgment), Article 2(3)(f) requires the claimant to state the amount claimed. The amount stated by the claimant will be used primarily by the administrator to determine the initial fee, payable in full when the notice of arbitration is filed. The fees payable by the claimant are based on the amount of the claim and are subject to increase if the amount of a claim is modified after the initial filing date. Fees are also subject to decrease if the amount of a claim is modified before the first hearing. The ICDR administrative practice therefore discourages a claimant from asserting overblown estimates of recoverable damages.

2.29 Claimants sometimes request a bifurcation of the proceedings for the arbitral tribunal to rule upon liability in principle before turning to quantification. This may be a sensible procedure in case it is (extremely) difficult and costly to go through the exercise of quantification of the amount claimed. In such cases, as well as other cases in which the amount claimed is unknown, parties are requested to state a range of claims or will be subject to the highest possible filing fee—currently US$65,000 under the Standard Fee Schedule. In case the claimant opted for the Flexible Fee Schedule, the maximum fee of US$65,000 will be imposed once the proceed fee is payable. The initial filing fee under the Flexible Fee Schedule for non-quantified claims amounts to US$4,500.

5. Optional contents (Article 2(3)(g))

2.30 At the claimant’s discretion, the notice of arbitration may include proposals as to the means of designating and the number of arbitrators, the place of arbitration, and the language(s) of the arbitration.

2.31 In well-drafted arbitration clauses, these items will have been included and the parties will have agreed upon them in writing already. If not already agreed upon in writing, the claimant may set out its preferences on all of these items as late as within the notice of arbitration in the hope that the respondent accepts one or another of the suggestions.

2.32 Even in cases in which the parties have already agreed upon these items in the arbitration agreement, the circumstances of the case may merit an attempt to change the agreements reached in light of possibly different economic interests and factual scenarios at the time that the dispute arose as compared to when the business relationship was initiated. In such a case, it might be preferable to entertain party correspondence prior to the preparation of the notice of arbitration. However, if the claimant wants to ensure ipso facto that the tribunal be informed about the parties’ discussions at a later stage, the notice of arbitration may be the most appropriate instrument to do so.
Any proposed qualification that the arbitrator(s) should have—such as the nationality, residence, profession, legal training, language proficiencies, or any other qualification—will aid the administrator in the appointment should the administrator be called upon to do so in accordance with Article 6. The ICDR Rules do not require the party initiating arbitration to nominate its arbitrator at the time of filing the notice of arbitration, nor do the Rules contain any requirement that the claimant has to nominate its arbitrator before the respondent. Article 6 allows the parties to designate the arbitrator(s) within 45 days after the commencement of the case.

C. Administrator’s acknowledgement of commencement (Article 2(4))

**Article 2(4)**

*Upon receipt of the notice of arbitration, the administrator shall communicate with all parties with respect to the arbitration and shall acknowledge the commencement of the arbitration.*

Upon receipt of the notice of arbitration, the administrator acknowledges the commencement of the arbitration and starts communicating with all parties by means of commencement letter.

It is the ICDR standard administrative practice to notify the parties of their responsible case manager and supervisor as early as within the commencement letter. At this time, the ICDR distributes its checklist for conflicts and encloses an arbitration information sheet, which provides basic information about the ICDR arbitration process. The commencement letter may also set forth initial case management dates, such as the time of the administrative conference call. Moreover, the administrator invites the respondent to file its written statement of defence and any counterclaim in accordance with Article 3.

As part of the ICDR’s administrative service, the ICDR maintains an AAA WebFile for each case. With the commencement letter, the ICDR invites the parties to take advantage of the AAA’s WebFile. It allows the parties to perform a variety of case-related activities online, including: the filing of additional claims; the completion of the checklist for conflicts form; viewing invoices and submitting payments; sharing and managing documents; striking and ranking the lists of neutrals; and reviewing the case status, hearing dates, and times. Cases filed in hard-copy format are posted electronically, and can then be viewed and managed online as well.

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10 See Art 4.
D. Deficient claim filing fee

2.37 The ICDR’s administrative practice of requiring a complete notice of arbitration for the commencement of the case under Article 2 is underlined by the possibility of a deficient claim filing fee if the filing party fails to respond to the ICDR’s request to correct the deficiency.

2.38 The vitality of the ICDR’s proactive case management approach is not only documented by the ICDR’s attempt to secure institutional jurisdiction in cases in which a notice of arbitration has been filed, but fails to reference the AAA or ICDR in the underlying arbitration agreement. Incomplete Notices of Arbitration or filings that otherwise do not meet the filing requirements contained in the ICDR Rules are also subject to a US$350 retainer of the initial filing fee.

2.39 As stated in the Fee Schedule:

Parties that file demands for arbitration that are incomplete or otherwise do not meet the filing requirements contained in these Rules shall also be charged the amount specified below [US$350] for deficient filings if they fail or are unable to respond to the ICDR’s request to correct the deficiency.

E. ICDR Fee Schedules

2.40 Effective 1 June 2010, the ICDR introduced two administrative fee options: the Standard Fee Schedule and the Flexible Fee Schedule. Arbitrator compensation is not included in either one of them. Pursuant to Article 31, arbitrator compensation and administrative fees are subject to allocation by the arbitrator in the final award.

2.41 The Standard Fee Schedule consists of a two-payment schedule: the initial filing fee and the final fee. The Flexible Fee Schedule consists of a three-payment schedule: the initial filing fee, the proceed fee, and the final fee.

2.42 The Standard Fee Schedule offers lower overall administrative fees if the case will proceed to a hearing. The Flexible Fee Schedule offers lower initial filing fees and is preferable in cases in which the arbitration can be settled before the final hearing on the merits. Depending on the amount in dispute, the total administrative fees under the Flexible Fee Schedule for cases that proceed to a hearing may be higher by approximately 12–19 per cent.

11 See Art 1 at para 1.33.
II. Textual commentary

1. The Standard Fee Schedule

The ICDR’s Standard Fee Schedule is set out in a table in the end of the International Dispute Resolution Procedures,\(^\text{12}\) and restated here:

<table>
<thead>
<tr>
<th>Amount of Claim</th>
<th>Initial Filing Fee</th>
<th>Final Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Above $0 to $10,000</td>
<td>$775</td>
<td>$200</td>
</tr>
<tr>
<td>Above $10,000 to $75,000</td>
<td>$975</td>
<td>$300</td>
</tr>
<tr>
<td>Above $75,000 to $150,000</td>
<td>$1,850</td>
<td>$750</td>
</tr>
<tr>
<td>Above $150,000 to $300,000</td>
<td>$2,800</td>
<td>$1,250</td>
</tr>
<tr>
<td>Above $300,000 to $500,000</td>
<td>$4,350</td>
<td>$1,750</td>
</tr>
<tr>
<td>Above $500,000 to $1,000,000</td>
<td>$6,200</td>
<td>$2,500</td>
</tr>
<tr>
<td>Above $1,000,000 to $5,000,000</td>
<td>$8,200</td>
<td>$3,250</td>
</tr>
<tr>
<td>Above $5,000,000 to $10,000,000</td>
<td>$10,200</td>
<td>$4,000</td>
</tr>
<tr>
<td>Above $10,000,000</td>
<td>Base fee of $12,800 plus .01% of the amount of claim above $10,000,000 Fee Capped at $65,000</td>
<td>$6,000</td>
</tr>
<tr>
<td>Nonmonetary Claims(^1)</td>
<td>$3,350</td>
<td>$1,250</td>
</tr>
<tr>
<td>Consent Award(^2)</td>
<td>$350</td>
<td></td>
</tr>
<tr>
<td>Deficient Claim Filing(^3)</td>
<td>$350</td>
<td></td>
</tr>
<tr>
<td>Additional Services(^4)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

\(^1\) This fee is applicable only when a claim or counterclaim is not for a monetary amount. Where a monetary claim amount is not known, parties will be required to state a range of claims or be subject to the highest possible filing fee (see fee range for claims above $10,000,000).

\(^2\) The ICDR may assist the parties with the appointment of an arbitrator for the sole purpose of having their Consent Award signed.

\(^3\) The Deficient Claim Filing Fee shall not be charged in cases filed by a consumer in an arbitration governed by the Supplementary Procedures for the Resolution of Consumer-Related Disputes, or in cases filed by an Employee who is submitting their dispute to arbitration pursuant to an employer promulgated plan.

\(^4\) The ICDR may assess additional fees where procedures or services outside the Rules sections are required under the parties’ agreement or by stipulation.

In cases with three or more arbitrators constituting the tribunal, the Standard Fee Schedule further provides ‘minimum fees for any case having three or more arbitrators are [US]$2,800 for the filing fee, plus a [US]$1,250 Case Service Fee.’

The initial filing fee is payable in full when a claim, counterclaim, or additional claim is filed. The final fee will be incurred for all cases that proceed to their first hearing. This fee is payable at the time that the first hearing is scheduled.

The final fee can be refunded at the conclusion of the case if no hearings have occurred and if the ICDR’s case administrator was notified of the conclusion of the case at least 24 hours before the time of the scheduled hearing.

\(^\text{12}\) See Appendix 1.
### 2. The Flexible Fee Schedule

2.47 Under the Flexible Fee Schedule set out in a table in the end of the International Dispute Resolution Procedures, the ICDR administrative fees are billed in accordance with the following schedule:

<table>
<thead>
<tr>
<th>Amount of Claim</th>
<th>Initial Filing Fee</th>
<th>Proceed Fee</th>
<th>Final Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Above $0 to $10,000</td>
<td>$400</td>
<td>475</td>
<td>$200</td>
</tr>
<tr>
<td>Above $10,000 to $75,000</td>
<td>$625</td>
<td>$500</td>
<td>$300</td>
</tr>
<tr>
<td>Above $75,000 to $150,000</td>
<td>$850</td>
<td>$1250</td>
<td>$750</td>
</tr>
<tr>
<td>Above $150,000 to $300,000</td>
<td>$1,000</td>
<td>$2125</td>
<td>$1,250</td>
</tr>
<tr>
<td>Above $300,000 to $500,000</td>
<td>$1,500</td>
<td>$3,400</td>
<td>$1,750</td>
</tr>
<tr>
<td>Above $500,000 to $1,000,000</td>
<td>$2,500</td>
<td>$6,700</td>
<td>$3,250</td>
</tr>
<tr>
<td>Above $1,000,000 to $5,000,000</td>
<td>$3,500</td>
<td>$8,200</td>
<td>$4,000</td>
</tr>
<tr>
<td>Above $5,000,000 to $10,000,000</td>
<td>$4,500</td>
<td>$10,300 plus .01% of claim amount over $10,000,000 up to $65,000</td>
<td>$6,000</td>
</tr>
<tr>
<td>Nonmonetary$^1$</td>
<td>$2,000</td>
<td>$2,000</td>
<td>$1,250</td>
</tr>
<tr>
<td>Consent Award$^2$</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Deficient Claim Filing Fee</td>
<td>$350</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Additional Services$^3$</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

1 This fee is applicable only when a claim or counterclaim is not for a monetary amount. Where a monetary claim amount is not known, parties will be required to state a range of claims or be subject to the highest possible filing fee (see fee range for claims above $10,000,000).

2 The ICDR may assist the parties with the appointment of an arbitrator for the sole purpose of having their Consent Award signed.

3 The ICDR reserves the right to assess additional administrative fees for services performed by the ICDR beyond those provided for in these Rules and which may be required by the parties’ agreement or stipulation.

2.48 Under the Flexible Fee Schedule, both the initial filing fee and the proceed fee are non-refundable either in whole or in part. No refund schedule is available for the Flexible Fee Schedule.

2.49 The initial filing fee is payable in full by a filing party when a claim, counterclaim, or additional claim is filed. The initial filing fee is intended to cover the ICDR’s costs in handling the commencement of the arbitration and notifying parties, as well as establishing the due date for filing of the statement of defence under Article 3, which may include a counterclaim.

2.50 In order to proceed with the further administration of the arbitration, the appointment of the arbitrator(s) and the presentation of the claim(s) or counterclaim(s) to the tribunal, the appropriate proceed fee must be paid within 90 days of the filing of the notice of arbitration. A party’s obligation to pay the proceed fee remains in effect regardless of any agreement of the parties to stay, postpone, or otherwise
modify the arbitration proceedings. Unless the parties agree upon an abeyance of the case, the ICDR will administratively close the file if the proceed fee is not paid and notify all parties thereof.

The ICDR imposes the third fee under the Flexible Fee Schedule—the final fee— for all claims and/or counterclaims that proceed to their first hearing. This fee is payable in advance when the first hearing is scheduled, but will be refunded at the conclusion of the case if no hearings have occurred and the administrator has been notified of a cancellation at least 24 hours before the time of the scheduled hearing.

The Flexible Fee Schedule’s minimum fees for any case having three or more arbitrators are: US$1,000 for the initial filing fee; US$2,125 for the proceed fee; and US$1,250 for the final fee.

3. Non-payment of administrative fees and abeyance

In case of non-payment of administrative fees in full or in part, the ICDR will inform the parties so that one of them may advance the required payment.

Should none of the parties make an advance, the ICDR or, if already appointed, the tribunal may order the suspension or termination of the proceedings.

Parties may also agree to hold in abeyance a case on an annual basis under either of the Flexible or Standard Fee Schedules. The ICDR’s annual abeyance fee is US$300. If a party refuses to pay the assessed fee, the other party/parties may pay the entire fee on behalf of all parties; otherwise, the matter will be administratively closed.
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ARTICLE 3—STATEMENT OF DEFENCE AND COUNTERCLAIM

I. Introduction

Focusing on the respondent’s entry into the proceedings, Article 3 is the mirror image of Article 2. Article 3 addresses the respondent’s answer to the claimant’s

II. Textual commentary

A. Contents of the statement of defence and joinder of third parties (Article 3(1))

B. Counterclaims (Article 3(2))

C. Additional content requirements (Article 3(3))

D. Thirty-day time limits and extensions (Article 3(4))

Article 3

1. Within 30 days after the commencement of the arbitration, a respondent shall submit a written statement of defense, responding to the issues raised in the notice of arbitration, to the claimant and any other parties, and to the administrator.

2. At the time a respondent submits its statement of defense, a respondent may make counterclaims or assert setoffs as to any claim covered by the agreement to arbitrate, as to which the claimant shall within 30 days submit a written statement of defense to the respondent and any other parties and to the administrator.

3. A respondent shall respond to the administrator, the claimant and other parties within 30 days after the commencement of the arbitration as to any proposals the claimant may have made as to the number of arbitrators, the place of the arbitration or the language(s) of the arbitration, except to the extent that the parties have previously agreed as to these matters.

4. The arbitral tribunal, or the administrator if the arbitral tribunal has not yet been formed, may extend any of the time limits established in this article if it considers such an extension justified.

I. Introduction

Focusing on the respondent’s entry into the proceedings, Article 3 is the mirror image of Article 2. Article 3 addresses the respondent’s answer to the claimant’s
notice of arbitration: the statement of defence. Contemporaneously with filing the statement of defence, third parties may be joined or counterclaims may be introduced.

3.02 Similar rules can be found in Article 5 of the ICC Rules, Article 2 of the LCIA Rules, and Article 19 of the 1976 UNCITRAL Rules or Article 21 of the 2010 UNCITRAL Rules.

II. Textual commentary

A. Contents of the statement of defence and joinder of third parties (Article 3(1))

Article 3(1)
Within 30 days after the commencement of the arbitration, a respondent shall submit a written statement of defense, responding to the issues raised in the notice of arbitration, to the claimant and any other parties, and to the administrator.

3.03 Article 3(1) requires the respondent to submit a written statement of defence in response to the claimant’s notice of arbitration within 30 days after the arbitration has been commenced—that is, 30 days after the administrator has received the notice of arbitration (Article 2(2)).

3.04 If the respondent fails to respond without showing sufficient cause, the tribunal ‘may proceed with the arbitration’ (Article 23(1)). However, the tribunal will not issue a default award for the relief sought in the notice of arbitration based on the respondent’s default alone.

3.05 Challenges to the tribunal’s jurisdiction must be made at the time of the statement of defence or will be considered waived (Article 15). If the respondent raises jurisdictional challenges in the statement of defence only, the ICDR Rules do not authorize the missing presentation of facts and/or legal arguments in defence to the merits of the claim(s) to be deemed an ipso iure waiver thereof.

3.06 The respondent is not required to provide a full defence, but may do so if it so wishes. In practice, as a responsive pleading, the contents of the statement of defence will depend on the facts and arguments presented by the claimant in the notice of arbitration. The respondent is required to ‘respond to the issues raised in the notice of arbitration’ and must submit its statement to the claimant and any other parties, as well as to the administrator. In the vast majority of cases, the respondent will request that the claims be dismissed and that the claimant be ordered to bear the costs of arbitration, including the respondent’s legal costs.
II. Textual commentary

Under Article 3(1), the respondent can submit a written statement of defence to any other party. The ICDR Rules thus provide for the possibility of a joinder of third parties. Since the respondent is required to submit its statement to the claimant, the administrator, ‘and any other parties’, the administrator exercises no scrutiny over whether such joinder is admissible. The jurisdictional challenges attached to multi-party arbitrations are for the arbitral tribunal to decide.¹

B. Counterclaims (Article 3(2))

At the time a respondent submits its statement of defense, a respondent may make counter-claims or assert setoffs as to any claim covered by the agreement to arbitrate, as to which the claimant shall within 30 days submit a written statement of defense to the respondent and any other parties and to the administrator.

In the statement of defence, the respondent may also make counterclaims covered by the agreement to arbitrate. If a counterclaim is made, in as much as the claimant does with respect to the claim at the time of filing of the notice of arbitration, the respondent must elect whether the counterclaim be governed by the Standard Fee Schedule or the Flexible Fee Schedule and pay the applicable initial filing fee.

The claimant, in turn, has 30 days in which to file a statement of defence to a counterclaim. Such statement of defence to the counterclaim will be governed by this Article 3 mutatis mutandis. Should the claimant challenge the arbitral tribunal’s jurisdiction to hear the counterclaim, Article 15(3) requires it to raise such objection within this answer statement.

Rather than pursuing a claim as a separate counterclaim, the respondent may also declare such counterclaim as a set-off against the relief sought. In such a case, to the extent that the counterclaim is introduced as a set-off only, the counterclaim is not regarded as an independent claim so that the amount of set-off will not be taken into account when the ICDR fixes the administrative fees. In case the counterclaim exceeds the claim, the ICDR’s fee assessment will thus be based on the amount exceeding the claim only if the counterclaim amount equalling the claim was presented as a set-off.

C. Additional content requirements (Article 3(3))

Article 3(3)

A respondent shall respond to the administrator, the claimant and other parties within 30 days after the commencement of the arbitration as to any proposals the claimant may have made as to the number of arbitrators, the place of the arbitration or the language(s) of the arbitration, except to the extent that the parties have previously agreed as to these matters.

3.11 The respondent must reply to any issue raised in the notice of arbitration. If raised by the claimant pursuant to Article 2(3)(g), this may include any proposals as to the number of arbitrators, the place of the arbitration, or the language of the arbitration. However, the ICDR Rules do not require the respondent to deviate from previously reached agreements with the claimant.

D. Thirty-day time limits and extensions (Article 3(4))

Article 3(4)

The arbitral tribunal, or the administrator if the arbitral tribunal has not yet been formed, may extend any of the time limits established in this article if it considers such an extension justified.

3.12 Whereas the claimant is afforded a virtually unlimited amount of time within which to prepare its notice of arbitration, the respondent is required to answer within 30 days of the receipt of the notice. This might lead to injustice. The respondent may be caught by surprise, and may even be unaware that the claimant considered that a dispute had arisen and should be submitted to arbitration. In addition, it might take a considerable amount of time within the respondent organization to reach the necessary level of decision-maker and to select outside counsel. In addition, various levels of unfamiliarity may be encountered. International commercial arbitration, as such, the language of the arbitration, the unfamiliarity with the underlying subject matter, and/or banal logistical problems such as the unknown location of the relevant files may be issues to consider when ruling upon an extension request.

3.13 In comparison to the claimant’s unlimited amount of time to prepare its notice of arbitration, it may constitute a denial of equal treatment if the respondent was forced to comply with the 30-day time limit for the preparation of its statement of defence in all cases. Article 3(4) addresses this issue and grants the administrator—or the arbitral tribunal, if already constituted—the authority to extend any of these time periods. Article 3(4) does not require the administrator to invite the other side’s comments and Article 3(4) does not specify how long an extension may be granted by the administrator. In practice, the administrator often harbours a first extension of time of seven days without inviting the other side’s comments and solicits the other parties’ input for any additional time requests.
ARTICLE 4—AMENDMENTS TO CLAIMS

I. Introduction

Article 4 affords the parties relatively wide latitude to modify claims, counterclaims, or defences, and establishes the principle that modification by means of amendment and supplementation are admissible at any time during the proceedings, as long as the arbitral tribunal considers it appropriate. Such claim, counterclaim, or defence modifications are required to be within the scope of the arbitration agreement—that is, the boundaries of an arbitral tribunal’s jurisdiction. The parties’ general right to amend their claims or defences is subject to the tribunal’s power of rejection on grounds of unexcused delay or prejudice to the parties or proceedings.

Article 4 is based on the similarly worded Article 20 of the 1976 UNCITRAL Rules. An ad hoc tribunal established under the UNCITRAL Rules warned that the alternative would be an ‘unduly static or formalistic rule that would require
4.03 In contrast, the comparable provision in the ICC Rules, Article 19, addresses new claims and counterclaims after the Terms of Reference have been signed only. Before allowing a party to amend any ‘claim, counterclaim, defence and reply’, Article 22.1(a) of the LCIA Rules even requires the tribunal to give the parties a ‘reasonable opportunity to state their views’. No such requirement can be found in the ICDR Rules.

4.04 Yet another approach is taken by the AAA Commercial Rules. Pursuant to section R-6 of the AAA Commercial Rules, the parties’ right to make a new or different claim or counterclaim is unqualified before the appointment of the arbitrator(s). Once appointed, no new or different claim may be submitted, except with the arbitrator’s consent.

II. Textual commentary

A. Amendment and supplement of claims, counterclaims, or defences

4.05 Whether amendments and supplements may be considered appropriate or inappropriate depends on the individual circumstances of the case and the arbitral tribunal’s exercise of its discretion vested under Article 16(1). Article 16(1) requires the arbitral tribunal to treat the parties with equality, and provides that each party has the right to be heard and is given a fair opportunity to present its case. In discharging their mandate, arbitral tribunals carefully structure procedural directions and it is not for the parties to treat an arbitral tribunal’s carefully structured procedural direction with an unwelcome disregard on its own motion.

4.06 Article 4 is open-ended, and applies to both amendments and supplements of claims, counterclaims, or defences. Although Article 4 spells out the party’s delay in making amendments or supplements and the prejudice to the other parties as grounds to consider when ruling whether the amendments or supplements are timely, Article 4 allows for any other circumstances to be considered as well.

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II. Textual commentary

Such other circumstances may include weighing the benefits against the burdens of the amending party having to initiate a new arbitration or court proceeding. Generally speaking, what Article 4 seeks to avoid is unjustified, substantial changes of the legal or factual basis of claims, counterclaims, or defences at the last minute. The interpretation of any provision regulating the amendment or supplementation of the parties’ pleadings must aim at avoiding disruption, while promulgating procedural efficiency.²

The balancing of interests under Article 4 may well depend on the conduct and stage of the written proceedings. The tribunal’s power to impose amended or supplemented claims, counterclaims, and defences may discourage parties from unnecessary changes to their written statements. In this respect, the initial pleadings, and the claims, counterclaims, and defences presented therein, serve a critical purpose as a basis for all other steps in the proceedings, including the structuring of the introduction, and adducing of witness and expert evidence, as well as document production requests. In light of the standards of Article 16, the threshold for the admission of an entirely new theory, whether factually or legally—that is, an amendment of the claims, counterclaims, and defences—at a late stage of the proceedings must be higher than for a mere supplementation of an already presented, yet not fully pled, claim, counterclaim, or defence.

B. Tribunal’s acceptance and denial of amendments and supplements to claims, counterclaims, or defences

In an ICDR arbitration, as the result of having allowed a third party to intervene in the arbitration, the tribunal had initially allowed the claimant to amend its demand with the addition of a claim against the intervenor based on tortious interference. More than a year into the arbitration, the claimant moved to amend its demand a second time, with two antagonistic claims against the initial respondent: one based on tortious interference; the other based on an invalid assignment of rights claim. The tribunal granted leave to add the tortious interference claim against the initial respondent, but denied leave with respect to the assignment of rights claim, because the claimant had notice of the assignment for months and an amendment at that stage of the proceeding could be prejudicial to the respondents and ‘inject new issues and complexities into the case that might adversely affect and delay the fair, expeditious and efficient resolution of the present dispute’. The tribunal’s ruling

was ‘without prejudice’ and ‘not meant to limit any of the arguments that the parties may make, or the evidence they may proffer, which may touch upon the subject matter of [the claimant’s] motion’.³

4.10 Since they are based on Article 20 of the 1976 UNCITRAL Rules, the awards published by the Iran-US Claims Tribunal may also be instructive as to a proper reading of Article 4. Tribunals find no undue delay or prejudice when a party seeks to amend the amount or interest rate claimed at a reasonable stage of the arbitration.⁴ If the facts supporting it are already pleaded or the other party has sufficient time to respond, a new legal theory for recovery may be admissible.⁵

4.11 By contrast, amendments were held inadmissible in the case of addition of a new respondent well after the statement of claim had been filed and in a case of the introduction of a new legal claim based on facts not introduced into the arbitration prior thereto.⁶ However, the addition of a new respondent can also be deemed a ‘clarification’ of the claim—as opposed to an amendment of the claim.⁷

. . . A party may not amend or supplement a claim or counterclaim if the amendment or supplement would fall outside the scope of the agreement to arbitrate.

4.12 While the wording of Article 4’s first sentence signals a presumption in favour of allowing amendments and supplements, Article 4’s second sentence establishes a strict boundary to the parties’ latitude. Amendments or supplements falling outside the scope of the agreement to arbitrate are inadmissible. A tribunal may well be cautious in using its power to avoid challenges for illegitimate broadening of its jurisdiction. A tribunal may hear claims, counterclaims, and defences only if competent to do so.

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³ See F Hoffmann-La Roche Ltd v Qiagen Gaithersburg, Inc, 2010 BL 184649 (SDNY, 11 August 2010) (confirming the tribunal’s ruling and denying a violation of US Federal Arbitration Act, s 10(a)(3)).

⁴ See eg Fereydoon Ghaffari [a claim of less than US$250,000 presented by the USA] v Islamic Republic of Iran (Order by Chamber Two in Case No 10792, 15 September 1987), reprinted in 18 Iran-USCTR 64, 65 (1988-I); Cal-Maine Food Inc v Islamic Republic of Iran (Award No 133-340-3, 11 June 1984), reprinted in 6 Iran-USCTR 52, 62–3 (1984-II).


C. Impact on fees

If admitted by the arbitral tribunal, the administrative fee may be subject to increase in case the amount of a claim (or counterclaim) is modified after the initial filing date. Fees are also subject to decrease if the amount of a claim or counterclaim is modified before the first hearing. The ICDR’s assessment of fees is based on the parties’ presentation of claims after having consulted with the tribunal.\footnote{See para 2.40 ff (administrative fees).}
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ARTICLE 5—NUMBER OF ARBITRATORS

I. Introduction

One of the first questions that parties in arbitration must consider when constituting a tribunal is the number of arbitrators that will resolve their dispute. As with most other aspects of international arbitration, the appointment of arbitrators is, in large part, governed by the principle of party autonomy, which grants the parties significant freedom to agree amongst themselves on the number of arbitrators and the mechanism for appointing them, either directly or by reference to institutional rules that invariably make provision for the constitution of the tribunal. Where the parties do not select the number of arbitrators by agreement and also do not select a set of governing institutional rules, they will face default provisions of national

1. Preference for three-member tribunal 5.09
2. Default of a sole arbitrator 5.16

2 This is because institutions provide fallback rules or presumptions regarding the number of arbitrators. For example, many institutional rules, such as the ICDR Rules, will consider the amount in dispute as a means to determine how many arbitrators are necessary: ICC Rules, Art 8(2); LCIA Rules, Art 5(4); Rules of Arbitration and Conciliation of the International Arbitral Centre of the Austrian Federal Economic Chamber (VIAC Rules, or Vienna Rules), Art 9(2); World Intellectual Property Organization (WIPO) Arbitration Rules, Art 14(b).
Chapter 5: Article 5—Number of Arbitrators

arbitration laws, which differ significantly by jurisdiction. It is therefore advisable for parties to select the number of arbitrators in their arbitration agreement, or at least fully to understand the impact of their choice of institutional rules on the constitution of the tribunal.

II. Textual commentary

A. Party autonomy (‘if the parties have not agreed’)

5.02 The ICDR Rules fully recognize the principle of party autonomy regarding all aspects of the selection of arbitrators. Parties’ freedom to choose the number of arbitrators is a concept rooted in national arbitration laws and international conventions, and affirmed by national court decisions. The UNCITRAL Model Law explicitly vests the right to select arbitrators in the parties when it provides that ‘the parties are free to determine the number of arbitrators’.³

5.03 Although it is certainly not explicit, Article 5, as written, would appear to permit parties to select a tribunal composed of an even number of arbitrators if the parties so choose. We are not aware of any examples of this provision being the basis for parties agreeing upon an even-numbered tribunal, but Article 5 arguably could have been drafted to recognize party autonomy in the utmost. National laws largely follow suit, whether based on the UNCITRAL Model Law or not,⁴ although some national laws contain nuances. The breadth of Article 5 may be a nod to the practice in the ICDR’s home jurisdiction, the USA, under which law arbitration tribunals comprised of an even number of arbitrators are not explicitly prohibited, as they are by mandatory law provisions under French (in domestic arbitrations), Dutch, Belgian, Egyptian, Indian, Italian, and Portuguese laws.⁵ These national arbitration statutes prohibit arbitration by an even number of arbitrators, presumably to avoid delays or impediments to the arbitral process by way of deadlocks.⁶ Arguably, such national restrictions on the parties’ choice regarding the number of arbitrators conflict with the New York Convention, Articles II(3) and V(1)(d), which mandate that parties’ agreements concerning the composition of the tribunal are to be given effect.⁷

³ UNCITRAL Model Law, Art 10(1).
⁴ See eg Spanish Arbitration Act, art 12; Danish Arbitration Act, s 10(1); English Arbitration Act, 1996, s 15(1); Swiss Law on Private International Law, art 179(1).
⁵ See eg Born, op cit, 1,351 and n 8.
⁶ See eg French New Code of Civil Procedure, art 1453 (in domestic arbitrations); Italian Code of Civil Procedure, art 809; Indian Arbitration and Conciliation Act, s10(1).
⁷ Born, op cit, 1,352–54.
II. Textual commentary

There are only a very few examples of successful even-numbered tribunals, with the most famous of them having been formed not as the result of the parties’ original expectations, but as a result of a three-arbitrator tribunal truncated by the retirement of one of the arbitrators in the course of a proceeding lasting more than ten years. The truncated two-arbitrator tribunal in the well-known IBM-Fujitsu arbitration delivered a generally acceptable result under the closely related AAA Commercial Rules. The complex, intellectual property dispute involved significant amounts of evidence, required specialized expertise, and staked the long-term business interest of two multinational companies against each other. After more than ten years of continuing consultations and mediation, the two-arbitrator tribunal in the end resolved the multibillion-dollar dispute in a process regarded by both parties as a success. The Fujitsu arbitration—one of the few available examples of a successful arbitration by an even-numbered tribunal—is a better example of parties agreeing to continue with a two-arbitrator tribunal following the resignation of the third arbitrator, than of parties intentionally selecting an even number of arbitrators to decide their dispute. In that regard, it is more representative of the operation of a rule similar to that of Article 11 regarding the ‘Replacement of an Arbitrator’, than the autonomy of the parties to select an even number of arbitrators. Article 11(1), discussed later in this commentary, specifies that in the event that one of the originally appointed arbitrators no longer sits on the panel by reason other than resignation or removal due to challenge, ‘the two other arbitrators shall have the power in their sole discretion to continue the arbitration and to make any decision, ruling or award, notwithstanding the failure of the third arbitrator to participate’. Even-numbered tribunals may lead to a more conciliatory, compromise-based award, but they may also lead to deadlock, as noted above. For that reason, parties should exert great caution in selecting such a number, as they may encounter problems in enforcement in some jurisdictions that nullify arbitrations conducted under even-numbered tribunals.

National courts have also upheld the parties’ rights to agree on the number of decision-makers. For example, in the US, lower court cases have often noted that the parties were free to reach an agreement on the number of arbitrators, prior to facing default provisions of institutional or national rules.

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10 See eg Egyptian Arbitration Law, art 15(2) (‘the Tribunal must, on pain of nullity, be composed of an odd number’); Omani Arbitration Law, art 15(2) (‘If there is a number of arbitrators, their number shall be odd, failing which the arbitration shall be a nullity’).
11 See eg Ansonia Copper and Brass, Inc v AMPCO Metal SA and AMPCO Metal Inc, 419 FSupp2d 186, 188 (D Conn 2006) (holding that the US Federal Arbitration Act, 9 USC s 5, applies by default because the parties to the dispute did not memorialize an agreement on the number of arbitrators, but
Chapter 5: Article 5—Number of Arbitrators

5.06 As to the timing of that determination, under Article 5 of the ICDR Rules (and other leading institutional rules), the parties can choose the number in their arbitration agreement; they can also agree upon the number after a dispute has arisen, but before an arbitration is commenced, or they can leave that determination to the discretion of the administrator. Thus, Article 5 of the ICDR Rules, similar to other institutional rules, leaves room for the parties to agree on the number of arbitrators after the dispute has arisen, which occurs frequently, or even after the arbitration has commenced, as long as no tribunal has been constituted.

5.07 While parties are well advised to select the number of arbitrators in their arbitration agreement, they frequently do not. Although statistics from the ICDR are not available, one set of statistics regarding arbitrations under the ICC Rules showed that a mere quarter to a third of arbitration agreements polled actually selected the number of arbitrators.

5.08 If the parties agree to the number of arbitrators, this agreement binds them like any other contractual commitment. Therefore a party can, in principle, not deviate from an earlier agreement (unless, conceivably, it contests the validity or conclusion of the arbitration agreement that contains the agreement on the number of arbitrators, in which case, it may be arguable that the agreement on the number of arbitrators was never validly concluded). In the absence of agreement, the parties are deemed to have left the determination of the number of arbitrators to the arbitral institution.

B. Institutional appointment

1. Preference for three-member tribunal

5.09 Although parties remain free to agree to virtually any number of arbitrators, most parties prefer a three-member tribunal. Although statistics regarding ICDR arbitrations are not available, statistics from the ICC show that almost 60 per cent of all arbitrations involve three arbitrators.

also noting that the parties were free to choose the number of arbitrators); Ore and Chemical Corp v Stinnes Interoil, Inc, 611 FSupp 237, 240–41 (SDNY 1985) (holding that, because the parties have not otherwise agreed, the appointment of a sole arbitrator is appropriate).


13 Ibid.

14 For the USA, see Howsam v Dean Witter Reynolds, Inc, 537 US 79, 84 (2002) (affirming the principle that questions of arbitrability are issues for judicial determination, as opposed to ‘procedural question[s]’ that grow out of the dispute and are presumptively not for the judge). Subsequent lower courts have applied Howsam to arbitrations conducted under the ICDR Rules for the Howsam proposition that the selection of arbitrators is a procedural aspect of arbitration. See, eg, Municipality of San Juan v Corp para el Fomento Económico de la Ciudad Capital, 597 FSupp2d 247, 249–250 (Civil No 03-1917 2008).

II. Textual commentary

The widespread preference for three arbitrators exists for several reasons. It is argued that such a choice facilitates a higher degree of quality in the award, in particular in cases that concern different legal areas and in which the arbitrators, due to their possibly different areas of experience and expertise, are able to complement each other in the decision-making process. With three arbitrators deliberating and discussing each other’s approaches, a three-member tribunal is vested with a powerful dynamic of internal quality control. These deliberations can reduce the risk of misunderstandings, facilitate the use of more sophisticated expertise, and (as is generally the case with diverse panels) take account of the parties’ different national and legal backgrounds, which in turn may make the award of the tribunal more acceptable to the parties.

As Article 5 recognizes, these quality considerations offset some disadvantages associated with three-member tribunals—in particular the risk of higher costs and the potential for delay. Further, parties are more likely to agree on the presiding arbitrator when the tribunal consists of three arbitrators, as opposed to the sole arbitrator, according to statistics from leading institutions.

The major perceived advantage of appointing a sole arbitrator is the limitation that this places on the costs of the arbitration (with a sole arbitrator incurring by definition only about a third of the expense incurred by a three-member tribunal). It is argued that a sole arbitrator may also be able to resolve the dispute with greater speed, without the need to coordinate the busy schedules of three members on the panel. Using a sole arbitrator is therefore said to have a significant impact in economic terms. Beyond these considerations, a sole arbitrator also removes the risk of a party-appointed arbitrator employing delaying tactics and of the likelihood

17 JP Lachmann, Handbuch für die Schiedsgerichtspraxis (3rd edn, Verlag Dr Otto Schmidt, Cologne, 2008) 208; there is a preference visible in common law countries to choose a sole arbitrator, whereas in civil law countries, preference is made to an arbitral tribunal. See J Lew, L Mistelis, and S Kröll, Comparative International Commercial Arbitration (Kluwer Law International, The Hague, 2003) para 10-10, commenting that a three-member tribunal also allows the appointment of arbitrators with particular scientific or technical knowledge when required (para 10-18).
20 In 2003, the ICC statistics showed that, in more than 80 per cent of its cases, the parties failed to agree on the sole arbitrator. However, in cases in which the arbitration agreement called for three arbitrators, the parties agreed on the presiding arbitrator in 55 per cent of all cases. See ’2003 Statistical Report’, 15(1) ICC Ct Bull 7, 10 (2004).
Chapter 5: Article 5—Number of Arbitrators

of an award created as a compromise between the interests of both parties.\(^{23}\) These rationales led parties who choose ICC arbitrations to select sole arbitrators in about 40 per cent of arbitrations between 2001 and 2007.\(^{24}\)

5.13 Reflecting these different considerations, there is significant debate about whether institutional rules should provide for one or three arbitrators by default, absent agreement by the parties. Requiring three arbitrators as a default in cases in which the parties cannot agree imparts a particular burden on a claimant who faces a non-cooperative or otherwise non-participating respondent.\(^{25}\) In those cases, the claimant may be forced to front the full cost of three arbitrators—not an insignificant expense. However, mandating a sole arbitrator could arguably be considered to be stripping the parties of an arguably fundamental right to participate in the selection of the tribunal, which some consider to be a key aspect of arbitration.\(^{26}\) The reports of the Working Group on the recently approved revisions to the 1976 UNCITRAL Rules evidence this tension in the appropriate default number of arbitrators, due largely to the concern that parties’ confidence in the proceedings is rooted in their right to select their decision-makers—and thus necessarily the number of their decision-makers at the outset.\(^{27}\)

5.14 One potential solution appears in the recently adopted 2010 UNCITRAL Rules, which maintain the old three-arbitrator default that was found in Article 5(1) of the 1976 UNCITRAL Rules (now Article 7(1) of the 2010 UNCITRAL Rules), but include a compromise that is designed to protect a claimant against uncooperative respondents. Thus, if the parties have not agreed upon a sole arbitrator, but one party has proposed a sole arbitrator and no other parties have appointed a second


\(^{26}\) See GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 1, 349; cf J Paulsson, ‘Moral Hazards and Wishful Thinking’, Lunch Presentation, 21st Annual ITA Workshop, *Commemcing an International Commercial Arbitration: Fundamentals and Strategy*, 17 June 2010 (Dallas, Texas). Paulsson instead suggested that institutions such as the ICC, LCIA, and ICDR should be charged with the task of selecting arbitrators, because they are better suited to assessing qualifications for selecting impartial and independent arbitrators, which would avoid such issues as parties appointing from the same limited pool of well-known, increasingly busy (and therefore slow, unavailable, or overwhelmed) individuals.

\(^{27}\) Levine, op cit.
arbitrator, then the appointing authority may appoint a sole arbitrator at the request of any party, pursuant to the list procedure.  

The newly adopted compromise position in the 2010 UNCITRAL Rules seems to cement a shift in modern arbitration rules toward the default of a sole arbitrator. For example, the ICC Rules call for the default of a sole arbitrator unless facts warrant the appointment of three arbitrators. Similarly, the LCIA Rules provide for a sole arbitrator by default, with the LCIA taking into account the special circumstances of the case. The ICDR Rules are interesting in that, despite the various revisions undertaken, they continue to reflect the structure and track the language of the 1991 AAA International Arbitration Rules, which were modelled on the 1976 UNCITRAL Rules. Yet the AAA abrogated the 1976 UNCITRAL Rules on the issue of sole versus three arbitrators by giving preference to a sole arbitrator by default in smaller cases, in an attempt to embrace a cost-effective approach to constituting the tribunal.

2. Default of a sole arbitrator

Even though parties often agree on the number of arbitrators and increasingly prefer three-member tribunals, institutional rules typically provide for a fallback solution if there is no consent on the number of the arbitrators, and the ICDR Rules are no exception. The default provision captured in Article 5 strives for efficient, cost-effective arbitrations associated with sole arbitrators, yet reserves sufficient flexibility to account for complex cases.

Indeed, statistics show that parties to higher-value or more complex disputes show a strong preference for three-member tribunals. Some institutional rules take this preference expressly into account; in contrast to the ICDR Rules, which permit some discretion as to whether one or three arbitrators will be chosen in the absence of party agreement, several other institutions explicitly call for the dispute to be decided by three arbitrators absent party agreement.

28 UNCITRAL Rules, Art 7(2) (2010).
29 ICC Rules, Art 8.2 provides, in relevant part, ‘[w]here the parties have not agreed upon the number of arbitrators, the Court shall appoint a sole arbitrator, save where it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators’.
30 LCIA Rules, Art 5.4 provides, in relevant part, ‘[a] sole arbitrator shall be appointed unless the parties have agreed in writing otherwise, or unless the LCIA Court determines that in view of all the circumstances of the case a three-member tribunal is appropriate’.
31 See above at para 1.61 ff.
32 Levine, op cit, 273.
33 The balance is struck by reserving the right in the ICDR administration to consider the facts of the dispute and TO choose to appoint three arbitrators where appropriate. See ICDR Rules, art 5.
34 ICSID Convention, Art 37(2)(b); Stockholm Chamber of Commerce Arbitration Rules (SCC Rules), Art 12 (‘The parties may agree on the number of arbitrators. Where the parties have not agreed on the number of arbitrators, the Arbitral Tribunal shall consist of three arbitrators, unless the Board,
5.18 Other rules introduce a specific threshold to determine whether a dispute should be heard by one or three arbitrators. For example, the AAA Commercial Rules delineate the number of arbitrators by default based on the amount of the claim, under the Supplemental Procedures for Large, Complex Commercial Disputes. These rules call for either one or three arbitrators in claims that exceed US$500,000. If, however, the claim exceeds US$1 million, the rules require a default of three arbitrators to determine the case.

5.19 Article 5 of the ICDR provides for a sole arbitrator as a default, absent party agreement. Unlike the AAA Commercial Rules, it does not contain a fixed threshold, but allows the administrator to deviate from the default if he determines that three arbitrators are appropriate 'because of the large size, complexity or other circumstances of the case', conferring upon the ICDR administrator the discretion to tailor the size of the tribunal to the particular dispute. In reality, the ICDR administrative staff has assumed that the conditions of Article 5 referring to the 'large size, complexity or other circumstances of the case' are met, and a three-member panel is appropriate, if the claim exceeds US$1 million—a practice that aligns with parties' increasing preference for three-member tribunals and parallels the AAA Commercial Rules under the Supplemental Procedures for Large, Complex Commercial Disputes, which, as discussed, create a threshold amount in dispute of US$1 million for a three-member tribunal.

5.20 The default of one arbitrator in Article 5 is unsurprising if one considers the history and provenance of the ICDR Rules, which developed in the US. The US FAA provides for the default of a sole arbitrator as well in section 5, which reads 'unless otherwise provided in the agreement the arbitration shall be by a single arbitrator'. In turn, lower US courts have upheld the appropriateness of a sole arbitrator to taking into account the complexity of the case, the amount in dispute or other circumstances, decides that the dispute is to be decided by a sole arbitrator').

35 ICDR Rules, Art 5.
38 The observation that the ICDR administrative staff invokes a similar procedure is unsurprising, because the ICDR Rules developed as a corollary to the AAA Commercial Rules and undoubtedly cover both high-value, complex international disputes and also smaller, simpler international cases. Due to the similarities in interpretation, analogies can be made to US court decisions interpreting the AAA Commercial Rules on the probable outcome of litigation under the ICDR Rules.
39 9 USC s 5 provides: If the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, . . . then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been
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decide even international disputes when the agreements contained no provision for the appointment of arbitrators. For example, in one reported case from New York, the parties did not provide for the number of arbitrators by agreement. In fact, even after the court ordered the parties to reach an agreement or accept the AAA’s appointment, the parties still could not agree on the number of arbitrators. One party requested that the court appoint a sole arbitrator, appealing to concerns of cost, efficiency, and consistency in the consideration of evidence. It argued that ‘a single arbitrator . . . would be readily able to consolidate the arbitrations without needing to add a chairman and would also provide the salutary benefits of consistency in interpretation of fact and testimony’.\(^40\) The other party, however, sought a three-member panel, with each party choosing one arbitrator and those two selecting the third. The court found the arguments for a three-member tribunal unpersuasive in lieu of section 5 of the US Federal Arbitration Act (FAA), which compelled arbitration by a single arbitrator.\(^41\)

At least in the USA, the ICDR’s discretion in determining the number of arbitrators is not subject to review by the courts. Thus, a US appellate court rejected an appeal in which the parties contested the issue of whether the ICDR had correctly determined the number of arbitrators and whether one arbitrator or three was appropriate to preside over the dispute.\(^42\) Considering that the dispute was governed by the AAA’s Procedures for Large, Complex Commercial Disputes—that is, additional procedures for disputes under the AAA that exceed US$500,000 in claim value\(^43\)—the court held that ‘[t]he parties have agreed that arbitrator selection should follow the rules and procedures of the American Arbitration Association, and the number of arbitrators is a procedural question to be answered exclusively in that forum’.\(^44\) Therefore, the court refused to engage in a *de novo* review and did not entertain the arguments regarding the appropriateness of three versus one arbitrator. The ICDR’s discretion to determine the number of arbitrators absent party agreement was also upheld in another line of cases. For example, when one party sued to compel the ICDR to appoint three arbitrators instead of one, a lower US court specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

It appears that this provision applies to domestic, as well as international, arbitrations, and thus is subject to the New York and Inter-American Conventions. Even so, the FAA arguably permits the court to take into account the practice of other leading jurisdictions, as a measure of judicial discretion. See GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 1,361, fn 56. Other rules also provide for one arbitrator as a rule, but leave it to the institution to appoint three arbitrators where the circumstances so require. See eg LCIA Rules, Art 5(4); ICC Rules, Art 8(2); SCC Rules, Art 12.

\(^40\) *Ore and Chem Corp v Stinnes Interoil, Inc*, 611 FSupp 237, 239 (SDNY 1985).
\(^41\) Ibid, 240–41.
\(^42\) *Dockser v Schwartzberg*, 433 F3d 421, 426 (4th Cir 2006).
\(^43\) Available online at <http://www.adr.org/sp.asp?id=22440> [accessed 14 July 2010].
\(^44\) *Dockser v Schwartzberg*, 433 F3d 421, 426 (4th Cir 2006).
refused, holding that the selection and number of arbitrators is a procedural decision that must have an arbitral, rather than judicial, resolution. The arbitration clause did not specify how the parties would choose the arbitrators; instead, it stated:

In the event any controversy arises between the parties with regard to their responsibilities and obligations under this contract, said differences shall be resolved by arbitration. The parties should mutually agree to consent to the designation of an arbitrator and shall become obligated by his decision.

Because the agreement promoted arbitration and made no mention of domestic courts, the court deferred to the ICDR to determine the number of arbitrators.

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46 Ibid, 249.
ARTICLE 6—APPOINTMENT OF ARBITRATORS

I. Introduction

II. Textual commentary

A. Party autonomy and the constitution of the tribunal (Article 6(1) and (2))

B. The limits on party autonomy to select arbitrators

C. Default procedure for institutional arbitrator appointments (Article 6(3))

D. Selecting ‘suitable’ candidates (Article 6(4))

E. Constituting the tribunal in multi-party arbitrations (Article 6(5))

Article 6

1. The parties may mutually agree upon any procedure for appointing arbitrators and shall inform the administrator as to such procedure.

2. The parties may mutually designate arbitrators, with or without the assistance of the administrator. When such designations are made, the parties shall notify the administrator so that notice of the appointment can be communicated to the arbitrators, together with a copy of these rules.

3. If within 45 days after the commencement of the arbitration, all of the parties have not mutually agreed on a procedure for appointing the arbitrator(s) or have not mutually agreed on the designation of the arbitrator(s), the administrator shall, at the written request of any party, appoint the arbitrator(s) and designate the presiding arbitrator. If all of the parties have mutually agreed upon a procedure for appointing the arbitrator(s), but all appointments have not been made within the time limits provided in that procedure, the administrator shall, at the written request of any party, perform all functions provided for in that procedure that remain to be performed.

4. In making such appointments, the administrator, after inviting consultation with the parties, shall endeavor to select suitable arbitrators. At the request of any party or on its own initiative, the administrator may appoint nationals of a country other than that of any of the parties.

5. Unless the parties have agreed otherwise no later than 45 days after the commencement of the arbitration, if the notice of arbitration names two or more claimants or two or more respondents, the administrator shall appoint all the arbitrators.
Chapter 6: Article 6—Appointment of Arbitrators

I. Introduction

6.01 Article 6 sets out the default procedures for selecting the arbitrator(s) as the decision-makers in the parties’ dispute. It is a hallmark of arbitration that the parties can agree on that process and, indeed, choose the arbitrators for their dispute, ensuring that the arbitrators’ qualifications are appropriate for the individual circumstances at hand. This differs from national courts systems, within which existing judges, permanently installed, hear randomly assigned cases. In arbitration, the parties compose the tribunal according to their agreement, the particular arbitration rules chosen, and the applicable law. Under the ICDR Rules, as elsewhere, the principle of party autonomy is not limited to the parties’ choice of the number of arbitrators, but extends (within the confines of the mandatory law at the seat of the arbitration) to the procedure pursuant to which the tribunal is constituted.

6.02 The parties’ agreement on the procedure to constitute the tribunal is often contained in the arbitration agreement. If not contained therein, the ICDR Rules stipulate important procedural safeguards and substantive mechanisms for the appointment of their arbitrators (including procedures that attempt to minimize delays) in the event that the parties cannot agree on the process.

6.03 Specifically, Article 6(3) affords the parties an additional 45 days from the commencement of the arbitration to agree on an appropriate procedure before the ICDR administrative staff may step in to designate the arbitrator(s). The ICDR will intervene only at the written request of a party and does so to prevent significant delays in the constitution of the panel. Indeed, only a few limitations restrict the broad autonomy that parties to ICDR arbitrations typically enjoy, most notably in multi-party arbitration. In that case, Article 6(5), by default, reserves the appointment of the entire tribunal to the administrative staff unless the parties agree otherwise. Other restrictions on the parties’ autonomy to select the decision-makers for their arbitration exist to safeguard important public policies, such as ensuring the impartiality and independence of the selected arbitrators.

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1 See ICDR Rules, Art 1(2) (discussed at para 1.93 ff above).
3 See ICDR Rules, Arts 7–9 (containing the provisions for challenging arbitrators based on lack of impartiality or independence).
II. Textual commentary

A. Party autonomy and the constitution of the tribunal (Article 6(1) and (2))

Article 6(1)

The parties may mutually agree upon any procedure for appointing arbitrators and shall inform the administrator as to such procedure.

Article 6(2)

The parties may mutually designate arbitrators, with or without the assistance of the administrator. When such designations are made, the parties shall notify the administrator so that notice of the appointment can be communicated to the arbitrators, together with a copy of these rules.

All leading institutional rules accord parties broad autonomy in selecting their arbitrators. Articles 7–9 of the ICC Rules and Articles 7–10 of the 2010 UNCITRAL Rules contain rules similar to Article 6 of the ICDR Rules, granting the parties the right to agree directly on party-appointed (or nominated) arbitrators, and on the procedure for selecting a sole or presiding arbitrator. The parties’ agreement can, and will typically, contain time limits for the various steps in that procedure.

The constitution of the tribunal supplies the parties with a strategic opportunity to tailor the composition of the tribunal to their individual and substantive needs. Parties may select a tribunal that includes specialists in relevant fields, or nominate arbitrators who represent a balance of nationalities or who speak a particular language, or else have a particular academic, practical, or legal background. The ICDR Rules leave it to the parties to agree whether, in the case of a three-arbitrator panel, each party designates a co-arbitrator, who, in turn, jointly agree upon and designate a presiding arbitrator, or whether the presiding arbitrator is designated directly by the parties, or, alternatively, directly by the ICDR administrator, or, indeed, another process (again within the confines of applicable mandatory arbitration law). Additionally, parties may choose to have a sole arbitrator resolve their dispute, which creates its own, sometimes delicate, tactical considerations in the selection process.

4 Certain industries have specialized arbitration rules that even require expertise or a level of experience commensurate with the disputed issues. See eg Procedures of the Resolution of US Insurance and Reinsurance Disputes, Rule 6.2 (requiring the arbitrator and umpire to be either a current or former officer or executive or an insurer or reinsurer).

5 Born, op cit, 1,387.

6.06 In each of these scenarios, only a modicum of restrictions curtails the parties’ freedom to adopt both the method by which arbitrators are selected and to select the arbitrators of their dispute, because multilateral treaties, international conventions, national court decisions, and institutional safeguards, as a general matter, uphold the principle of party autonomy in arbitrator selection.\(^7\) For example, the Geneva Protocol and the Geneva, New York, European, and Inter-American Conventions all explicitly affirm the principle of party autonomy regarding the selection of arbitrators.\(^8\) In turn, national courts of member states of the New York Convention strongly affirm the parties’ right to choose the means of selecting arbitrators.

6.07 In the US, this principle of arbitration has been consistently confirmed in the appellate courts, which have refused to enforce awards that had ignored the parties’ procedural agreements. In one instance, an international arbitral agreement between a company and a foreign government agency called for arbitrators ‘chosen by mutual consent’.\(^9\) The chosen institutional rules, however, provided that the institution would select the arbitrators, similar to the default provisions of Article 6 of the ICDR Rules.\(^10\) After the institution refused to allow the parties to select the arbitrators, one party immediately filed a motion in a US court to compel arbitration by mutually appointed arbitrators, and thus to bar institutionally appointed arbitrators. When the district court denied this motion, the arbitral panel proceeded with the hearing and rendered an award against the objecting party, which the district court confirmed. The objecting party appealed both the denied motion to compel arbitration and the confirmation of the award. The appellate court found fault with the district court’s decision to allow the arbitration to proceed absent mutually appointed arbitrators and also vacated the judgment that enforced the arbitration award, because it was not rendered by arbitrators upon whom the parties had mutually agreed.\(^11\) This decision strongly affirms the principle that in

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\(^7\) For a discussion of some limitations on party autonomy, see below at para 6.16 ff.

\(^8\) See Geneva Protocol, Art II (‘the constitution of the arbitral tribunal shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place’); Geneva Convention, Art I(2)(d) (indirectly requires the constitution of the tribunal ‘in a manner agreed upon by the parties and in conformity with the law governing the arbitration procedure’); New York Convention, Art V(1)(d) (permitting the refusal of recognition and enforcement of an award if ‘the composition of the arbitral authority . . . was not in accordance with the agreement of the parties’); European Convention, Art IV(1)(b) (‘they shall be free inter alia (i) to appoint arbitrators or to establish means for their appointment in the event of an actual dispute’); Inter-American Convention, Art 2 (‘Arbitrators shall be appointed in the manner agreed upon by the parties’).


\(^10\) Ibid, 224 (noting that the Rice Millers’ Association of the United States (RMA) Rules (the RMA Rules) call for an institutional committee to appoint the arbitrators).

\(^11\) Ibid, 226 (4th Cir 1994). See also Universal Reinsurance Corp v Allstate Ins Co, 16 F3d 125, 129 (7th Cir 1994) (noting that procedures for designating arbitrators command as much deference as substantive procedures in the context of a domestic arbitration).
cases in which parties have expressed a desire to select the arbitrators, US courts may find that nothing less will do.

The principle of party autonomy in arbitrator appointments is exemplified further in the context of selecting the presiding arbitrator, or chair, of the tribunal. Most institutional rules preserve the parties’ right to agree to the means of such a selection.\textsuperscript{12} However, institutional rules handle the selection of the third arbitrator differently when the parties have not specifically chosen a method by which the co-arbitrators will appoint the third arbitrator. For example, Article 8(4) of the ICC Rules leaves it to the ICC Court to select the presiding arbitrator unless the parties have specifically agreed otherwise.\textsuperscript{13} Likewise, the LCIA Rules reserve for the LCIA the responsibility for confirming the parties’ nomination, or the co-arbitrators’ selection, of the presiding arbitrator.\textsuperscript{14} By contrast, Article 9 of the 2010 UNCITRAL Rules expressly provides by default that the co-arbitrators agree upon a presiding arbitrator in the absence of a specific provision in the arbitration agreement\textsuperscript{15}—an approach most likely motivated by the fact that arbitrations under the UNCITRAL Rules are unadministered and therefore lack the intervening supervisory power of an arbitral institution.\textsuperscript{16}

To determine whether the presiding arbitrator was selected according to the parties’ agreement, national courts have parsed the language of the parties’ arbitration agreement to assess whether the parties strictly complied with the selection requirements. One US court held that the premature appointment of a third arbitrator by

\textsuperscript{12} See ICC Rules, Art 9(2) (stating that ‘[t]he Secretary General may confirm as co-arbitrators, sole arbitrators and chairmen of Arbitral Tribunals persons nominated by the parties or pursuant to their particular agreements’); SCC Rules, Art 13(1) (leaving the appointment of the chair up to the SCC Board in Art 13(3), but noting that ‘the parties are free to agree on a different procedure for appointment of the Arbitral Tribunal than as provided under this Article). Compare LCIA Rules, Art 5(6) (providing that ‘the chairman (who will not be a party-nominated arbitrator) shall be appointed by the LCIA Court’); International Institute for Conflict Prevention and Resolution (CPR) International Arbitration Rules (CPR Rules), Art 5 (outlining default provisions based on the parties’ choice of three or a sole arbitrators, but not explicitly affirming broad party autonomy in selecting the presiding arbitrator).

\textsuperscript{13} ICC Rules, Art 8(4) provides:

Where the dispute is to be referred to three arbitrators, each party shall nominate in the Request and the Answer, respectively, one arbitrator for confirmation. If a party fails to nominate an arbitrator, the appointment shall be made by the Court. The third arbitrator, who shall act as the chairman of the Arbitral Tribunal, shall be appointed by the Court, unless the parties have agreed upon another procedure for such appointment, in which case the nomination will be subject to confirmation pursuant to Article 9. Should such a procedure not result in a nomination within the time limit fixed by the parties or the Court, the third arbitrator shall be appointed by the Court.

\textsuperscript{14} LCIA Rules, Art 7(1).

\textsuperscript{15} 2010 UNCITRAL Rules, Art 9(1), provides that ‘[i]f three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the tribunal’.

the institution rendered the final award unenforceable under the New York Convention.\textsuperscript{17} In that case, the arbitration agreement called for the two party-nominated arbitrators to attempt to agree on a third arbitrator. The arbitrators were to request an institution to appoint the third arbitrator only if they could not agree. The court thus found a fatal flaw in the process when the institution proceeded to an appointment on the request of one arbitrator without any evidence of an attempted agreement between the two arbitrators.\textsuperscript{18} These decisions underscore the importance of respecting the parties’ choice of the method of arbitrator selection, including the method of selecting the presiding arbitrator—a principle that Article 6 of the ICDR Rules recognizes and implements.

\section*{6.10} Article 6 of the ICDR Rules also permits the parties to designate a sole arbitrator. The arbitration agreement may even specifically identify the sole arbitrator prior to the commencement of the dispute itself—a practice condoned by the national arbitration acts in the USA and other jurisdictions, such as France.\textsuperscript{19} In the same way, US courts have generally enforced agreements in which the parties pre-selected their arbitrator.\textsuperscript{20} However, while the joint appointment of a sole arbitrator before a dispute arises may avoid the possibility that the parties cannot agree on an arbitrator after the dispute commences, the practice is not recommended. One Swiss court, for example, duly noted that ‘it is not forbidden to appoint the arbitrator(s) already in the arbitration clause. This is, however, a ‘risky practice’.\textsuperscript{21} After all, the parties’ designee might be unable or unwilling to serve when a dispute arises (due to illness, death, change of personal circumstances, etc), leaving the parties to resort to the default selection procedure in the Rules, or to attempt to agree to another arbitrator or procedure for selection with the opposing party.\textsuperscript{22}

\section*{6.11} The parties are also free to select a sole or presiding arbitrator once the dispute arises. Even though parties to a dispute may struggle to agree on any issue once the controversy has arisen, it is not infrequent that they reach agreement on a presiding arbitrator. Parties often recognize that their agreement will produce a better, more comfortable result than the imposed appointment by an institution. Thus, statistics

\begin{enumerate}
\item Encyclopaedia Universalis, \textit{SA v Encyclopaedia Britannica, Inc}, 403 F3d 85, 91 (2d Cir 2005).
\item Ibid.
\item See FAA, 9 USC s 5 (noting that the court may appoint an arbitrator if the parties have not agreed ‘with the same force and effect as if he or they had been specifically named therein’); French Code of Civil Procedure, art 1493(1)([t]he arbitration agreement may, directly or by reference to arbitration rules, appoint the arbitrator or arbitrators or provide for a mechanism for their appointment’).
\item See Aviall, \textit{Inc v Ryder Sys}, 913 FSupp 826, 833 (SDNY 1996) (holding that ‘when parties have validly contracted to have a particular arbitrator resolve their disputes, federal courts are loath to alter that selection, especially before the arbitration’); \textit{Floransynth, Inc v Pickholz}, 750 F2d 171, 174 (2d Cir 1984); \textit{Michaels v Marisforum Shipping}, 624 F2d 411, 414 n4 (2d Cir 1980).
\end{enumerate}
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from the ICC and ICSID indicate that parties are able to agree in between 55 and 90 per cent of the disputes.23

Some methods to facilitate such an agreement include the ranking and list methods. Indeed, these methods are outlined in detail, and incorporated into, the AAA Commercial Rules.24 The AAA selects a number of names from its National Roster of Arbitrators. The AAA National Roster of Arbitrators contains the professional information of arbitrators and neutrals upon whom the AAA will draw to select arbitrators when parties so request or when the rules so require.25 The AAA administrator then instructs the parties to reject unacceptable candidates and to rank the remaining ones in order of preference, and chooses the sole or presiding arbitrator from among the remaining names.

The ICDR Rules do not explicitly call for the use of the list procedure as the AAA Commercial Rules do, but instead in Article 6(3), leave the selection of the tribunal by default largely up to the institution’s discretion.26 Although its use is not mandatory, the AAA has developed a list of international arbitrators for the ICDR, as well, known as the ICDR International Panel of Arbitrators and Mediators.27

In line with these principles, the role of the ICDR is naturally limited where the parties are in agreement on the procedure of constitution, or indeed are able to designate the arbitrator(s) themselves. Article 6(1) merely requires the parties to inform the administrator of any agreement that the parties have reached, and of any designation of arbitrators by the parties that arises from such a procedure. In that case, according to Article 6(2), the administrator will notify the arbitrators so designated of their appointment and provide them with a copy of the ICDR Rules. If, however, the parties do not specify the procedure for the constitution of the tribunal, then, by agreeing to the ICDR Rules, the parties have implicitly designated a role for the ICDR in selecting their arbitrators.28

23 ‘2006 Statistical Report’, 18(1) ICC Ct Bull 5, 8 (2007) (finding 42 per cent of cases were referred to a sole arbitrator); ICSID, 2006 Annual Report, 6, available online at <http://icsid.worldbank.org> (finding that 85 per cent of total appointments to ICSID tribunals resulted from party appointments between July 2005 and June 2006).
24 See AAA Commercial Rules, ss R-3 and R-11.
25 To be considered for admission to the AAA National Roster of Arbitrators, individuals must meet several criteria. See Qualification Criteria for Admittance to the AAA National Roster of Arbitrators, available online at <http://www.adr.org/si.asp?id=4223> (requiring a minimum of ten years’ senior-level business or legal experience, appropriate professional licences and degrees, leadership in one’s field of expertise, and neutrality, capacity, and the completion of various administrative steps).
26 Born, op cit, 1,416.
27 See below at para 6.29 ff; see also Qualification Criteria for Admittance to the ICDR International Roster of Neutrals, available online at <http://www.adr.org/si.asp?id=4495> (requiring similar, but more rigorous, experience qualifications for its roster as those required by the AAA National Roster of Arbitrators).
28 This occurs by operation of ICDR Rules, Arts 6–11. Indeed, all leading institutional rules incorporate the same role for the institution when parties agree to apply that institution’s rules. See eg ICC Rules, Arts 7–9; LCIA Rules, Arts 5–9; Swiss International Arbitration Rules, Art 7.
The wording of Article 6(2) could be read to suggest that a designated arbitrator’s first contact with the case is through the administrator. However, neither Article 6(3) nor, more importantly, Article 7(2) prevents a party from approaching a prospective arbitrator to check his or her availability and the existence of conflicts, without, of course, discussing the substance of the case. Indeed, it is standard practice in international law firms today to research and vet proposed arbitrator appointments. As noted above, parties may select arbitrators based upon any number of characteristics and qualifications. Once the strategy is considered, the practitioners typically formulate a list of candidates, and then proceed to contact each to inquire of the candidate’s interest and availability. In contrast, the presiding arbitrator’s first contact with the dispute is usually through the administrator in the instance of an institutional appointment by the ICDR administrator, or through the co-arbitrators, who would contact proposed presiding arbitrators to determine their interest and availability in serving. The involvement by co-arbitrators in the process of selecting the presiding arbitrator can offer an advantage to the parties, particularly if the co-arbitrators are experienced practitioners who may have personal knowledge of, and experience with, the candidates for presiding arbitrator.

B. The limits on party autonomy to select arbitrators

While the parties are free, in principle, to agree on the procedure for the appointment of the arbitrators, multilateral treaties/international conventions, the arbitration law at the seat of the arbitration, and the ICDR Rules (as applied through the parties’ agreement to arbitrate) may impose some limits.

For example, within the scope of the European Convention on Human Rights (ECHR), some countries require that the parties’ agreement on the constitution of the tribunal (including an agreement on the number of arbitrators) comply with the principle of a fair trial mandated under Article 6 of the ECHR. These principles may form part of a country’s procedural public policy and thus limit the parties’ freedom to agree on an appointment mechanism that is unfair to one side.
II. Textual commentary

Other national laws impose more random restrictions on the appointment of arbitrators, based, for example, on nationality or age. These restrictions appear to be at odds with Article V(1)(d) of the New York Convention, which provides an exception to the obligation for enforcement states to recognize Convention awards if the tribunal was not constituted according to the parties’ agreement. Whilst Article V(1)(d), which is on its face limited to the enforcement of awards, does not appear to forbid states directly from imposing such restrictions on the parties’ ability to select their arbitrators, the enforcement state may not have to give effect to such foreign restrictions and instead may defer to the parties’ arbitration agreement.

Notwithstanding the possible conflict of national laws regarding the composition of the tribunal with the New York Convention, because national laws may affect directly the enforceability of the award under Article V(1)(d) of the New York Convention, they retain an important role.

Even so, courts will usually refuse to recognize an award under Article V(1)(d) of the New York Convention if the parties’ agreement regarding constitution of the tribunal is not followed, even if the arbitrator-selection process technically abided by the law of the seat of the arbitration. For example, a US appellate court refused to apply a national law that would fundamentally alter the terms of the parties’ selection clause in an international arbitration between a US company and a UK company. In that case, the application of a legal holiday under the law of the seat of the arbitration would have extended a contractual deadline for the nomination of an arbitrator. The respondent failed to nominate an arbitrator until two days after the agreement specified it was required to do so. Because the respondent was in default, the claimant nominated a second arbitrator, following the procedure specified in the agreement. The respondent challenged the claimant’s nomination of the second arbitrator, and argued that the 30th day was a legal holiday under the state law of California, the seat of arbitration. The court upheld...

35 Born, op cit, 1,444, n 475 (noting that there is a strong argument that some legislatively imposed requirements should apply only to domestic arbitrations, which thus would not impact international arbitrations).

36 Article V(1)(d) of the New York Convention provides:

Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that . . . (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.

37 Born, op cit, 1,444 (analysing the validity of national laws that limit parties’ choices to nominate arbitrators based on nationality).

38 Certain Underwriters at Lloyd’s London v Argonaut Ins Co, 500 F3d 571, 581 (7th Cir 2007).
the claimant’s appointment of a second arbitrator in light of the respondent’s default and wrote:

In light of the recognition by the Supreme Court and by our sister circuits that uniformity in determining the manner by which agreements to arbitrate will be enforced is a critical objective of the Convention, we hold that, in this circumstance, the injection of a parochial rule that interprets a contractual deadline other than by its plain wording is contrary to the interests of the United States as embodied the [New York] Convention.39

6.21 Historically, leading institutions contained rules that limited parties’ choices to require them to select among a list of arbitrators pre-approved by the arbitral institution.40 Most institutions have evolved past this narrow rule because it was seen as contrary to the parties’ genuine preferences and hindered the quality of the final award.41 The AAA/ICDR and ICSID continue to maintain lists from which the administrator selects presiding or sole arbitrators, but these lists are not exclusive nor exhaustive.

C. Default procedure for institutional arbitrator appointments (Article 6(3))

Article 6(3)

If within 45 days after the commencement of the arbitration, all of the parties have not mutually agreed on a procedure for appointing the arbitrator(s) or have not mutually agreed on the designation of the arbitrator(s), the administrator shall, at the written request of any party, appoint the arbitrator(s) and designate the presiding arbitrator. If all of the parties have mutually agreed upon a procedure for appointing the arbitrator(s), but all appointments have not been made within the time limits provided in that procedure, the administrator shall, at the written request of any party, perform all functions provided for in that procedure that remain to be performed.

6.22 One of the more frequently heard complaints about international arbitration is that although it has historically been intended to provide for a more rapid adjudication of a dispute than could be achieved under national court processes, it can become a lengthy process.42 It can sometimes even take months for the parties or an institution

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39 Ibid.
40 Born, op cit, 1,454.
41 A few institutions continue the practice today. For example, see art 4(1) of the Hungarian Chamber of Commerce Court of Arbitration Rules and Proceedings, and arts 21–22 of the China International Economic and Trade Arbitration Commission (CIETAC) Rules, both of which still have a form of the list procedure for selection of arbitrators.
II. Textual commentary

to constitute the tribunal. Institutional rules attempt to mitigate these delays in various ways.

Article 6(3) is triggered if the parties have not agreed on a procedure for constituting the tribunal, in the arbitration agreement or otherwise, within 45 days from the commencement of the arbitration. The ICDR Rules provide for the simple solution of the ICDR appointing all arbitrators—that is, the sole arbitrator or, where agreement on a panel exists or a panel is deemed appropriate by the ICDR pursuant to Article 5, all members of the tribunal—to help to avoid delays.

The administrator thus becomes active in two circumstances. First, the administrator’s role will be triggered if the parties do not agree, within 45 days of the commencement of the arbitration, on the procedure to designate the arbitrators. The ICDR Rules require that ‘any party’ submit a written request in such a case in order to involve the administrator formally. This generally allows for additional time for the parties to reach an agreement and provides additional notice to the parties that the institution will soon be involved in case they prefer to try to agree.

Second, the administrator will become active if the parties have agreed on a procedure, but fail to designate the arbitrators as required and within the agreed time frame under Article 6(3). In that case, the administrator will follow the agreed procedure and simply ‘perform all functions provided for in that procedure that remain to be performed’. If for example, the parties have agreed that each side shall designate an arbitrator within 30 days and the two co-arbitrators then designate a presiding arbitrator, but only the claimant proceeds to make a designation, the administrator will appoint both the arbitrator for the respondent and the presiding arbitrator: both appointments ‘remain to be performed’ within the meaning of Article 6(3).

The ICDR’s default provisions differ from other institutional rules in that they remain silent regarding whether and/or the extent to which the administrator will consider a late party nomination. For example, the LCIA Rules also reserve the power in the LCIA Court to decide whether or not to take a party’s late nomination of an arbitrator into account in making their designation(s). Although it appears clear under the text of the LCIA Rules that the LCIA Court is under no obligation to consider late nominations, the LCIA Court does, in practice, take

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43 ICDR Rules, Art 6(3).
44 Compare LCIA Rules, Art 7.2 (permitting the LCIA to appoint arbitrators, but facilitating the consideration of late nominations made by parties).
45 See LCIA Rules, Art 7(2) (providing that where a party fails to make a nomination within the specified time, ‘the LCIA Court may appoint an arbitrator notwithstanding the absence of the nomination and without regard to any late nomination’).
party nominations into account to the greatest extent possible.  The ICDR Rules similarly leave room for party input through the consultations envisaged in Article 6(4).

D. Selecting ‘suitable’ candidates (Article 6(4))

In making such appointments, the administrator, after inviting consultation with the parties, shall endeavor to select suitable arbitrators. At the request of any party or on its own initiative, the administrator may appoint nationals of a country other than that of any of the parties.

6.27 In making an institutional appointment, Article 6(4) requires the administrator to designate a ‘suitable’ candidate. Article 6(4) does not define a ‘suitable candidate’, nor does it outline specific factors that the administrator may take into account when it appoints an arbitrator or arbitrators. This term is deliberately not specified; it is designed to confer significant discretion on the administrator and the freedom to take into account the circumstances of the case. For the chairman or sole arbitrator appointment, an increased level of arbitral experience may be required. Knowledge of the substantive law and the subject matter of the dispute will also be taken into account.

6.28 Article 6(4) specifically identifies the issue of nationality in conjunction with selecting a suitable candidate. Article 6(4) contains the conditional term ‘may’ in reference to the administrator’s consideration of nationality. Thus the administrator may take into account the nationality of the parties, but is not required to do so, even when so requested by a party. In practice, the nationality of an arbitrator may play a prominent role during the appointment of the presiding arbitrator: there is a perception of additional neutrality if the presiding arbitrator is from a different country from the parties and otherwise removed from any national links to the dispute.

47 Although concrete, overt examples of arbitrator partiality based on nationality are difficult to identify, numerous anecdotes lead parties to desire a presiding arbitrator from a neutral country. One well-documented instance of partiality based on nationality captured just the sort of arbitrator partiality that administrators try to avoid when appointing the presiding arbitrator. This well-known instance took place when a dispute arose between Portuguese and Norwegian parties. The Norwegian-appointed arbitrator was overheard stating that Portuguese people were liars. The arbitrator was removed. See Re The Owners of the Steamship ‘Catalina’ and The Owners of the Motor Vessel ‘Norma’, [1938] 61 Lloyd’s List LR 360, 361, relying on a witness affidavit that the arbitrator had said:

The Italians are all liars in these cases and will say anything to suit their book. The same thing applies to the Portuguese. But the other side here are Norwegians, and in my experience the Norwegians generally are a truthful people. In this case I entirely accept the evidence of the master of the Norma.
The list method plays a significant role in arbitrations under ICDR Rules—even more so if the parties’ lack of agreement triggers the default in Article 6. As an initial matter, Article 6 allows the parties mutually to agree to employ the list procedure to establish the tribunal at any stage of the constitution of the tribunal. Under this approach, the ICDR administrative staff may submit a list of arbitrators from which each party may delete names that it finds unacceptable for the particular dispute. Alternatively, the parties may call upon the ICDR administrative staff to appoint the arbitrators without submission of lists at all or leave the use of the lists up to the AAA/ICDR’s discretion.

Although not provided for in the ICDR Rules, the ICDR’s default administrative practice is to use the list method for the appointment of arbitrators. Accordingly, if the parties have not agreed on a procedure for appointing arbitrators within 45 days of the commencement of the arbitration, the AAA/ICDR will invite comments from the parties and then appoint the arbitrators under Article 6(3). In practice, the parties tend to opt for the list procedure within the 45-day window provided by Article 6. Where the parties agree on the application of the ‘list method’, the ICDR usually requires the parties either to agree on an arbitrator, or to return the list with their choices, within seven to 15 days, depending on the nature of the case, and unless the parties have agreed otherwise. If a party fails to return the list, it is deemed to have accepted all of the names on it as suitable. The list procedure has been successful within the AAA/ICDR, largely because the AAA/ICDR remains mindful of the importance of skilled arbitrators. Accordingly, the institution maintains and reviews its roster of preeminent and nationally diverse arbitrators. The institution reviews the candidate’s credentials, level of international expertise, prior arbitration and mediation experience, and demonstrated acceptability. Routinely, the ICDR and AAA interview parties who have undertaken AAA/ICDR institutional arbitration to ascertain their level of satisfaction with the arbitrator’s performance. However, even with these mechanisms in place, the list procedure can result in lengthy delays and sometimes provides few advantages beyond those that a simple exchange of names between the parties or co-arbitrators could produce. Several prominent commentators have identified the LCIA’s process for arbitrator appointment, which vests the appointment of the

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49 Hoellering, op cit, 106.
50 Ibid.
51 Hoellering, op cit, 106.
52 Ibid, 104.
53 Ibid, 105.
54 Ibid.
tribunal in the LCIA, as the most efficient, albeit at the expense of some party involvement. Notwithstanding the success of the ICDR institutional appointments and the list method, parties are well advised to discuss specific qualifications and requirements for the prospective arbitrators as early as during the administrative conference call.

E. Constituting the tribunal in multi-party arbitrations (Article 6(5))

Article 6(5)

Unless the parties have agreed otherwise no later than 45 days after the commencement of the arbitration, if the notice of arbitration names two or more claimants or two or more respondents, the administrator shall appoint all the arbitrators.

6.31 One of the fundamental principles of commercial arbitration is the parties’ equal treatment. But this seemingly self-evident notion gets complex when one party commences arbitration against two other parties, under a clause that provides for a three-member tribunal. The increasingly common phenomenon of multi-party arbitrations—and in particular the appointment of an arbitrator where multiple parties on one side fail to agree on a joint nomination—raises significant concerns in this regard. Assuming a situation in which a single claimant claims against several respondents, to permit the claimant to appoint an arbitrator and to require the respondents jointly to nominate an arbitrator may deny each respondent its right to select ‘its’ arbitrator—and arguably, therefore, fails to comport with the principle of equal treatment. If there are, for example, three respondents who may even have divergent interests, why should they be forced jointly to nominate an arbitrator and what are the consequences if they do not? Conversely, to allow two respondents each to select an arbitrator could allow aligned interests to compose

56 See ibid, 1417 (commenting on the efficiency of the LCIA Rules regarding the constitution of the tribunal); P Turner and R Mohtashami, A Guide to the LCIA Arbitration Rules (Oxford University Press, Oxford, 2009) 71–72 (describing the procedures for constituting the tribunal expeditiously and noting that these tribunals may also consider the merits, which is a unique feature of the LCIA Rules).
57 A call with the administrator may be warranted if the parties require administrator involvement in arbitrator selection.
58 Born, op cit, ch 14.
60 Schwarz and Konrad, op cit, para 15-033 ff.
the majority of the panel, effectively sealing off the claimant’s chances of obtaining the relief sought. Issues of due process and public policy also arise in the context of joinder, when the respondent joins additional parties to the arbitration, even though the original parties have selected the tribunal already—leaving the joined respondents without a role in one of the most important and outcome-determinative aspects of the arbitral process: the selection of the decision-makers.61

The default rule in the ICDR Rules, Article 6(5), permits the administrator to select all arbitrators in multi-party arbitrations under its rules. Such a result, it has been argued, could deny all three (or more) parties the right to select an arbitrator, and thus usurp the fundamental right of the parties to participate in the selection and constitution of the panel,62 albeit in a manner that treats each of the parties equally. Neither result seems satisfactory.63

The problems associated with denying parties their right to participate are illustrated by the famous case of Siemens AG/BKMI Industrienanlagen GmbH v Dutco Construction Company, decided by the French Cour de Cassation in 1992.64 In this case, the Court was asked to consider the issue of equal treatment of the parties with regard to the constitution of an arbitral tribunal when two respondents each claimed a right to appoint an arbitrator. The respondents ultimately made a joint appointment, but they did so under protest. The French Court found that the constitution of the tribunal had been unfair to the respondents because it afforded Dutco (which was able to appoint an arbitrator) a better position to influence the final outcome of the arbitration than that of the respondents (who could not agree on an arbitrator and therefore lost their right of appointment to the institution). The Court therefore set aside the award reasoning that ‘the principle of the equality of the parties in the appointment of arbitrators is a matter of public policy (ordre public) [and] can be waived only after a dispute has arisen’.65

Although the Dutco decision has met with considerable scepticism in other jurisdictions,66 most major arbitral institutions have subsequently amended their

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61 Born, op cit, 2,099.
63 See generally Schwarz and Konrad, op cit, para 15-032 ff (considering the effect of multiple parties on the constitution of the tribunal under the Vienna Rules); Born, op cit, 2,099–104.
65 See ibid.
rules to ensure equality. For example, the ICC Rules were amended in 1998 to reserve the right in the ICC Court to appoint all members of the tribunal in multiparty cases. The SCC Rules similarly vest the SCC Board with the power to appoint the entire tribunal if the multiple claimants or respondents fail jointly to nominate an arbitrator. This procedure also exists in modified form in the German Institution of Arbitration (DIS) and WIPO Rules. Likewise, Article 6(5) of the ICDR Rules leaves it to the parties to agree on a particular procedure within 45 days from the commencement of the arbitration, failing which, the administrator will appoint all arbitrators, both for the claimant and the respondent side.

6.35 Some have raised concerns that this solution is unfair because, by deliberately not agreeing on an arbitrator, the respondents could effectively cancel the appointment of the claimants’ arbitrator. But absent indications of bad faith in connection with the non-appointing multi-party side or other circumstances specifically justifying non-identical treatment, such as equality of interest amongst one multi-party side, the institutional appointment of only one side’s arbitrator while upholding the other side’s appointment still runs the risk of violating the principle of equality. Therefore, the now-predominant approach of the institutions appointing all three arbitrators tends to treat both sides equally, because both sides are faced with an institutional appointment, in what is a prompt and unequivocal solution that uniformly applies to all cases—perhaps the lesser of many evils.

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67 ICC Rules, Art 10(2) provides that if the multiple claimants or respondents cannot jointly agree to nominate an arbitrator, ‘the Court may appoint each member of the Arbitral Tribunal and shall designate one of them to act as chairman’.

68 SCC Rules, Art 13(4).

69 Under the DIS Rules, Art 13, if multiple respondents fail jointly to appoint an arbitrator, the institution will set aside the claimant’s appointment and nominate two arbitrators—but the institution will not appoint the presiding arbitrator.


73 The other model, which is less favoured today, takes the more traditional approach of leaving the claimants’ joint appointment in place and making an institutional appointment only on behalf of the respondents. See eg VIAC Rules, Art 15.

74 K-P Berger, ‘Schiedsrichterbestellung in Mehrparteien- und multilateralen Wirtschaft 702 [1993].
ARTICLE 7—IMPARTIALITY AND INDEPENDENCE OF ARBITRATORS

I. Introduction

Article 7 requires that arbitrators in ICDR disputes shall be impartial and independent. To assess an arbitrator’s independence and impartiality, Article 7 requires broad

II. Textual commentary

A. Impartiality and independence (Article 7(1))

1. The application of impartiality and independence under the ICDR Rules (‘[a]rbitrators acting under these Rules shall be impartial and independent’)
and continuous disclosure (‘at any stage during the arbitration’), which also allows the parties to determine whether they wish to challenge a named arbitrator using the procedure set out in Articles 8 and 9. The requirements of impartiality and independence seek to ensure the integrity of the arbitral process, and emanate from the arbitrators’ judicial function in resolving the dispute.¹

7.02 These obligations have gained importance more recently, altering the historic view that arbitrators might serve if partial to one side. Contemporary qualifications of impartiality and independence have evolved in academic writings, national law, and international law; the concept of ‘justifiable doubt’, which the ICDR and other leading arbitral institutions explicitly incorporate into their rules, requires further analysis.

7.03 The importance of impartiality and independence is significant. These notions affect the very core of arbitration, including the selection of arbitrators and the subsequent process for challenging arbitrators, and even provide a potential basis for seeking to annul the resulting award. Most leading institutional rules and national laws permit a party or the administering institution to challenge or reject a nominated arbitrator due to a lack of independence or impartiality.² The New York Convention indirectly supports the requirements for independence and impartiality in Articles II(1), II(3), and V(1)(d), which bind a national court to recognize and enforce an award rendered according to the parties’ agreement to arbitrate. The parties’ agreement, in turn, may include contractual requirements providing for the independence and impartiality of the arbitrators³—particularly

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¹ See GB Born, International Commercial Arbitration (Kluwer Law International, The Hague, 2009) 1,463 (discussing the need for independence and impartiality in arbitrators because arbitration involves binding decisions that dispose of parties’ legal rights and which are subject to minimal appellate review).

² The ICC, for example, retains discretion to reject parties’ nominations, by virtue of the fact that the ICC Rules require the institution to confirm the arbitrators even when the parties agree on the appointment. See ICC Rules, Arts 7–9. In practice, the ICC rarely rejects nominations, doing so in fewer than 2 per cent of its total appointments and confirmations in 2009. When the ICC does refuse to appoint an arbitrator, it is typically for lack of independence. See ‘2009 Statistical Report’, 21(1) ICC Ct Bull 10 (2010) (identifying that, of 1,305 total appointments and confirmations, the ICC Court refused to appoint only 22 arbitrators; of the 22 whom it refused to appoint, it refused 15 for lack of independence).

³ The New York Convention also indirectly addresses the independence and impartiality of the arbitrators in Art V(1)(b), which provides for the non-recognition of awards where a party was denied an opportunity to be heard—a result that can occur with a biased tribunal. This provision is similar to Art 6 of the ECHR, which requires a hearing by ‘an independent and impartial tribunal’.
where the agreement incorporates institutional rules that require impartiality and independence, such as Article 7 of the ICDR Rules. In addition, Article V(2)(b) of the New York Convention permits a contracting state to refuse recognition and enforcement of an award if to do so would be contrary to public policy in that state. This, in turn, indirectly supports a requirement of independence and impartiality if a state’s public policy includes having awards rendered by impartial and independent arbitrators.

Notwithstanding the obligation that party-appointed nominators remain impartial and independent, it is important to remember that an important purpose of having party-appointed arbitrators is to ensure that one member of the tribunal is aware of, and sensitive to, that party’s legal, cultural, and commercial background. Indeed, selecting an arbitrator who will view a particular issue or case through a similar cultural prism as one’s client is one of the more important characteristics of international arbitration. For these and other reasons, the appointment of an arbitrator of one’s choosing is viewed as a fundamental right that must not be undermined through overzealous standards and frivolous challenges.

II. Textual commentary

A. Impartiality and independence (Article 7(1))

Article 7(1)

Arbitrators acting under these rules shall be impartial and independent. Prior to accepting appointment, a prospective arbitrator shall disclose to the administrator any circumstance likely to give rise to justifiable doubts as to the arbitrator’s impartiality or independence. If, at any stage during the arbitration, new circumstances arise that may give rise to such doubts, an arbitrator shall promptly disclose such circumstances to the parties and to


6 Born, op cit.

7 N Blackaby, C Partasides, A Redfern, and M Hunter, Redfern and Hunter on Law and Practice of International Commercial Arbitration (5th edn, Oxford University Press, Oxford, 2009) 315 (referring to party autonomy in choosing procedures to govern the arbitration as a ‘guiding principle . . . that has been endorsed not only in national laws, but by international arbitral institutions and organisations’; also discussing the UNCITRAL Model Law, Art 19(1), which provides ‘[s]ubject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings’).
7.05 It is an important principle of due process that arbitrators, like any judicial decision-maker, must carry out their functions impartially and independently from the parties. Unlike in national courts, in commercial arbitration, parties have the right to select arbitrators of their choosing in arbitration. Respecting this right and ensuring a non-partisan decision-making process at the same time has been called the ‘crux of arbitration’. The significance of these requirements is rooted in the potential for challenging arbitrators based on their lack of impartiality and independence, as discussed below in Articles 8 and 9.

7.06 Historically, it was commonplace for party-appointed arbitrators to be partisan. This trend was particularly pronounced in domestic arbitration in the USA, which has a robust history of openly partisan arbitrators, with the presiding arbitrators the only ones labelled ‘neutral’. While the ICDR Rules have always required party-nominated arbitrators to be impartial and independent, the AAA Commercial Rules called for different standards of independence and impartiality for co-arbitrators and presiding arbitrators until 2003. Thus, the drafting history of the Commercial Rules reflects the acceptability of partisan arbitrators in particular in domestic

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9 Recently, this cornerstone principle of arbitration was challenged by a prominent arbitrator as a hindrance to efficiency and cost savings in arbitrations: J Paulsson, ‘Moral Hazards and Wishful Thinking’, Lunch Presentation, 21st Annual Institute for Transnational Arbitration (ITA) Workshop, Commencing an International Commercial Arbitration: Fundamentals and Strategy, 17 June 2010 (Dallas, Texas). Paulsson instead suggested that institutions such as the ICC, LCIA, and ICDR should be charged with the task of selecting arbitrators because they are better suited to assessing qualifications for selecting impartial and independent arbitrators, which would avoid such issues as parties appointing from the same limited pool of well-known, increasingly busy (and therefore slow, unavailable, or overwhelmed) individuals.

10 F Matscher, ‘Schiedsgerichsbarkeit und EMRK’, in WJ Haberscheid and K Schwab (eds) Festschrift für Heinrich Nagel zum 75 Geburtstag (Aschendorff, Münster, 1987) 236. Indeed, the Committee for the Revised Uniform Arbitration Act, which is a US model arbitration law available for adoption by the 50 states, noted ‘[t]he notion of decision making by independent neutrals is central to the arbitral process’: Revised Uniform Arbitration Act, s 12, comment 1 (2000).


13 AAA Commercial Rules, s R-12(b) [2009].
II. Textual commentary

US arbitrations. To this day, whilst a presumption of neutrality now extends more broadly to all arbitrators, the ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes recognizes that, in domestic US cases, the parties may still wish to appoint non-neutral arbitrators and thus permits the parties, by agreement, to appoint non-neutral decision-makers.

Actions to vacate awards under the FAA therefore often involved a sharp distinction between the roles of co-arbitrators and presiding arbitrators. One lower court noted that party-appointed arbitrators ‘may not be completely disinterested, [which] accords with the generally accepted practice in arbitration proceedings of this kind’. Another early judgment famously stated: ‘As everyone knows, the party’s named arbitrator is an amalgam of judge and advocate.’ In a decision as recent as 2001, a US appellate court found obvious bias on the part of a domestic arbitrator to be acceptable, stating that ‘a non-neutral party arbitrator’s conduct in participating in meetings with witnesses, suggesting lines of testimony, helping select consultants and advising an expert witness as to his testimony is “not only unobjectionable, but commonplace”.’ This strong historic ‘bias towards bias’ perhaps explains the contemporary backlash in the USA to create the default assumption that all arbitrators must be neutral, resulting in the internationally criticized trend towards overdisclosure.

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14 Finizio, op cit.
15 See eg the American Bar Association (ABA) Code of Ethics for Arbitrators in Commercial Disputes, Preamble:

The sponsors of this Code believe that it is preferable for all arbitrators—including any party-appointed arbitrators—to be neutral, that is, independent and impartial, and to comply with the same ethical standards. This expectation generally is essential in arbitrations where the parties, the nature of the dispute, or the enforcement of any resulting award may have international aspects. However, parties in certain domestic arbitrations in the United States may prefer that party-appointed arbitrators be non-neutral and governed by special ethical considerations. These special ethical considerations appear in Canon X of this Code. (Emphasis added)

See also ABA Code of Ethics for Arbitrators, Canon X, ‘Exemptions for Arbitrators Appointed by One Party Who Are Not Subject to Rules of Neutrality’, available online at <http://www.abanet.org/dispute/commercial_disputes.pdf>; AAA Commercial Rules, s R-12(b) (‘Where the parties have agreed that each party is to name one arbitrator, the arbitrators so named must meet the standards of R-17 with respect to impartiality and independence unless the parties have specifically agreed pursuant to R-17(a) that the party-appointed arbitrators are to be non-neutral and need not meet those standards’).

16 See Petition of Dover SS Co, 143 FSupp 738, 740–41 (SDNY 1956) (party in a domestic arbitration moved to disqualify the arbitrator before the arbitration proceedings began).

17 In this case, one of the party-appointed arbitrators died prior to the rendering of a final award. The arbitration clause did not address the appropriate procedures for such circumstances. The court ultimately held that a new arbitration must be commenced, because the party who lost his partisan arbitrator potentially faced an unfair disadvantage in the dispute: Cia de Navegacion Omsil, SA v Hugo Neu Corp, 359 FSupp 898, 899 (SDNY 1973).


19 For example, the ICC’s promulgation in August 2009 of its new ‘Statement of Acceptance, Availability and Independence’ for prospective arbitrators appointed under its Rules (and its revised
In any event the 2004 revision of the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes signified a change, in that it provided expressly for a presumption of neutrality to all, including the party-appointed, arbitrators, which applies unless the parties agree otherwise.\textsuperscript{20} The AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes (which is frequently referenced by the ICDR as part of the AAA framework) has therefore brought US arbitration more in line with international practice, which typically imposes the same standards of independence and impartiality on party-nominated and presiding arbitrators alike.\textsuperscript{21} For example, since the 1970s, the UNCITRAL Model Law has not distinguished between party-nominated and presiding arbitrators, indicating that co-arbitrators are subject to the same standards of impartiality and independence.\textsuperscript{22} Since 1989, the Swiss arbitration statute has similarly required that all arbitrators be independent.\textsuperscript{23}

Institutional rules for international arbitration appear to adopt the same view, although the particular provisions differ across institutions. For example, arbitrators acting under ICC Rules must be, and must remain throughout the case, ‘independent of the parties involved in the arbitration’, and are required to ‘act fairly and impartially’.\textsuperscript{24} Arbitrators acting under LCIA Rules ‘shall be and remain at all times impartial and independent of the parties; and none shall act in the form in January 2010) has drawn criticism from the established arbitration community for being at once ineffectual and an overbroad intrusion into an individual's affairs. With regard to these requirements, the Global Arbitration Review recently noted that '[b]usy prospective arbitrators may find the disclosure requirements onerous or the disclosure itself may prove to be of historical interest only in light of commitments agreed to after appointment': P Heneghan, 'Arbitrator Ethics: Developments', in \textit{The European and Middle Eastern Arbitration Review 2010} (2009) available online at <http://www.globalarbitrationreview.com/reviews/22/sections/81/chapters/827/arbitrator-ethics-developments/>. In contrast, however, without explicitly requiring disclosure, the ICDR’s Guidelines for Arbitrators Concerning Exchanges of Information, available online at <http://www.adr.org/si.asp?id=5288>, state that arbitrators ‘have the authority, the responsibility, and, in certain jurisdictions, the mandatory duty to manage arbitration proceedings so as to achieve the goal of providing a simpler, less expensive, and more expeditious process’. These rules became effective in all international cases administered by the ICDR after 31 May 2008.


\textsuperscript{21} See eg UNCITRAL Model Law, Art 12; Swiss Law on Private International Law, art 180; English Arbitration Act 1996, s 24(1)(a).

\textsuperscript{22} UNCITRAL Model Law, Art 12 (originally adopted in 1985 and amended to retain requirements of independence in 2006).


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arbitration as advocates for any party’. Arbitrators acting under the 2010 UNCITRAL Rules may simply be challenged for lack of ‘impartiality and independence’. No apparent difference exists in those rules between party-appointment arbitrators and chairs.

1. The application of impartiality and independence under the ICDR Rules ([a]rbitrators acting under these Rules shall be impartial and independent)

Even though all major institutional arbitration rules impose some standard of neutrality on the arbitrator, there is no unified terminology. Article 7 simply requires that ‘[a]rbitrators acting under these Rules shall be impartial and independent’. Yet none of the institutional or non-administered rules define ‘impartiality’ or ‘independence’.

While current international institutional rules on arbitrator conflicts represent an almost universal consensus on the requirements of impartiality and independence, much controversy exists around the precise application of the requirements in practice: it is clear that they must apply, but less clear what they actually mean. Notably, the International Bar Association (IBA) Guidelines on Conflicts of Interest (the ‘IBA Conflict Guidelines’) sought to establish internationally accepted standards. To create the IBA Conflict Guidelines, the Committee on Arbitration and ADR of the IBA appointed a working group of 19 experts from 14 countries to examine thoroughly conflicts of interest and disclosure issues across jurisdictions, and to adopt a set of general standards to assist lawyers, parties, arbitrators, and courts in making clear and uniform decisions on challenges.

First, the IBA Conflict Guidelines set out General Standards and explanatory notes. For example, the IBA Conflict Guidelines propose an objective standard for assessing doubts of the arbitrator’s impartiality and independence in General Standard 2(b), which requires the doubts to be in the mind of a ‘reasonable and informed third party’. Second, the IBA Conflict Guidelines formulate lists of specific situations

25 LCIA Rules, Art 5(2). The LCIA emerged from arbitration facilities that date back to the 1880s. The modern arbitration rules, including requirements of independence, were adopted in 1981: ‘History of LCIA’, available online at <http://www.lcia.org/LCIA_folder/lcia_history_main.htm> [accessed 12 July 2010].

26 2010 UNCITRAL Rules, Art 12.

27 CA Rogers, ‘Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct’, 41 Stan J Intl L 53 (2005); W Craig, W Park, and J Paulsson, International Chamber of Commerce Arbitration (3rd edn, Oceana Publications, New York, 2000) para 13-03 (noting that while ‘it is undoubtedly established that all ICC arbitrators must be independent, the definition of “independence” remains elusive’).


that are categorized as ‘Red’ (relationships or circumstances inconsistent with the appearance of impartiality), ‘Orange’ (relationships or circumstances requiring disclosure), and ‘Green’ (relationships or circumstances that do not require disclosure), providing an indication of whether it is appropriate for the arbitrator to disclose any circumstance that might give rise to the appearance of partiality, or whether self-recusal or removal of an arbitrator is appropriate.\(^{30}\) The list approach seeks to balance flexibility and certainty, and permits waiver of most conflicts. For example, the Green list identifies potential ‘conflicts’, such as the situation of a potential arbitrator having previously written and published on a particular issue that is relevant to the arbitration at hand. This and other such issues have been deemed by the drafters as posing no problem to an arbitrator serving impartially, and hence are deemed not to require disclosure to the parties. If a proposed arbitrator has had a number of prior appointments by the same client or law firm, however, such a circumstance would qualify for the Orange list and require disclosure. For relationships and situations encompassed by the Orange list, the IBA Conflict Guidelines provide a sliding scale that allows for varying circumstances to be taken into account.\(^{31}\)

7.13 The IBA Conflict Guidelines have been influential, but because institutions (much less national courts) are not constrained by the list-based definitions, a binding international standard of impartiality and independence is yet to emerge.\(^{32}\) The role of the IBA Conflict Guidelines should not be overstated in the context of ICDR arbitrations, particularly those seated in the US, where the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes, as revised in 2004, remains particularly important.

7.14 Internationally, scholars have gone to great lengths to attempt to distinguish between ‘independence’ and ‘impartiality’.\(^{33}\) Some have suggested that independence indicates the absence of unacceptable external relationships or connections between an arbitrator and a party or its counsel—including financial, professional, employment, or personal.\(^{34}\) These relationships that may affect independence thus

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\(^{30}\) Hoffmann, op cit.

\(^{31}\) Ibid, 435.


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appear to be objectively observable through factual connections.\textsuperscript{35} Impartiality, in contrast, appears to be a subjective inquiry that refers to (and demands) a certain state of mind from the arbitrator.\textsuperscript{36} Most importantly, commentators have also stressed that these qualifications of impartiality and independence are demanded also vis-à-vis an appointing party.\textsuperscript{37} One author specifically addressed the evolution of non-partisan arbitrators and noted that:

Unquestionably all members of the tribunal in international arbitration should be held to the same standard of independence, whether appointed by a party or not. The concept of a non-neutral arbitrator as it exists in some common law systems simply has no place where the parties are of different nationalities and might lose faith in the arbitral process if a foreign, apparently lesser, standard was applied.\textsuperscript{38}

Yet national law remains highly relevant for these issues. Although the arbitral institution (such as the ICDR under Articles 7 and 8) will decide a challenge, that decision is usually subject to review by the courts at the seat of the arbitration, either immediately or in the context of a recognition and enforcement proceeding.

Similarly, ‘impartiality’ and ‘independence’ assume different meanings in international doctrine. Impartiality is described as the arbitrator’s ability to assume a state of mind,\textsuperscript{39} in which the arbitrator does not adopt a position favourable to either of the parties until the case has been heard and argued in full.\textsuperscript{40} Independence, in contrast,\textsuperscript{41} is often understood as a more objective factor that refers to the relationship


It seems to us that lack of independence, unless it gives rise to justifiable doubts about the impartiality of the arbitrator, is of no significance. The latter is, of course, the first of our grounds for removal. If lack of independence were to be included, then this could only be justified if it covered cases where the lack of independence did not give rise to justifiable doubts about impartiality, for otherwise there would be no point including lack of independence as a separate ground.


\textsuperscript{36} Significantly, scholars have also noted that the distinction between objective and subjective standards may be moot, because even impartiality—a presumably subjective state—must be shown effectively through factual, objective circumstances in order to sustain a challenge or seek annulment of an award. Therefore, both terms prompt slightly different aspects of the same inquiry: ibid.


\textsuperscript{38} WM Tumman, ‘Challenge and Disqualification of Arbitrators in International Commercial Arbitration’, \textit{38 Intl and Comp LQ} 26, 49 (1989).


\textsuperscript{41} The term ‘neutral’ or ‘non-neutral’ arbitrator is also commonly used in domestic US arbitration. Under that concept, a party-appointed arbitrator may be non-neutral and, as such, predisposed towards a party. At least conceptually, the idea of a non-neutral arbitrator is difficult to understand, or endorse, from a European perspective. Indeed, the ABA/AAA Code of Ethics for Arbitrators has abandoned the previously applicable principle that party-nominated arbitrators are non-neutral in favour of an assumption of neutrality; thus parties must expressly agree to non-neutral arbitrators.
between the arbitrator and the parties. An arbitrator is independent if he or she lacks a close, substantial, and recent relationship, whether personal, social, or financial, with either one of the parties that is ‘likely to give rise to a personal interest in the result of the arbitration’.

At a minimum, arbitrators are prohibited from having any direct relationship with the parties that would give rise to a financial, business, or professional interest by the arbitrator. Obviously, a close, private relationship to one of the parties may also affect the arbitrator’s freedom of judgment. A lack of independence (arising from objective, external factors) therefore indicates a lack of impartiality (as a matter of the arbitrator’s subjective mindset).

7.16 Although there are requirements of impartiality and independence under international doctrine, the exact contours are unclear. In considering a challenge to an International Court of Justice (ICJ) judge, a judge on the panel deciding the challenge wrote: ‘Judicial ethics are not matters strictly of hard and fast rules—I doubt that they can ever be exhaustively defined—they are matter of perception and of sensibility to appearances that courts must continuously keep in mind to preserve their legitimacy.’

Perhaps most succinctly, one commentator noted: ‘It is the international reflection of the maxim that justice must not only be done, but must be seen to be done.’

2. Nationality of the arbitrator

7.17 Nationality alone is not determinative of whether an arbitrator is independent or impartial. The UNCITRAL Model Law specifically denies the parties from complaining about a proposed arbitrator if regarding nationality only.

The Model Law further provides that an appointing authority, when appointing the sole or presiding arbitrator, ‘shall take into account’ the ‘advisability’ of appointing an arbitrator whose nationality differs from that of the parties. The phrases ‘take into account’ and ‘advisability’ indicates that a different nationality is not a mandatory criterion, but is a factor that must be considered when selecting an arbitrator. Similarly, the

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47 UNCITRAL Model Law, Art 11.1, provides, ‘[n]o person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties’.
48 Ibid, Art 11.5, which provides in relevant part, ‘The court or other authority, in appointing an arbitrator, . . . shall take into account as well the advisability of the appointing an arbitrator other than those of the parties’.
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ICC Rules only require that the ICC Court ‘shall consider the prospective arbitrator’s nationality, residence, and other relationships with the countries of which the parties or the other arbitrators are nationals’.  

Article 6(3) of the ICDR Rules, similar to the ABA Code of Ethics for Arbitrators in Commercial Disputes, provides, that ‘[a]t the request of any party or on its own initiative, the administrator may appoint nationals of a country other than that of any the parties’. Again, this rule is not mandatory and incorporates the factor of nationality as one consideration into the institution’s discretion. Under the framework of the ICDR Rules, an arbitrator’s identical nationality with one of the parties is therefore by itself no indication of a lack of impartiality and independence.

3. Disclosure

The duty to disclose is a necessary corollary of the duty to be impartial and independent: one cannot exist without the other. Article 7(1) requires arbitrators to ‘be’ impartial and independent, and it requires disclosure of circumstances ‘likely to give rise to justifiable doubts’. If the arbitrator ‘is’ not actually impartial and independent, he or she must not accept the appointment in the first place; in addition, if the arbitrator thinks that a certain fact is ‘likely to give rise to justifiable doubts’, he or she must disclose it. These duties are directly imposed on each arbitrator. Importantly, the failure to disclose a fact that is ‘likely to give rise to justifiable doubts’—even if the non-disclosed matter would not itself justify disqualification—may provide independent grounds for challenging an arbitrator, because it can indicate a partial state of mind.

Disclosure obligations, like the impartiality requirement itself, stem from many sources, including national arbitration laws, national court decisions, and

49 ICC Rules, Art 9(1).
50 ABA Code of Ethics for Arbitrators, art 6.4.
51 In Switzerland, the Swiss Bundesgericht has found that the duty to disclose is an implied contractual duty of the arbitrator. See OLO De Witt Wijnen, N Voser, and N Rao, ‘Background Information on the IBA Guidelines on Conflict of Interest’, 5 Bus L Intl (2004) fn 13.
52 See eg International Bar Association (IBA) Rules of Ethics for International Arbitrators, Art 4(1) (providing that ‘[f]ailure to make such [a required] disclosure creates an appearance of bias, and may of itself be a ground for disqualification even though the non-disclosed facts or circumstances would not of themselves justify disqualification’).
53 See eg French Code of Civil Procedure, art 1452(2) (‘L’arbitre qui suppose en sa personne une cause de récusation doit en informer les parties. En ce cas, il ne peut accepter sa mission qu’avec l’accord des parties’); Swedish Arbitration Act, s 9; German Zivilprozessordnung (ZPO), s 1036(1). But see the US Federal Arbitration Act, which does not contain an explicit obligation to disclose potential conflicts: GB Born, International Commercial Arbitration (Kluwer Law International, The Hague, 2009) 1,544 (noting that the FAA imposes no direct obligation, but US court decisions have required such disclosures).
54 Commonwealth Coatings Corp v Cont’l Cas Co, 393 US 145, 149 (1968) (holding that arbitrators must ‘disclose to the parties any dealings that might create an impression of possible bias’); Hoffman,
Article 7(1) of the ICDR Rules contains two important principles that give rise to significant disclosures. The first principle is the duty to disclose potentially disqualifying relationships, which the ICDR implements through the notice of appointment, as discussed further below. The second principle is that the requirements of independence and impartiality exist at the beginning of the proceedings and remain throughout the proceedings, because Article 7(1) requires arbitrators to ‘be’ impartial and independent and the duty of prompt disclosure continues to apply ‘at any stage during the arbitration’.

7.21 The application of the disclosure requirements depends heavily on the facts and the context of the parties’ arbitration agreement. Disclosure enables the institution and the parties to make an informed decision if the appointment, or the challenge, of an arbitrator is appropriate under the circumstances. In fact, the ICDR’s approach to ensuring that the arbitrators make informed decisions has been called ‘cautious’. It attempts to ensure that the awards rendered under the institution’s auspices are enforceable. Article 7 requires any prospective arbitrator to examine his or her relationship to the parties and the circumstances of the case carefully to identify conflicts that would prevent his or her accepting the appointment, or would require the parties’ waiver of a fact or circumstance giving rise to a disclosure obligation. However, the arbitrator cannot be the ultimate judge as to whether his or her service is appropriate under the circumstances. Thus disclosure affords the parties and the administering institution the opportunity to assess the arbitrator’s impartiality and independence.

7.22 The standard of disclosure, like the standard of impartiality and independence, is hotly debated in international arbitration, as discussed above. Most rules and laws advocate a subjective standard that requires arbitrators to disclose those circumstances that give rise to doubts from the parties’ perspective. As discussed above, General Standard 3(a) of the IBA Conflict Guidelines, for example, requires the disclosure of facts ‘that may, in the eyes of the parties, give rise to doubts as to the arbitrator’s impartiality or independence’.

7.23 Although Article 7(1) does not contain such an express reference to a subjective perspective of the parties, on balance, it is more appropriate to apply a subjective standard to disclosure under the ICDR Rules as well. As a matter of principle, if...
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there is an objective appearance of bias, the arbitrator should simply decline to serve. If one were to require disclosure under the same criteria that apply to disqualification, however, every disclosure by an arbitrator would necessarily lead to disqualification. The arbitral process benefits from disclosures even where the disclosed fact should not and does not lead to disqualification; this facilitates the policy aims of transparency, and of encouraging disclosures in case of doubt and at all stages of the arbitration.

The potential to challenge an arbitrator for failing to make appropriate disclosures creates further incentives for robust and continuing disclosures throughout the arbitration procedure. An arbitrator will be removed under Article 8 (discussed below) ‘whenever circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence’. The standard that will give rise to a successful arbitrator challenge (‘circumstances exist that give rise to justifiable doubts’) and the wider standard for disclosure (‘circumstances exist that are likely to give rise to justifiable doubts’) differ. The duty to disclose certain facts that are likely to give rise to doubts is broader, more inclusive, and more subjective than the assessment as to whether certain facts actually give rise to justifiable—that is, reasonable—doubts. A prospective arbitrator willing to accept the appointment should therefore disclose all circumstances that ‘are likely to’ (rather than only those that actually will) justify doubts as to the arbitrator’s impartiality.

The arbitrator will also be required to make all reasonable enquiries as to whether circumstances for disclosure exist. Again, the national law at the seat of the arbitration may also impact on the specific disclosure requirements imposed on arbitrators. This so-called ‘duty to investigate’ a known potential conflict has been


59 See IBA Conflict Guidelines, General Standard 3(a), which clarifies:

If facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator’s impartiality or independence, the arbitrator shall disclose such facts or circumstances to the parties, the arbitration institution or other appointing authority (if any, and if so required by the applicable institutional rules) and to the co-arbitrators, if any, prior to accepting his or her appointment or, if thereafter, as soon as he or she learns about them.

60 IBA Conflict Guidelines, General Standard 3(c), provides: ‘Any doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favour of disclosure.’

61 Ibid, para (d), provides: ‘When considering whether or not facts or circumstances exist that should be disclosed, the arbitrator shall not take into account whether the arbitration proceeding is at the beginning or at a later stage.’

62 The arbitrator obviously can decline the appointment without giving any reasons, and thus without disclosing potentially disqualifying circumstances: Schwarz and Konrad, op cit, para 7-147 (for further references).

63 See eg IBA Conflict Guidelines, General Standard 7(c):

An arbitrator is under a duty to make reasonable enquiries to investigate any potential conflict of interest, as well as any facts or circumstances that may cause his or her impartiality or independence to be questioned. Failure to disclose a potential conflict is not excused by lack of knowledge if the arbitrator makes no reasonable attempt to investigate.
upheld by some national courts. One US appellate court held that the failure to investigate—or even the failure to disclose the *intention* not to investigate—was a conflict that amounted to evident partiality. Even so, a number of courts have rejected such a duty or refused to make adverse inferences due to an arbitrator’s failure to investigate, alone.

7.26 The second principle in Article 7 is the continued duty of disclosure that exists throughout the proceeding. The ICDR Rules are not unique in this requirement. In fact, many institutions, national laws, and the IBA Conflict Guidelines require ongoing disclosure of potential conflicts. This requirement can have significant impacts on arbitrators, especially considering that many arbitrators are affiliated with law firms that have a significant client base already and that may acquire clients during the proceeding that may have affiliations that require disclosure.

7.27 After calling for broad and continuing disclosures, Article 7 outlines the procedures for disclosure. Under Article 7, the arbitrator will make the disclosure first only to the administrator, who then forwards this information to the parties and, where applicable, to the other arbitrators. This enables the parties to consider the facts and to decide whether to challenge the arbitrator pursuant to Article 8.

7.28 In ruling on the challenges, the ICDR balances the need for party confidence in the fairness of the arbitration with the desire to resolve the challenge efficiently.
In practice, an arbitrator will be removed if the disclosure reveals a significant relationship with an important individual or entity involved in the arbitration—which may be one of the parties, the counsel, or a material witness. For example, in a recent ad hoc arbitration under the 1976 UNCITRAL Rules, a party-appointed arbitrator disclosed that he and his law firm represented an unrelated company in unrelated investment arbitration against a party to the current dispute—the Republic of Argentina. The appointing authority sustained the challenge against the arbitrator, even though the other matter had no impact on the dispute in which he was nominated to serve as an arbitrator. The appointing authority noted that this scenario was included on the Orange list of the IBA Conflict Guidelines and rejected the argument that the other case was essentially finished (thus requiring no more substantive work by the challenged arbitrator). In that case, the appearance of bias was sufficient to justify the challenge. In the published decision, the appointing authority wrote:

This situation puts [the challenged arbitrator] in a situation of adversity towards Argentina, a situation that is often a source of justified concerns and that I believe should in principle be avoided, except where circumstances exist that eliminate any justifiable doubts as to the arbitrator’s impartiality or independence.

While few precise guidelines exist governing challenge decisions, one prominent commentator and former general counsel of the AAA identified several criteria that guide the AAA in determining whether to sustain a challenge generally—that is, whether the particular relationship is ‘direct’ rather than ‘remote’, ‘substantial’, ‘ongoing’, and ‘significant’ rather than ‘uncertain’ or ‘speculative’. These criteria would almost certainly be relevant and applicable to the ICDR decisions regarding challenges as well.

Disqualifying an arbitrator at the more advanced stages of the proceedings—that is, after a hearing has begun and beyond—imposes serious costs and delay upon the parties. Like many institutions, the ICDR appears to apply a stricter standard for disqualification when arbitral proceedings are at a more advanced stage and would remove an arbitrator only if the disclosed information reflects an interest on the arbitrator’s part. Although issues of cost and time are important, this practice of applying different standards depending on what stage the arbitration has reached is problematic and not covered by the text of the ICDR Rules. Rather, under the

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69 Ibid.
70 ICS Inspection and Control Services Ltd (UK) v The Republic of Argentina, Decision on Challenge to Arbitrator, 17 December 2009 (the Permanent Court of Arbitration in The Hague selected an individual as the appointing authority to decide the challenge).
71 Ibid, 4.
73 Ibid.
ICDR Rules, an arbitrator should simply be removed whenever there are doubts as to his or her impartiality, no matter when they arise, as long as the challenge is made timely within the meaning of the Rules. In other words, the substantive standard for review is dictated by the language of Article 7 (‘justifiable doubts’) without reference to the stage of the arbitration. Indeed, concerns regarding dilatory challenges, and their obstructive effect on the arbitration, are sufficiently and exclusively addressed by the requirement that challenges must be made within 15 days of knowledge of disqualifying circumstances. Wherever that threshold of timeliness is met, the same substantive standard of review should be applied.

7.31 To assess the nature of any relationships between arbitrators and parties, the ICDR requires each arbitrator to complete and file a detailed Notice of Appointment before the arbitrator is confirmed in office. This Notice prompts extensive disclosures, prefaced by the statement:

It is most important that the parties have complete confidence in the arbitrator’s impartiality. Therefore, please disclose any past or present relationship with the parties, their counsel, or potential witnesses, direct or indirect, whether financial, professional, social or of any other kind. This is a continuing obligation throughout your service on the case and should any additional direct or indirect contact arise during the course of the arbitration or if there is any change at any time in the biographical information that you have provided to the ICDR/AAA, it must also be disclosed. Any doubts should be resolved in favor of disclosure. If you are aware of direct or indirect contact with such individuals, please describe it below. Failure to make timely disclosures may forfeit your ability to collect compensation. The ICDR will call the disclosure to the attention of the parties.

7.32 The Notice specifically asks each arbitrator to confirm:

- whether he or she, or his or her law firm, presently represent any person in a proceeding involving any party to the arbitration;
- whether he or she, or his or her law firm, has represented any person against any party to the arbitration;
- whether he or she, or his or her law firm, has had ‘any professional or social relationship with counsel for any party in this proceeding or the firms for which they work’;
- whether he or she, or his or her law firm, has had ‘any professional or social relationship’ with any parties or witnesses identified to date in this proceeding or the entities for which they work;
- whether he or she, or his or her law firm, has had any ‘professional or social relationship of which you are aware with any relative of any of the parties to this proceeding, or any relative of counsel to this proceeding, or any of the witnesses identified to date in the proceeding’;
- whether he or she or any member of his or her family, or any close social or business associate, has ever served as an arbitrator in a proceeding in which any of the identified witnesses or named individual parties gave testimony;
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- whether he or she ‘or any member of [his or her] family, or any close social or business associate has been involved in the last five years in a dispute involving the subject matter contained in the case, which you are assigned’; or
- whether he or she has ‘ever served as an expert witness or consultant to any party, attorney, witness or other arbitrator identified in this case’.

These direct questions align with common conflict scenarios that arise in national courts, as discussed further below. Accordingly, the Disclosure Guidelines that are appended to the Notice emphasize that the prospective arbitrator ‘must disclose any relationships . . . with any party, attorney, witness or other arbitrator in this case—which includes relationships with their families and household members; current employers, partners, and professional and/or business associates’.

Further, the Notice of Appointment inquires:

- whether any of the party representatives, law firms, or parties have appeared before the prospective arbitrator in past arbitration cases;
- whether the prospective arbitrator is a member of any organization relevant to the arbitration;
- whether the prospective arbitrator has ever sued or been sued by either party or its representative; or
- whether the prospective arbitrator, or his or her spouse, own stock in any of the companies involved in the arbitration.

If there is more than one arbitrator appointed to the case, the Notice also requires disclosure of whether the prospective arbitrator has had any professional or social relationships with any of the other arbitrators. In an attached ‘Arbitrator’s Oath’, the prospective arbitrator then discloses any relevant circumstances and otherwise attests that he or she has performed a ‘thorough review’ of these issues.

While the arbitrator must sign the oath, he or she does not have to make a separate and general declaration that the arbitrator knows of no circumstances likely to give rise to justified doubts as to his or her impartiality or independence. Other leading institutional rules do require such express declarations in addition to the specific disclosure of certain facts. For example, the LCIA Rules, in Article 5(3), provide in relevant part, ‘. . . and [the potential arbitrator] shall sign a declaration to the effect that there are no circumstances known to [him or her] likely to give rise to any justified doubts as to [his or her] impartiality or independence, other than any circumstances disclosed by him in the declaration’. Additionally, the ICC released

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74 See below at para 8.16 ff.
75 The Notice of Appointment, as discussed below, does require extensive disclosures and does note that failure to disclose in a timely fashion may forfeit the arbitrator’s ability to collect compensation. Even so, the notice of arbitration does not include a specific clause that declares that no other conflicts exist.
an updated and more extensive disclosure form in January 2010, which requires a declaration of any past or present relationships with any of the parties pursuant to ICC Rules, Article 7(2). The updated disclosure form also represents an attempt to reduce delays caused by lack of availability, as discussed below.

B. Ex parte communications (Article 7(2))

**Article 7(2)**

No party or anyone acting on its behalf shall have any ex parte communication relating to the case with any arbitrator, or with any candidate for appointment as party-appointed arbitrator except to advise the candidate of the general nature of the controversy and of the anticipated proceedings and to discuss the candidate’s qualifications, availability or independence in relation to the parties, or to discuss the suitability of candidates for selection as a third arbitrator where the parties or party designated arbitrators are to participate in that selection. No party or anyone acting on its behalf shall have any ex parte communication relating to the case with any candidate for presiding arbitrator.

7.37 It is well accepted in international arbitration that there should principally be no ex parte communication between an arbitrator and one party—that is, that what cannot be done in the open, before the eyes of all parties, should not be done at all. The only generally accepted exception regards contacts of a party with a prospective arbitrator to assess his or her qualifications and availability, and to discuss the appointment of the presiding arbitrator. The AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes, for example, permits these ex parte contacts if ‘concerning such logistical matters as setting the time and place of hearings or making other arrangements for the conduct of the proceedings’. A discussion of the merits of the case with one party alone is not permitted.

7.38 Thus, the LCIA Rules (Article 13), the WIPO Arbitration Rules (Articles 21 and 45), and the AAA Commercial Rules (section R-18) all prohibit ex parte communications that address the merits of the arbitration. Likewise, under Article 7(2) of the ICDR Rules, ex parte communications relating to the case are prohibited with any arbitrator and expressly with ‘any candidate for appointment as party-appointed arbitrator’. They are permitted only in order to advise a prospective arbitrator ‘of

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78 See IBA International Code of Ethics.
79 AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes, Canon III(B)(5). This code is jointly approved and recommended by the AAA and the ABA.
the general nature of the controversy and of the anticipated proceedings’, and to ascertain whether the prospective arbitrator meets any specific requirements or qualifications, and is otherwise able and willing to accept the appointment. As regards the presiding arbitrator, if such a procedure has been agreed, parties are allowed to discuss with ‘their’ co-arbitrators suitable candidates for that position. However, Article 7(2) is very clear in prohibiting any *ex parte* contact between a party and a candidate for presiding arbitrator.

These principles are also found under national laws and upheld by national courts. For example, US courts have vacated awards based on the presumption that improper contacts with the tribunal cause prejudice to the other party and thus justify vacating the award under the FAA. In one US appellate court case, the court considered whether a phone call from the arbitrators to one of the parties to inquire about a specific dollar amount in dispute was sufficient to bar the award from enforcement. The merits hearing had already ended and the tribunal’s award adopted the precise dollar amount that it obtained through the *ex parte* exchange. The court analysed the communication under the AAA Commercial Rules, which prohibited evidence to be taken outside of the presence of all parties, and held that the arbitrators’ *ex parte* call to one of the parties constituted misbehaviour that prejudiced the opposing party. However, other US courts have required there to be a significant adverse impact in order to refuse to enforce an arbitration award on the basis of an *ex parte* communication.

Although US courts have taken different approaches when considering the nature of *ex parte* communication, the ICDR Rules were specifically drafted to prevent the type of evidence-related *ex parte* communication described above, and thus to implement more thoroughly the international norms regarding appropriate

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81 See eg *Totem Marine Tug and Barge, Inc v N Am Towing, Inc*, 607 F2d 649, 652 (5th Cir 1979) (vacating the award for *ex parte* communication under the AAA Commercial Rules); *United Food and Comm Workers Intl Union v SIPO, Inc*, 1992 US Dist LEXIS 21332 (D Iowa 1992) (vacating award where arbitrator heard evidence *ex parte*); *Goldfinger v Lisker*, 68 NY2d 225, 229 (NY 1986) (holding that several ‘critical’ private communications justified vacating the award when the arbitrator discussed evidence and the value of the claim); *MacNeal v Rotfeld*, 1990 US Dist LEXIS 4371 (ED Pa 1990).


83 Ibid.

84 AAA Commercial Rules, s R-30, provides, in relevant part, ‘[a]ll evidence shall be taken in the presence of all parties, except where any of the parties is absent in default or has waived his right to be present’.


86 *Natl Bulk Carriers, Inc v Princess Mgt Co*, 597 F2d 819, 825 (2d Cir 1979) (refusing to vacate an award rendered under the AAA Commercial Rules because the court found no evidence that the alleged *ex parte* communications affected the outcome); *Remmey v Paine Webber, Inc*, 32 F3d 143, 148–49 (4th Cir 1994) (holding that the alleged conflict of interest did not qualify as misconduct because the contacts would have been immaterial even if proven).
communication with candidates for party-appointed arbitrators. Accordingly, given the undesirable possibility of producing an unenforceable award, if a party approaches an arbitrator *ex parte* in any fashion during the arbitration, the arbitrator is well advised to communicate that approach immediately to the other arbitrators and the other parties, in order to avoid any appearance of inappropriate conduct, because appearance alone may justify a challenge. In addition, an *ex parte* communication violates Article 7 and thus the parties' arbitration agreement; awards resulting from proceedings that were not conducted in accordance with the parties' agreement may separately be subject to vacatur or non-enforcement.

## C. Availability and qualifications

### 7.41 As discussed above, arbitrators are required to be impartial and independent, but there are few other hard-and-fast requirements to be an arbitrator in international commercial arbitration. International investment and trade arbitrators are often required to maintain additional professional requirements as prerequisites to serving on a tribunal and parties may impose additional requirements. Parties may also inquire into the international commercial arbitrator's schedule and general availability—an issue of significant importance given the costs associated with subsequent delays in the proceedings. While this requirement that an arbitrator consider his or her availability prior to accepting an appointment is certainly not new, it has become increasingly important as parties seek ways in which to minimize delays and reduce the costs of proceedings.

### 7.42 The ICC noted a growing problem with arbitrators failing to make realistic assessments of their availability, and the concomitant delays in scheduling hearings and issuing awards. The ICC responded with its recent release of a new Statement of Availability, Acceptance, and Independence for Arbitrators. Effective in January

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88 Even so, many national laws place additional qualifications on arbitrators. For example, in some countries, arbitrators must be qualified to practice law or be adults, or must not be adjudged bankrupt. *See* Columbian Arbitration Act, art 7 (providing that 'if the award is to be according to law, the arbitrator or arbitrators must be lawyers').


90 For example, the 1987 IBA Rules of Ethics for International Arbitrators, Art 2.3, advises arbitrators to accept appointments only if they are able to devote the time and attention needed to resolve the dispute. Further, both the LCIA and ICC Rules allow the institutions to remove arbitrators who fail to fulfill their functions within the proscribed time limits: LCIA Rules, Art 10(1)(b) and (2); ICC Rules, Art 12(2).

2010, the new disclosures required by the Statement do not focus only on independence, but instead highlight the practical side of scheduling and current commitments. The ICC has attempted to require arbitrators to consider and assess carefully the amount of time that a case might take, and this requisite Statement now prompts arbitrators to disclose professional time constraints. The disclosures allow the Secretary General, in the first instance, and ultimately the ICC Court to take an active role in assessing the potential arbitrator’s workload based on the individual’s responses, and also enhances the parties’ awareness of the potential for delays from appointing an overextended arbitrator.

To date, the ICDR’s Notice of Appointment has taken only a cursory glance at availability of the arbitrator and has not attempted to delve into specific or concurrent commitments so that the ICDR might independently assess the time constraints of a particular proposed arbitrator, or to encourage the arbitrator to assess whether he or she has capacity to serve as arbitrator. The ICC will assess the impact of the ICC’s new availability disclosure throughout 2010, perhaps providing an opportunity for other institutions, such as the ICDR, to adopt similar requirements.
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**ARTICLE 8—CHALLENGE OF ARBITRATORS (ARTICLES 8 AND 9)**

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**Article 8**

1. A party may challenge any arbitrator whenever circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence. A party wishing to challenge an arbitrator shall send notice of the challenge to the administrator within 15 days after being notified of the appointment of the arbitrator or within 15 days after the circumstances giving rise to the challenge become known to that party.

2. The challenge shall state in writing the reasons for the challenge.

3. Upon receipt of such a challenge, the administrator shall notify the other parties of the challenge. When an arbitrator has been challenged by one party, the other party or parties may agree to the acceptance of the challenge and, if there is agreement, the arbitrator shall withdraw. The challenged arbitrator may also withdraw from office in the absence of such agreement. In neither case does withdrawal imply acceptance of the validity of the grounds for the challenge.

**I. Introduction**

Articles 8 and 9 continue the logical progression from Article 7 by setting forth a procedure for challenging arbitrators for lack of impartiality or independence; they should be read together with that provision. Article 8 provides that one may
challenge an arbitrator ‘whenever circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence’ and provides the structure of the challenge procedure. If there is no agreement by the parties on the challenge, or a voluntary withdrawal by the arbitrator, the ICDR administrator will decide the challenge pursuant to Article 9. The obvious importance of having an impartial and independent arbitration tribunal is therefore underscored by the applicable sanctions: an arbitrator’s lack of impartiality or independence constitutes a ground to challenge his or her nomination and to remove him or her even after appointment. Notably, depending on the applicable law, lack of impartiality and independence may also constitute a ground for refusing to recognize or enforce the final award. The notion of an impartial arbitrator is vital to the integrity of the arbitral process and, without it, arbitration as a dispute resolution mechanism would fail.

8.02 Yet challenges have become an increasingly frequent and significant occurrence in international arbitration. This is due, in large part, to the increase in the number of participants in arbitration, which has led, in turn, to complex conflict situations. Leading institutions have reported that challenges to arbitrators increased in recent years, although the percentage of arbitrators removed has remained stable. Some suggest that arbitration has become a more hostile process and that many challenges are tactically motivated.

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2 GNicholas and C Partasides, ‘LCIA Court Decisions on Challenges to Arbitrators: A Proposal to Publish’, 23(1) Arb Intl 1, 2 (2007). The IBA Conflict Guidelines took this trend into account and noted the complication, stating, ‘[t]he growth of international business and the manner in which it is conducted, including interlocking corporate relationships and larger international law firms, have caused more disclosures and have created more difficult conflict of interest issues to determine’: IBA Conflict Guidelines, Introduction, para 1. Similarly, other commentators have noted that ‘[t]he consolidation both of commercial enterprise and of law firms which had previously been distinct into larger units increases the risk that arbitrators will have connections with parties or their affiliates of which they are unaware and consequently do not disclose’: Lord Mustill and SC Boyd, *Commercial Arbitration* (Companion Volume to 2nd edn, Butterworths, London, 2001) 96.
3 N Blackaby, C Partasides, A Redfern, and M Hunter, *Redfern and Hunter on Law and Practice of International Commercial Arbitration* (5th edn, Oxford University Press, Oxford, 2009) para 4-91 (noting that most of the main arbitration institutions and some commentators have concluded that the practice of challenges of arbitrators has increased significantly).
4 In 2003, the ICC Court considered 20 challenges and removed one arbitrator; in 2002, the ICC Court removed five arbitrators out of 17 challenges; ICC Intl Ct Bull, Statistical Reports (1996–2005). This trend continued in the recently released 2009 statistics, in which the ICC Court considered challenges in 34 arbitrations against 57 arbitrators and removed only five arbitrators: 21(2) ICC Ct Bull 9 (2010).
5 See Redfern and Hunter, op cit, para 4-91. See also ‘Preventing Delay or Disruption of Arbitration’, ICCA Congress Series No 5 (1991), 131–59.
I. Introduction

There is no doubt that challenge proceedings can have adverse, and sometimes dramatic, effects on an arbitration. They may increase the duration and cost of arbitrations, in some cases derailing an arbitration for months during the pendency of a challenge. Once an arbitrator is removed, he or she must be replaced in accordance with Article 10 (unless the parties agree otherwise). Some aspects of the arbitration may then need to be repeated. 6 If the arbitrator removal and replacement happens at a late stage in the proceedings, it may lead to significant further delays and expense.

When they are successful, challenges will also preclude a party from having its choice of arbitrator. As discussed above, choosing one’s arbitrator has long been considered among the most valuable, fundamental features of commercial and ad hoc arbitrations.

For all of these reasons, the substantive standard and the procedure for challenging an arbitrator are vitally important to the arbitral process. Justifiably, practitioners and participants have demanded clarity, consistency, and predictability regarding precisely what constitutes ‘justifiable doubts’ sufficient for removal under the ICDR Rules and other leading arbitration rules. 7

Although the text of Articles 8 and 9 permits a party to challenge an arbitrator after identifying ‘justifiable doubts’ as to an arbitrator’s impartiality or independence, neither the ICDR Rules nor any published guidelines by the AAA elaborate on the underlying standards that the ICDR administrator would use to decide upon a challenge pursuant to Article 9. In keeping with the generally confidential nature of commercial arbitration proceedings, the ICDR rarely publishes decisions regarding challenges. 8 Thus, how the ICDR (or many other institutions) determine contested challenges is difficult to ascertain.

Notably, the IBA Guidelines on the Resolution of Conflicts in International Arbitrations (the ‘IBA Conflict Guidelines’), which were approved on 22 May 2004, have also gone some way towards guiding arbitrators and parties alike on what challenges are more likely to be successful. Of course, these guidelines are not binding on any institution. The existing uncertainties, and the strong push for more transparency in the application of these standards, have led some commentators to call for institutions to provide more specific guidance or to publish the written, reasoned decisions of institutions on arbitrator challenges, redacted to protect

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6 See ICDR Rules, Art 11(2), ‘Replacement of an Arbitrator’.
7 Even so, these challenges are sustained in very few cases and the vast majority of cases do not involve an arbitrator challenge. See ICC Ct Bull, Statistical Reports 1996–2005.
8 As discussed below, Art 27(8) of the ICDR Rules permits the administrator to publish or otherwise make publicly available selected awards, decisions, and rulings that have been edited to conceal the names of the parties. In practice, the ICDR rarely publishes decisions, although a few awards are available on certain legal research websites.
confidential information regarding the parties, the arbitrators, and the issues in dispute.\textsuperscript{9}

Finally, it bears emphasis that challenges may still be determined in national courts if the mandatory law at the seat of the arbitration so requires, where choice of law issues may implicate national arbitration statutes,\textsuperscript{10} or where an arbitrator is challenged at the recognition and enforcement stage before national courts. Further, national arbitration law at the seat of the arbitration may also provide for a review of the administrator's decision under Article 9 by the local courts. National court decisions and challenge decisions under other institutional rules provide some insight into the standards that govern a challenge, and parties are well advised to study those standards as applicable to their particular case.

II. Textual commentary

A. Challenging an arbitrator (Article 8(1))

\textbf{Article 8(1)}

\textit{A party may challenge any arbitrator whenever circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence. A party wishing to challenge an arbitrator shall send notice of the challenge to the administrator within 15 days after being notified of the appointment of the arbitrator or within 15 days after the circumstances giving rise to the challenge become known to that party.}

1. When to challenge an arbitrator

\textbf{8.09} A party may challenge an arbitrator at any time whenever circumstances arise that lead a party to have ‘justifiable doubts’ about the arbitrator’s impartiality or independence. Parties are well advised to raise their substantiated challenges as soon as possible after learning of the circumstances giving rise to the challenge. Notably, as discussed in more detail below,\textsuperscript{11} a party is deemed under the ICDR Rules to have waived its right to challenge an arbitrator if it knows of a reason to challenge, but does not meet the 15-day deadline for instituting a challenge according to Article 8(1).


\textsuperscript{10} Born, op cit (discussing the option of seeking an interlocutory challenge to an arbitrator in some national courts under national laws).

\textsuperscript{11} See below at para 8.22 ff.
Irrespective of any waiver, arbitrators are in practice more likely to be unseated when the challenge is made early in the proceeding, rather than if it were made in the late stages of an arbitration. In practice, challenges in the early stages of arbitrations may result in an arbitrator withdrawing of his or her own accord more often than in the later stages, because the arbitrators will have invested less time in the dispute and may be reluctant to move forward with one party opposing them. Even in contested challenges, anecdotal evidence from leading institutions seems to indicate that challenges are significantly more likely to succeed if a party challenges an individual before the institution confirms the arbitrator’s nomination, rather than after the proceedings commence. For example, several ICC surveys show that a higher number of pre-appointment challenges succeed than post-appointment. Challenges under the ICC Rules up to 2000 that were lodged after the commencement of the proceedings, however, have succeeded in only 10 per cent of cases.12

Some scholars and practitioners have argued that institutions should more readily sustain challenges (and thus be more willing to remove arbitrators) at the early stages of the proceedings and be more reluctant to remove an arbitrator for conflicts after the proceedings have gotten under way. The argument is rooted in the twin goals of efficiency and reducing costs, because parties may be forced to repeat significant portions of the hearings if an arbitrator is removed after significant procedural or merits decisions have been taken. For example, the drafters of the 1976 UNCITRAL Rules ‘wanted to ensure that challenges were made at the earliest possible stage . . . due to the high costs of challenges made once proceedings are well under way’.13

Whilst efficiency and cost are important considerations, that argument is ultimately not convincing, and not supported by the ICDR Rules. Article 8 specifically allows for a challenge ‘within 15 days after the circumstances giving rise to the challenge become known to that party’, yet makes no reference at all to the stage of the arbitration at the time that the challenge is raised. What matters therefore, in terms of timeliness, is not whether the arbitration has advanced, but whether an aggrieved party has raised the challenge as soon as (and no later than 15 days after) discovering a disqualifying circumstance. In some cases, this may well be far into the arbitration.

However, given an institution’s motivation to save the parties time and cost, it may be difficult to show for a party that it did in fact not know of the disqualifying circumstance earlier—or even that it could not or should not have known of the circumstance earlier. Although Article 8 does, on its face, not suggest that a

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challenge must be raised within 15 days after a party *ought to have known* of a disqualifying circumstance, it is unsatisfactory to allow a party to turn, perhaps deliberately, a blind eye to suspicious circumstances and to seek affirmative knowledge at a tactically opportune moment in the future. In practice, this raises difficult questions, which the administrator has to resolve within the discretion vested upon it by virtue of Article 9.

2. The substantive standard for challenging an arbitrator

Reflecting solely on the text of the relevant articles, the standard for *removing* an arbitrator is different from the standard for which *disclosure* is required: an arbitrator will be removed under Article 8 if circumstances *exist* that give rise to justifiable doubts as to the arbitrator’s impartiality or independence, whereas the arbitrator must disclose all circumstances that are *likely* to give rise to justifiable doubts. Thus, disclosure is required if there is a *likelihood* of disqualifying circumstances, whereas disqualification itself depends on the *actual existence* of justifiable doubts as to the arbitrator’s impartiality. This subtle, but perhaps critical, distinction triggers additional questions, such as whether the appearance of partiality alone will sustain a challenge, how to establish partiality (presumably a subjective state), and whether different standards of impartiality apply at different stages of the proceedings. Articles 8 and 9 of the ICDR Rules do not directly answer these questions.

In practice, the ICDR administrator will be primarily guided by the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes and, in particular in cases that have their seat in the US, by US case law. Whilst the IBA Conflict Guidelines provide an important ‘internationalized’ framework for determining conflicts in international arbitration,14 which some arbitration institutions, such as the SCC and the WIPO, will take into consideration when deciding challenges,15 the ICDR ‘does not use [the IBA Conflict Guidelines] as a ‘template’, but only ‘applies the standard of independence’ in accordance with the IBA Conflict Guidelines.’16 National court decisions on arbitrator conflicts under other institutional arbitration rules have highlighted several key factors that may affect the analysis. For example, one US appellate court held that conflicts:

include an arbitrator’s financial interest in the outcome of the arbitration, an arbitrator’s ruling on a grievance that directly concerned his own lucrative employment for a considerable period of time, a family relationship that made the arbitrator’s

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14 See above para 7.12.
16 Ibid.
impartiality suspect, the arbitrator’s former employment by one of the parties, and the arbitrator’s employment by a firm represented by one of the parties’ law firms.\footnote{\textit{Toyota of Berkeley v Auto Salesman’s Union Local 1095}, 834 F2d 751, 756 (9th Cir 1987) (citations omitted).}

Similarly, another US court listed four factors that are relevant to an arbitrator’s bias:

(1) any personal interest, pecuniary or otherwise, the arbitrator has in the proceedings;
(2) the directness of the relationship between the arbitrator and the party he is alleged to favor, keeping in mind that the relationship must be ‘substantial’, rather than ‘trivial’ . . .
(3) the relationship’s connection to the arbitration; and
(4) the proximity in time between the relationship and the arbitration proceeding.\footnote{\textit{Hobet Mining, Inc v Intl Union, United Mine Workers}, 877 F Supp 1011, 1020 (SD W Va 1994) (considering a challenge under the FAA for ‘evident partiality’ and applying the AAA Code of Ethics to the arbitrator’s lack of disclosure).}

From these and other decisions, practitioners and arbitrators can glean several recurrent scenarios that pose problems under conflict rules, as follows.

(1) An arbitrator clearly cannot decide a case in which he or she is a party.\footnote{See \textit{Cross and Brown Co v Nelson}, 167 NYS2d 573, 576 (NY App Div 1957) (invalidating an agreement where the board of directors of a corporate entity was designated to decide disputes where that entity was a party); IBA Guidelines, Explanation to General Standard 2(d) (noting that ‘this situation cannot be waived by the parties’).}
(2) Similarly, it is well established that an arbitrator must not have a financial interest in the outcome.\footnote{See eg \textit{Middlesex Mutual Ins Co v Levine}, 675 F2d 1197 (11th Cir 1982); \textit{Hyman v Potthberg’s Ex’rs}, 101 F2d 262 (2d Cir 1939).}
(3) A party may not directly and presently employ an arbitrator, because such a relationship results in the arbitrator essentially deciding his or her own case.\footnote{See IBA Conflict Guidelines, Explanation to General Standard 2(d) and Non-waivable Red List 1.1., 1.2; \textit{Donegal Ins Co v Longo}, 610 A2d 466 (Pa Super Ct 1992) (holding that arbitrator’s current representation of a party in an unrelated matter violated due process).}
(4) An arbitrator who was previously involved in the case is presumed to be biased.\footnote{\textit{Commonwealth Coatings Corp v Continental Cas Co}, 393 US 145 (1968) (holding that a conflict existed where the presiding arbitrator had been a consultant to one of the parties on several occasions).}
(5) Familial ties between an arbitrator and a party may result in a finding of a conflict.\footnote{\textit{Pacific and Arctic Ry and Navigation Co v United Transp Union}, 952 F2d 1144, 1148–49 (9th Cir 1991) (vacating award where presiding arbitrator was a friend of the president of one of the parties and dined with the president—at the party’s expense—before the hearing). But see \textit{Hobet Mining, Inc v Intl Union, United Mining Workers}, 877 FSupp 1011 (SD W Va 1994) (analysing the proximity of the}
Chapter 8: Article 8—Challenge of Arbitrators (Articles 8 and 9)

(6) Non-trivial business relationships between an arbitrator and a party may result in a finding of a conflict.

(7) Conflicts related to prior representation by or of a law firm of a party or an affiliate of a party often surface.

(8) Finally, as discussed above, ex parte communications may also result in a disqualification based on presumed bias after the exchange.

Underlying these fact scenarios is the theme that the precise circumstances can have a drastic impact on how a court or an institutional administrator may decide a challenge.

8.18 Furthermore, these examples highlight another issue: is the ‘appearance’ of partiality—as opposed to actual partiality—sufficient to sustain a challenge or warrant the vacatur of the award? One English court called for the consideration of whether there is any real danger of bias on the part of the decision maker. There does not appear to be a clear answer under US law. Several US courts have rejected the notion that the appearance of bias alone justifies a challenge, but there is at least one Federal court that has vacated an award based on the appearance of bias alone. In many civil law jurisdictions, the appearance of bias is sufficient.

relationship and its potential impact on the dispute, and ultimate holding that the arbitrator was not disqualified even though his brother was an executive in a related corporation).

24 Petroleum Cargo Carriers Ltd v Unitas, Inc 220 NYS2d 724 (NY Sup Ct 1961) (vacating award where arbitrator’s firm received US$350,000 in commissions from the party), affd 224 NYS2d 654 (NY App Div 1962).

25 Al-Harbi v Citibank NA, 85 F3d 680, 682 (DC Cir 1996) (refusing to vacate award where arbitrator was a former partner of a firm representing one party); Fertilizer Corp of India v IDI Management Inc, 517 F Supp 948 (SD Ohio 1981) (party-appointed arbitrator had served as counsel for the party on several occasions).

26 AT&T Corp v Saudi Cable Co [2000] 2 Lloyd’s Rep 127 (English Court of Appeal). One commentator has concluded that the ‘real danger’ standard is similar to a rejection of the mere appearance of bias in the US courts: GB Born, International Commercial Arbitration (Kluwer International Arbitration, The Hague, 2009) 1,480.

27 Sheet Metal Workers Intl As’n Local 420 v Kinney Air Conditioning Co, 756 F2d 742, 745–46 (9th Cir 1985) (holding that the appearance of impropriety, standing alone, does not establish bias and that the burden of proving specific facts indicating improper motives rests on the party challenging the arbitral award); Morelite Constr Corp v NYC Dist Council Carpenters Benefit Funds, 748 F2d 79, 83–84 (2d Cir 1984) (holding that evident partiality existed where a reasonable person would have to conclude that the arbitrator was partial); Hunt v Mobil Oil Corp, 654 F Supp 1487, 1497–98 (SDNY 1987) ("Evident partiality" means more than a mere appearance of bias’); Apperson v Fleet Carrier Corp, 879 F2d 1344, 1358 (6th Cir 1989) (considering whether the appearance of bias suffices under s 10(b) of the FAA); Applied Indus Materials Corp v Ovalar Make Hane Ticaret Ve Sanayai AS, No 05CV10540, 2006 WL 1816383, *9 (SDNY 28 June 2006) (suggesting that the appearance of impropriety alone is enough to justify a challenge), affd 492 F3d 132 (2d Cir 2007).


29 Under French law, an arbitrator will be considered biased if a party can show that there is reason to suspect that an arbitrator will prefer one party over another. Actual bias need not be proven by either party. See Judgment of 28 November 2003 (Paris Cour d’Appel) (2003) Rev Arb 445. Under Swiss Law, an arbitrator can be removed on the grounds of bias ‘if there are circumstances which are capable of raising distrust in the impartiality of a judge’: Judgment of 9 February 1998 16 ASA
Under the ICDR Rules, an appearance of impartiality appears to be sufficient to justify disqualification. After all, Article 8 does not require a showing that an arbitrator is actually biased, but merely demands the existence of circumstances that justify doubts as to the arbitrator’s impartiality.

In addition to the debate surrounding the appearance of partiality, it is inherently difficult to prove partiality. As discussed above, partiality, or ‘bias’, is a subjective state of mind. In the words of one US judge: ‘Bias is always difficult, and indeed often impossible, to “prove”. Unless an arbitrator publicly announces his partiality, or is overheard in a moment of private admission, it is difficult to imagine how “proof” would be obtained.’ In practice, a party must rely on, and base its challenge upon, its own inferences from the arbitrator’s observable conduct, discussions, and relationships, which typically evidence a lack of independence—which, in turn, allows the inference of justifiable doubts as to the arbitrator’s impartiality.

Although bias is the focus in challenge proceedings, other grounds for removal exist in practice, such as incapacity, failure to conduct or participate in the arbitral proceedings, and failure to satisfy the qualifications required by the parties’ arbitration agreement, to name a few. Some of these other grounds for removal arguably may be found to exist in the ICDR Rules under the broad discretion granted to the remaining arbitrators on the tribunal by Article 11 to continue the proceedings in the absence of the third arbitrator, or to ‘determine not to continue the arbitration without the participation of the third arbitrator’, and thus require the administrator to declare the office vacant so that another arbitrator may be appointed according to Article 6.

Bull 634, 644. Similarly, s 8 of the Swedish Arbitration Act states that an arbitrator may be discharged ‘if there exists any circumstance which may diminish confidence in the arbitrator’s impartiality’. Morelite Constr, 748 F2d, 84.


The grounds which justify a challenge differ depending on the rules and laws applicable. Since most of them recognise the lack of qualifications agreed to by the parties’ as a reason for challenge the whole process is de facto submitted to party autonomy. As the parties are free to agree on whatever qualifications they want they can agree on what reasons justify a challenge.
3. The procedure to challenge an arbitrator

8.22 To minimize the disruption of a challenge to ongoing proceedings and to prevent parties from obstructive tactics, the parties must file a challenge no later than 15 days either after being notified by the ICDR of the appointment or after learning of the disqualifying circumstance. All leading institutional rules require the challenging party to submit its challenge within a similarly short time period.33

8.23 A party is deemed to have waived its right to a challenge under Article 8 if it waits longer than 15 days to bring its challenge, and such a belated challenge will not be accepted by the administrator. The rationale for the requirement that a party file a timely challenge or face waiver is clear: parties cannot be permitted to continue in a proceeding while they conceal grounds for objecting to the arbitrators. One US court described the absurd result that would occur absent a waiver rule as amounting to a ‘[h]eads I win, tails you lose’ approach to challenging arbitrators.34 The judgment explained that ‘[w]here a party has knowledge of facts possibly indicating bias or partiality on the part of an arbitrator he cannot remain silent and later object to the award of the arbitrators on that ground. His silence constitutes a waiver of the objection.’35

8.24 While the position is clear regarding the timing of any challenge under the ICDR Rules (as under other institutional rules), national law at the seat of the arbitration may provide that certain conflicts cannot validly be waived (sometimes because particularly grave conflicts touch on procedural public policy)36 and, therefore, can be advanced even after the 15-day period has expired. The IBA Conflict Guidelines also explicitly adopt the position that certain conflicts may not be waived. Those Guidelines distinguish between these and other waivable conflicts within the ‘Red List’, thus permitting waiver only of particular conflicts and only if all parties, once fully informed, agree.37 In practice, time limits under institutional rules are strictly

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33 The ICDR rules align with the revised 2010 UNCITRAL Rules, Art 13, which provides: ‘A party that intends to challenge an arbitrator shall send notice of its challenge within fifteen days after it has been notified of the appointment of the challenged arbitrator or within fifteen days after the circumstances mentioned in articles 11 and 12 became known to that party.’

34 AAOT Foreign Econ Assn (VO) Technostroyexport v Intl Dev and Trade Serv, Inc, 139 F3d 980, 982 (2d Cir 1998).


37 See IBA Conflict Guidelines, Explanatory Note 4(c):

In a serious conflict of interest, such as those that are described by way of example in the waivable Red List, the parties may nevertheless wish to use such a person as an arbitrator. Here, party autonomy and the desire to have only impartial and independent arbitrators must be balanced. The Working Group believes persons with such a serious conflict of interests may serve as arbitrators only if the parties make fully informed, explicit waivers.

See also GB Born, International Commercial Arbitration (Kluwer International Arbitration, The Hague, 2009) 1,511–12 (noting the possibility and acceptability of parties agreeing to partial
enforced in national courts and thus the parties will be deemed to have waived the challenge unless there is a grave public policy reason at stake.

B. A ‘reasoned’ challenge (Article 8(2))

Article 8(2)

The challenge shall state in writing the reasons for the challenge.

Article 8(2) requires that a challenge must be written and filed with the administrator, and must contain reasons. Parties are well advised to provide detailed reasons to make their challenge persuasive and to refrain from challenges that are unlikely to succeed. Although Article 8(3) requires a party that challenges the nomination or continued service of an arbitrator to submit reasons to the ICDR administrator, the ICDR does not have to submit reasons when it decides a challenge, as discussed below.

C. Notification of the challenge and voluntary or agreed withdrawal (Article 8(3))

Article 8(3)

Upon receipt of such a challenge, the administrator shall notify the other parties of the challenge. When an arbitrator has been challenged by one party, the other party or parties may agree to the acceptance of the challenge and, if there is agreement, the arbitrator shall withdraw. The challenged arbitrator may also withdraw from office in the absence of such agreement. In no case does withdrawal imply acceptance of the validity of the grounds for the challenge.

1. Notification of the challenge

Article 8(3) provides that, once a challenge is received, the other party is notified. In practice, notification of a challenge is provided to all parties and all arbitrators, including the challenged arbitrator, and all parties are afforded an opportunity to comment—a practice that aligns with the 2010 UNCITRAL Rules, in which the appointing authority chosen by the parties decides upon arbitrator challenges. Although it is processed by the ICDR case manager, the ICDR has confirmed that the challenge is typically decided by an ICDR officer of at least supervisory status. The requirement for notice under the ICDR Rules differs significantly from the

 arbitrators in the US, but also noting that certain unwaivable conflicts exist, as outlined in the IBA Conflict Guidelines).

38 Born, op cit, 1,579.
39 2010 UNCITRAL Rules, Art 13(2).
notice requirement in the AAA Commercial Rules. The AAA Commercial Rules do not provide for either a proposed or a sitting arbitrator to have notice of the challenge, and forbid either party from notifying the arbitrator(s) of the challenge.\(^{40}\) The result is that the AAA does not afford an arbitrator a chance to be heard, or even to comment on a challenge to his or her partiality or independence. Furthermore, if the AAA sustains the challenge, the AAA removes the arbitrator without providing any explanation or reasons.\(^{41}\) The rationale behind the AAA policy is to prevent potential prejudice that may result from the arbitrator learning of the challenge.

8.27 Although the approach adopted under the AAA Commercial Rules does not reflect international practice, it has some merits. A challenge that does not ultimately result in removal of the arbitrator may produce a hostile environment. A party typically needs to heed the old maxim ‘if you shoot at a king, you must kill him’—weighing the potential risk of having an arbitrator on the panel who knows that a party sought to remove him or her against having one’s dispute decided by an arbitrator for whom a conflict arose during the course of the tribunal or who is potentially biased.\(^{42}\)

8.28 After the challenging party presents its arguments for removing the arbitrator, the ICDR administrator must apply the standards outlined under Article 9 to the constellation of facts arising in a particular application for challenge. The ICDR supervisory administrative staff decides challenges, but will consult with others within the ICDR when it is necessary. The ICDR administrator’s resulting decision—either to disqualify or to retain an arbitrator—does not contain statements of reasons and is not published.\(^{43}\)

8.29 Other leading institutions generally adopt the same broad procedures regarding the challenge of an arbitrator for partiality or affiliation with a party, which leave the decision on the merits of the challenge to the discretion of the institution. The ICC Rules, for example, require that challenges to proposed or sitting arbitrators are submitted to, and decided by, the ICC Court.\(^{44}\) The ICC Court accepts only written submissions regarding a challenge and does not conduct further evidentiary

\(^{40}\) AAA Commercial Rules, s R-17.

\(^{41}\) Born, op cit, 1,555 (criticizing the AAA for failing to provide notice and forbidding the parties from notifying any of the arbitrators).


or oral hearings. The LCIA follows a similar approach. In 2006, the LCIA decided to publish redacted decisions disposing of arbitrator challenges.

2. Agreed or voluntary withdrawal

When a party brings a challenge and all parties to the arbitration agree that the arbitrator should withdraw, the arbitrator must withdraw. This results from the contractual nature of arbitration, in which the arbitrator’s mandate arises from the parties’ selection of that arbitrator, or the method of selecting that arbitrator. Where an arbitrator lacks the support and trust of both parties, his or her mandate ends.

Article 8(3) also provides the challenged arbitrator with the opportunity to voluntarily withdraw before the administrator considers the challenge. If disqualifying circumstances exist, the arbitrator is obliged to withdraw. But even where no objective reasons for disqualification exist, a challenged arbitrator may consider that his or her withdrawal in fact benefits the process, the dynamics of the tribunal, or the acceptance of a final award. To protect an arbitrator in such circumstances, Article 8(3) expressly provides that the voluntary withdrawal (or the withdrawal on the back of the parties’ agreement) does not ‘imply acceptance of the validity of the grounds for the challenge’.

However, where no reasons for disqualification exist, an arbitrator may well be under the contractual duty to continue his or her service and to discharge his or her judicial function to the parties, maintaining the appointing party’s right to have an arbitrator of its choosing hear its dispute, and avoiding the delay and disruption (in particular at advanced stages of the proceedings) associated with having to appoint a replacement. Because Article 10 requires the administrator to appoint a substitute arbitrator when ‘the administrator determines that there are sufficient reasons to accept the resignation of an arbitrator’, in principle, an arbitrator is obliged to remain in office in cases in which no ‘sufficient reason’ for a resignation exists.

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45 See LCIA Rules, Art 10; G Nicholas and C Partasides, ‘LCIA Court Decisions on Challenges to Arbitrators: A Proposal to Publish’, 23(1) Arb Intl 1, 6 (2007).

46 See Nicholas and Partasides, op cit.

ARTICLE 9—CHALLENGE OF ARBITRATORS (ARTICLES 8 AND 9)

I. Introduction

Article 9, which addresses the ICDR’s power to decide on a challenge, completes the sequence of Articles 7 and 8 regarding the challenge of arbitrators, and must be read in context with those provisions.

If the parties do not agree on the merits of the challenge and if the arbitrator does not voluntarily withdraw, it is for the administrator, in his or her sole discretion, to decide the challenge. After the ICDR reviews the parties’ submissions and arbitrator’s comments, the administrator ordinarily resolves the challenge quickly. If the challenge is rejected, the arbitration will proceed. If the challenge is granted, the arbitrator will be replaced pursuant to Article 10. Typically, the ICDR’s decision is final and the parties lack any additional recourse or grounds for objection—absent the possibility of judicial review in some jurisdictions, as discussed below. In 2009, the ICDR heard 49 challenges, of which, it accepted 18.¹

¹ In 2008, the ICDR heard 27 challenges, of which it sustained 13; in 2007, it sustained 16 challenges out of a total of 37. The average time that it took the ICDR to decide a challenge was between one and three days.
II. Textual commentary

A. No reasoned decisions on challenges

9.03 Even though the outcome of a challenge before the ICDR can dramatically affect the proceeding, the ICDR’s decision usually does not contain reasons. The traditional view has held that institutional rules do not require reasoned, written decisions on arbitrator challenges to be distributed to the parties because such decisions would delay the challenge process, provide grounds for future litigation, and plant seeds for future challenges.\(^2\) Also, it was frequently argued that disseminating the reasons for sustaining or denying a challenge would violate the parties’ and arbitrators’ expectations of confidentiality. Even so, there appears to be a disconnect between the calls for increased transparency in arbitral decision-making and the dearth of guidance on how administrators decide challenges. Although scholars and, indeed, parties have clamoured for transparency to understand how administrators apply standards for partiality to the facts,\(^3\) no institutional rules, in fact, require that the deciding institution must submit its reasons for sustaining a challenge to the parties.\(^4\) The ICC Rules go one step further than the ICDR Rules in explicitly specifying that the decisions will be final and that no rationale will be communicated to the parties.\(^5\)

9.04 Even so, the growing trend is for institutions to make their reasoning more accessible. While the LCIA Rules provide that the LCIA ‘shall not be required to give reasons’,\(^6\) nevertheless, it has recently decided to publish sanitized versions of challenge decisions. The LCIA explained its decision:\(^7\)

> The publication in appropriate form of the growing wealth of LCIA learning and guidance on independence and impartiality not only responds to mounting calls for greater transparency, but is also likely to make a unique contribution to filling the void in guidance.

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\(^4\) This is the case for the ICC Rules, Art 7(4), CIETAC Rules, Art 31, LCIA Rules, Art 29(1), and AAA Commercial Rules, s R-17(b).

\(^5\) ICC Rules, Art 7(4) provides ‘[t]he decisions of the Court as to the appointment, confirmation, challenge or replacement of an arbitrator shall be final and the reasons for such decisions shall not be communicated’.

\(^6\) LCIA Rules, Art 29(1).

II. Textual commentary

The appointing authorities selected by the Permanent Court of Arbitration have also published several challenge decisions.⁸

Providing reasons may enhance the parties’ confidence that their objections were taken seriously, and also bring greater clarity and predictability to the challenge process. In relying on such published decisions, however, parties should note that the context of the challenge and the specific circumstances usually drive the analysis and the result. Although some commentators fear that publishing decisions could create confusion, distort key issues in the arbitration, or lead to even more arbitrary results if the principles in published extracts were to be applied to other, factually dissimilar challenge fact-patterns,⁹ greater transparency, and guidance are much needed.

B. Challenging arbitrators pursuant to national law

Some modern arbitration statutes provide a process to review (immediately) challenge decisions rendered by tribunals or institutions in the national courts,¹⁰ or else for parties to apply to vacate an award based upon the arbitrator’s lack of independence and impartiality.¹¹ In addition, under some national arbitration laws, a party may use an interlocutory request to the national courts to challenge and remove an arbitrator on the basis of bias while the arbitration procedure is ongoing.¹² Under the FAA, there is no basis to challenge an arbitrator through a request for interlocutory relief. The absence of this procedural remedy would appreciably limit the options available to a party seeking to challenge an arbitrator

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⁸ See eg Born, op cit, 1,560, citing Challenge Decision of Appointing Authority Designated by the Secretary-General of the PCA (15 April 1993), XXII YB Comm Arb 222 (1997).
⁹ Whitesell, Remarks made at International Commercial Arbitration in Latin America: The ICC Perspective, 4–6 November 2007 (Miami); G Nicholas and C Partasides, ‘LCIA Court Decisions on Challenges to Arbitrators: A Proposal to Publish’, 23(1) Arb Intl 1, 22–23 (2007) (noting some concerns regarding publishing challenged decisions, including: first, the fact that challenges are of such a fact-specific nature that there is little precedential value in being aware of decisions that have been taken in earlier challenges; second, making more challenge guidance available may increase the number of challenges; third, the publication of decisions may lead to court challenges founded on the alleged inconsistency of a challenged decision with an earlier published decision; and finally, the concern that the publication of challenged decisions is somehow inconsistent with the generally confidential nature of the arbitral process).
¹⁰ See eg the three different appeals from an arbitral tribunal’s decision under the English Arbitration Act 1996, ss 67 (appeal on the grounds that the tribunal had no substantive jurisdiction), 68 (appeal on the ground of a serious procedural irregularity), and 69 (appeal on point of law).
¹¹ See eg FAA, 9 USC s 10(a)(2) (providing that an award may be vacated if ‘there was evident partiality or corruption in the arbitrators’).
¹² See eg UNCITRAL Model Law, Art 13(1) (permitting interlocutory judicial removal in both ad hoc and institutional arbitrations); Germany ZPO, s 1037 (adopting the UNCITRAL Model Law); Singapore International Arbitration Act, s 3(1); Japanese Arbitration Law, art 19.
if the arbitration were seated in the USA. Instead, the FAA only permits courts to address an arbitrator’s independence in relation to a party’s application to vacate an award based on partiality after the final award has been issued. Indeed, US cases that address independence and impartiality do so in the context of considering a request to vacate an award under s 10(a)(2) of the FAA after the final award is rendered. Thus, in a US-seated arbitration, a party applying to challenge under the procedure set forth in the ICDR’s Article 15 would be required to wait until the final award were rendered before it would be able to raise its challenge before US courts.

9.07 In conclusion, the decision to challenge an arbitrator raises significant strategic questions for the parties, including weighing whether the benefits of the possibility of a successful challenge to an arguably impartial or not-independent arbitrator outweigh the drawbacks of:

- introducing a potentially costly delay to the proceedings;
- carrying the burden of proving its assertions of partiality without authoritative guidelines around which to structure its argument; and
- potentially losing the challenge and having the challenged arbitrator know that a particular party considered his or her analysis so partial or affiliations so intertwined with the other party’s as to warrant a challenge.

These considerations, of course, interact. Often, therefore, the decision as to whether to bring a challenge against an arbitrator is extremely delicate and requires caution. Once the decision is made to challenge an arbitrator, however, it needs to be pursued with utmost rigour and based on solid grounds.

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14 The FAA, s 10(a)(2), provides that an award may be vacated if ‘there was evident partiality or corruption in the arbitrators, or either of them’. The FAA contains neither a provision governing interlocutory challenges to arbitrators, nor a provision explicitly allowing removal of an arbitrator. Therefore, it has been noted that nearly all US decisions concerning an arbitrator’s independence and impartiality have been rendered in the context of actions to vacate or to recognize awards, and not in the context of interlocutory challenges to arbitrators: see Born, op cit, 1,467.
15 The US Court of Appeals for the Second Circuit, located in New York, noted that ‘it is well established that a district court cannot entertain an attack upon the qualifications or partiality of arbitrators until after the conclusion of the arbitration and the rendition of the award’: *Aviall, Inc v Ryder Sys Inc*, 110 F3d 892, 895 (2d Cir 1997) (quoting *Michaels v Mariforum Shipping*, SA, 624 F2d 411, 414 n4 (2d Cir 1980); see also *Florasynth, Inc v Pickholz*, 750 F2d 171, 174 (2d Cir 1984); *Alter v Englander*, 901 F Supp 151, 153 (SDNY 1995); *Marc Rich and Co v Transmarine Seaways Corp*, 443 F Supp 386, 387 (SDNY 1978).
ARTICLE 10—REPLACEMENT OF AN ARBITRATOR (ARTICLES 10 AND 11)

I. Introduction

Following the creation of a vacancy on the tribunal addressed in Articles 8 and 9, Articles 10 and 11 address the replacement of an arbitrator and its consequences, such as a repetition of prior proceedings. This involves a delicate balancing act: a substitute arbitrator must be able to consider all of the details of the case, while the parties may want to avoid starting the case over or repeating significant portions of the proceedings, because doing so creates time and cost burdens. Article 11 further provides for the possibility of a truncated tribunal in certain circumstances.

Other leading institutional rules adopt a similar approach to filling vacancies on the arbitral tribunal. For example, the 2010 UNCITRAL Rules provide that such vacancies shall be filled in the same manner as the arbitrators were.

originally selected.\(^2\) To ensure that a party is not deprived of its opportunity to select an arbitrator, the same original selection provisions employed will apply to fill a vacancy.\(^3\) It is said that any other rule would risk creating an incentive for a party to challenge and remove an arbitrator tactically to disadvantage the party who lost its nominee.\(^4\) However, where an arbitrator is removed for bias, there are serious doubts about whether the same party, having already appointed a biased arbitrator, can be trusted with the appointment of a substitute. In such cases, it may be preferable to afford the institution the option to make a direct substitute appointment without recourse to the originally agreed method of arbitrator selection.\(^5\)

10.03 Following the structure of Articles 10 and 11, the discussion in this and the following chapter focuses on three broad issues.

(1) What process or mechanism applies when replacing an arbitrator who has withdrawn, resigned, or is removed after a challenge? (Addressed in this chapter.)

(2) May the remaining arbitrators on the tribunal continue the proceedings without the third arbitrator (in a so-called ‘truncated tribunal’)? (Addressed in the context of Article 11.)

(3) Finally, how much discretion do the remaining arbitrators have to determine whether, and to what extent, to repeat previous proceedings if an arbitrator is replaced? (Also addressed in the context of Article 11.)

II. Textual commentary

10.04 An arbitrator may be unable to serve from the beginning of the arbitration through to its conclusion for any number of reasons. As discussed above in Article 8, an arbitrator’s mandate stems from his or her contractual relationship with the parties.

\(^2\) Article 14(1) of the 2010 UNCITRAL Rules provides that ‘[i]n any event where an arbitrator has to be replaced during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in articles 8 to 11 [of the UNCITRAL Rules] that was applicable to the appointment or choice of the arbitrator being replaced’.

\(^3\) The drafters of the 1976 UNCITRAL Rules, for example, considered alternatives to appointing new arbitrators, such as permitting the institutional authority or national courts to appoint a new arbitrator. These initial proposals were rejected as causing substantial and disproportionate damage to the party whose nominee was removed or resigned. See D Caron, L Caplan, and M Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary* (Oxford University Press, Oxford, 2006) 251; *Report of the UNCITRAL on the Summary of Discussion of the Preliminary Draft*, Eighth Session, UN Doc A/10017, para 83, VIY.B. UNCITRAL 24, 33 (1975).


\(^5\) This option is available, for example, to the ICC Court pursuant to Art 12(4) of the ICC Rules (‘When an arbitrator is to be replaced, the Court has discretion to decide whether or not to follow the original nominating process’).
The contract may be subject to early termination if it is violated, much like any other contract. Accordingly, Article 10 addresses the replacement of an arbitrator when such a vacancy arises. The application of Article 10 is limited to certain specified circumstances:

1. an arbitrator’s voluntary withdrawal after a challenge pursuant to Article 8(3);
2. an arbitrator’s removal after a successful challenge under Article 9;
3. a justified resignation, as determined by the ICDR administrator; or
4. the arbitrator’s death.

These grounds trigger Article 10, resulting in the appointment of a substitute arbitrator in accordance with the appointment procedure in Article 6 (unless the parties agree otherwise).

As a textual matter, only the grounds expressly mentioned in Article 10 trigger the replacement process. However, Article 10 must logically also apply if the parties have agreed, pursuant to Article 8(3), that the arbitrator should be replaced. Indeed, Article 10 itself, in its closing words, allows the parties to agree on any procedure to fill a vacant arbitrator position with a substitute.

The express grounds for replacement under Article 10 are mainly self-explanatory, but the voluntary resignation of an arbitrator, as a particular feature of the ICDR Rules, deserves additional discussion. Article 8 permits an arbitrator to resign if he or she is challenged. Article 10 extends the opportunity for resignation to other circumstances, but limits the arbitrator's freedom to resign by making it conditional. Before considering what limits an arbitrator’s right to resign, it is important to note that judicial authorities are sceptical about the value of holding an arbitrator to serve after he or she has chosen to withdraw from office. As one US appellate court explained:

There are certainly circumstances under which, although a party could not successfully mount a charge of evident partiality against an arbitrator, the arbitrator may wish to resign. That decision is better left to the discretion of the individual arbitrator . . . There is, therefore, no basis, statutory or otherwise, for a court to review an arbitrator’s earlier resignation, and we know of no authority that grants courts the power to force unwilling arbitrators to continue to serve. However, absent a ground for withdrawal that is recognized under either the ICDR Rules or applicable mandatory law, an arbitrator’s resignation may constitute a breach of his or her undertaking of the appointment. Yet, unlike a national court’s

6 Born, op cit, 1,612 (noting that an arbitrator's contractual relationship might also end by party agreement, with no reasons necessary).
8 See P Sanders, 'Commentary on the UNCITRAL Arbitration Rules', II Ybk Comm Arb 172, 191 (1977) (noting that the rules do not—and could not—outline specific grounds that would justify resignation, but also noting that 'once the arbitrator has agreed to function, he should fulfil his task."

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involvement in the context of challenges to the arbitrators, there is no role for a judicial intervention when an arbitrator chooses to resign. This is perhaps unsurprising, because at least one commentator stressed that ‘[n]othing would be less conducive to the proper administration of justice than the conduct of a reference by a recalcitrant arbitrator’. However, an unjustified resignation may have implications for the arbitrator’s entitlement to fees, and may, in some jurisdictions, give rise to the arbitrator’s liability for breach of contract. In line with this reasoning, all leading institutional rules allow arbitrators to resign, at least in limited circumstances. Article 10 effectively limits an arbitrator’s right to resign to cases in which justifiable grounds exist. It is thus for the ICDR administrator to determine whether to accept the resignation. This mechanism is designed to deter obstructive arbitrators from delaying the process by forcing the parties to seek a replacement. Thus, where the resignation of an arbitrator is deemed unjustified by the administrator, no substitute arbitrator will be appointed; rather, the rules for truncated tribunals pursuant to Article 11 will apply. By the same token, the ICDR Rules also do not permit a party to seek a replacement arbitrator if the grounds for resignation are insufficient; instead, the parties must invoke Article 11 procedures for a truncated tribunal.

The fact that Article 10 gives the ICDR administrator discretion to approve the grounds for resignation is by no means unique. Indeed, several institutions limit an arbitrator’s freedom to resign by requiring institutional acceptance of

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9 Born, op cit, 1,575.
12 See eg 2010 UNCITRAL Rules, Art 13(3) (‘When an arbitrator has been challenged by a party . . . [t]he arbitrator may also, after the challenge, withdraw from his or her office’); ICC Rules, Art 12(1) (‘An arbitrator shall be replaced upon his death, upon the acceptance by the Court of the arbitrator’s resignation, upon acceptance by the Court of a challenge, or upon the request of all the parties’); LCIA Rules, Art 10(1) (‘If . . . any arbitrator dies, falls seriously ill, refuses, or becomes unable or unfit to act, either upon challenge by a party or at the request of the remaining arbitrators . . .’); ICSID Arbitration Rules, Rule 8(2) (‘An arbitrator may resign by submitting his resignation to the other members of the Tribunal and the Secretary-General. . .’); CIETAC Rules, Art 27(1) (‘The arbitrator may also withdraw from [sic] his/her office’); Permanent Court of Arbitration (PCA) Rules, Art 13(1) (adopting the identical UNCITRAL provision); Swiss Rules of International Arbitration, Art 13(1) (‘. . . This rule also applies if an arbitrator has been successfully challenged, has been otherwise removed or has resigned’); SIAC Rules, Arts 12(1) (‘If the other party does not agree to the challenge and the arbitrator who is being challenged does not withdraw voluntarily within 7 days of receipt of the notice of challenge . . .’) and 13(1) (‘In the event of the death or resignation of an arbitrator during the course of the arbitral proceedings, a substitute arbitrator shall be appointed in accordance with the procedure applicable to the appointment of the arbitrator being replaced’); Japan Commercial Arbitration Association (JCAA) Rules, Art 31(1) (‘If an arbitrator resigns or dies, the Association shall, without delay, notify the parties and the remaining arbitrator(s) thereof’).
II. Textual commentary

the resignation. For example, the ICC Rules require the ICC Court to accept the resignation for it to be valid. Others, such as the Swiss Rules of International Arbitration, appear to permit general resignation as no such qualifying language exists.

National laws similarly provide for resignation, usually in specified circumstances. Even so, national laws, like institutional rules, are mostly silent regarding when an arbitrator may properly withdraw.

Under the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes, an arbitrator’s resignation without just cause violates his or her contractual obligations to the parties. Thus resignation should occur only when serving would be nearly impossible. Circumstances that might justify resignation include an unforeseen increase in the workload, the addition of new parties or substantive claims that give rise to conflicts, the failure of the parties to cooperate in the arbitrator’s efforts to conduct the arbitration in an efficient and professional manner, or misconduct by the parties in relation to the arbitration. In addition, should the parties fail to compensate the arbitrators, they are not required to serve.

Particularly at advanced stages of the proceedings, an arbitrator’s obligation to discharge his or her judicial function to the parties binds him or her to avoid the disruption associated with having to appoint a replacement. Other commentators,

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13 See eg ICC Rules, Art 12(1) (arbitrator's resignation effective upon acceptance by the ICC Court); Belgian Centre for Arbitration and Mediation (CEPANI) Rules, Art 18(4) (the institution must accept the arbitrator's resignation).

14 ICC Rules, Art 12(1) (arbitrator’s resignation effective upon acceptance by the ICC Court). See also CEPANI Rules, Art 18(4) (the institution must accept the arbitrator's resignation).

15 See Swiss Rules of International Arbitration, Art 13(1).

16 See eg UNCITRAL Model Law, Arts 13(2) (permits withdrawal if challenged) and 14(1) (permits withdrawal if unable to perform duties); English Arbitration Act 1996, s 25 (permits resignation by party agreement or upon approval of the court based on the reasonableness of ‘all of the circumstances’); French New Code of Civil Procedure, art 1462 (‘arbitrators are to continue their mission until it has been completed’).

17 AAA/ABA Code of Ethics for Arbitrators in Commercial Arbitrations, Canon I(E):

When an arbitrator’s authority is derived from the agreement of the parties, an arbitrator should neither exceed that authority nor do less than is required to exercise that authority completely. Where the agreement of the parties sets forth procedures to be followed in conducting the arbitration or refers to rules to be followed, it is the obligation of the arbitrator to comply with such procedures or rules.

18 Ibid, Canon I(H): ‘Once an arbitrator has accepted an appointment, the arbitrator should not withdraw or abandon the appointment unless compelled to do so by unanticipated circumstances that would render it impossible or impracticable to continue.’

19 A point that is perhaps controversial: an increase in workload can typically be avoided by refusing to accept further work that conflicts with existing commitments.

considering several major institutional rules, have noted this contractual obligation on the part of the arbitrators to complete their duties to the parties.\(^{21}\)

10.12 Once a tribunal has a vacancy, Article 10 calls for the substitute arbitrator to be, in principle, appointed according to the same procedure that governed the appointment of the arbitrator that is being replaced.\(^{22}\) The parties, however, can agree otherwise and provide, for example, that the substitute arbitrator is appointed directly by the ICDR administrator. As discussed, this approach varies from that adopted by the ICC Rules, which vests the ICC Court with the power to override the originally agreed-upon appointment procedure and make a direct appointment if the Court deems this appropriate in the circumstances of the case.\(^{23}\)


\(^{22}\) Born, op cit.

\(^{23}\) ICC Rules, Art 12.
ARTICLE 11—REPLACEMENT OF AN ARBITRATOR (ARTICLES 10 AND 11)

I. Introduction

11.01 Articles 11(1) addresses whether, and in what circumstances, two arbitrators are permitted to continue the proceedings without the third member of the tribunal in a so-called ‘truncated tribunal’. Article 11(2) affords the newly constituted tribunal,
whenever a substitute arbitrator has been added, the discretion to determine whether, and to what extent, to repeat previous proceedings.

II. Textual commentary

A. The authority of a truncated tribunal to render an award (Article 11(1))

Article 11(1)

If an arbitrator on a three-person tribunal fails to participate in the arbitration for reasons other than those identified in Article 10, the two other arbitrators shall have the power in their sole discretion to continue the arbitration and to make any decision, ruling or award, notwithstanding the failure of the third arbitrator to participate. In determining whether to continue the arbitration or to render any decision, ruling or award without the participation of an arbitrator, the two other arbitrators shall take into account the stage of the arbitration, the reason, if any, expressed by the third arbitrator for such non-participation and such other matters as they consider appropriate in the circumstances of the case. In the event that the two other arbitrators determine not to continue the arbitration without the participation of the third arbitrator, the administrator on proof satisfactory to it shall declare the office vacant, and a substitute arbitrator shall be appointed pursuant to the provisions of Article 6, unless the parties otherwise agree.

11.02 Only when an arbitrator on a three-member tribunal is removed or withdraws from office on the grounds specified in Article 10 will a substitute arbitrator be appointed. In all other cases, the two remaining arbitrators are entitled to proceed under Article 11 in what is sometimes referred to as a ‘truncated’ tribunal. Instances in which the arbitrators decide to proceed as a truncated tribunal are rare, but significant.¹

11.03 The threshold question of who decides whether the tribunal proceeds as ‘truncated’ is under Article 11(1) answered by the tribunal itself. Not all institutional rules adopt the same approach. The ICC Rules, for example, do not leave it to the remaining arbitrators to determine whether to proceed as a truncated tribunal or replace the missing arbitrator. Instead, the ICC Rules require the ICC Court to decide in certain circumstances.²

¹ A well-documented example is Himpurna California Energy Ltd v Republic of Indonesia (2000) 25 YB Comm Arb 186, in which the respondent’s arbitrator could not attend the tribunal in The Hague because he was kidnapped. The remaining arbitrators, acting under the 1976 UNCITRAL Rules, continued with the proceedings and sat as a truncated tribunal.

² ICC Rules, Art 12(5) provides:

Subsequent to the closing of the proceedings, instead of replacing an arbitrator who has died or been removed by the Court pursuant to Articles 12(1) and 12(2), the Court
Whether to continue an arbitration with a truncated tribunal can trigger a debate over the correct balance between avoiding delays and excessive costs when an arbitrator withdraws and, conversely, potentially hindering a party’s ability to participate effectively in the arbitration, because its co-arbitrator has disappeared. On the one hand, allowing a truncated tribunal to proceed with the arbitration could be an unfair and disproportionate response to a co-arbitrator’s withdrawal from the proceedings. In addition, operating with a truncated tribunal departs from the parties’ original agreement to have at minimum a three-arbitrator tribunal. There is thus an argument that to do so is unfaithful to the underlying principle of party autonomy in arbitration. On the other hand, provisions such as Article 11 ensure that the arbitration proceeds even if an arbitrator, without proper justification, fails to participate—in particular when this occurs for obstructive reasons. Thus Article 11 may save the parties the delay of a replacement process, and the potentially greater delay and cost of having to repeat part of the proceedings under Article 11(2).

In light of these issues, some arbitration institutions expressly permit truncated tribunals to proceed to an award in limited circumstances, such as after the tribunal has formally closed the proceedings—that is, when the submission of further evidence is precluded, but before the award has issued. Other rules do not confer such powers on a truncated tribunal, but instead provide for the replacement of the defaulting arbitrator.

The ICDR Rules adopt a broader approach than other institutions by permitting a truncated tribunal to act. Article 11, which entitles the two remaining arbitrators to proceed with the arbitration and to ‘make any decision, ruling or award’ without the third arbitrator, provides significant possibilities for a truncated tribunal to make an award. The two remaining arbitrators enjoy significant discretion in determining whether they want to stay the proceedings (and invoke Article 6 procedures for nominating a replacement) or whether they want to proceed with

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4 Ibid.
5 See eg ICC Rules, Art 12(5) (leaving it to the discretion of the ICC Court to decide whether the remaining arbitrators shall continue with the arbitration). Therefore, prior to the close of the proceedings under the ICC Rules, the solution for an obstructing co-arbitrator is removal and replacement either by the ICC Court or by the party that nominated the original co-arbitrator: Y Derains and E Schwarz, *A Guide to the ICC Rules of Arbitration* (2nd edn, Kluwer Law International, The Hague, 2005) 205–06.
6 See eg LCIA Rules, Art 11.
7 See Born, op cit.
Chapter 11: Article 11—Replacement of an Arbitrator (Articles 10 and 11)

The truncated tribunal must take into account, however, whether the arbitration has already proceeded to an advanced stage, in accordance with Article 11. The more advanced the arbitration proceeding is, the more likely a delay without good justification will be (perceived as) disruptive, and as frustrating an efficient and expedient proceeding. The arbitrators are also asked to consider the justification offered by the defaulting arbitrator who fails to participate.

11.07 When exercising their discretion and considering the circumstances of the case, the remaining arbitrators may insist upon continuing only with a replacement arbitrator. In that case, the administrator is compelled (‘shall’) to appoint a replacement arbitrator pursuant to Article 6 (unless the parties agree otherwise). Although the administrator must do so only upon receiving ‘proof satisfactory to it’, suggesting that the last word in the matter is for the administrator, not for the truncated tribunal, in practice, the administrator follows the directions of the remaining arbitrators if it is evident that the third arbitrator will no longer participate in the arbitration.

B. Repeating previous hearings (Article 11(2))

Article 11(2) allows the newly constituted tribunal to decide if, and to what extent, prior hearings should be repeated. The newly constituted tribunal can require the parties to repeat prior hearings, including witness examinations and oral arguments. The newly constituted tribunal has the sole discretion to decide and is likely to consider, but is under no obligation to solicit, the views of the parties.

11.08 Article 11(2) allows the newly constituted tribunal to decide if, and to what extent, prior hearings should be repeated. The newly constituted tribunal can require the parties to repeat prior hearings, including witness examinations and oral arguments. The newly constituted tribunal has the sole discretion to decide and is likely to consider, but is under no obligation to solicit, the views of the parties.

11.09 As a general matter, leaving the discretion to the tribunal is a feature of the ICDR Rules that should preempt the application of any peculiar or nuanced procedural rules that might otherwise apply under national laws, such as the default rule in New York that would require a tribunal to be constituted anew upon the death of an arbitrator before the final award is rendered, as discussed above.8

8 US decisions under the FAA (which is silent regarding the consequences of replacing an arbitrator) have held that the death of an arbitrator before an award is rendered required repeating the entire arbitral process. See eg Marine Prods Exp Corp v MT Globe Galaxy, 977 F2d 66, 68 (2d Cir 1992) (requiring the panel to begin anew after the death of one of the arbitrators); Cia de Navegacion Omsil, SA v Hugo Neu Corp, 359 FSupp 898 (SDNY 1973) (holding that a new proceeding was appropriate upon the death of an arbitrator where the parties had not explicitly agreed on a method for replacing an arbitrator).
The recent discussion about replacement in the New York courts highlights the importance of parties’ desire to choose their decision-makers and the potential abuse that can result from resignation. Clearly, a replacement arbitrator needs an opportunity to address and personally consider prior witness testimony and cross-examination. Merely consulting hearing transcripts and prior submissions poses problems of interpretation, denies the newly instated arbitrator an equal opportunity to weigh the credibility of such evidence and/or testimony, and is a second-best solution.

Purely as a textual matter, Article 11(2) enables the newly constituted tribunal to decide what ‘prior hearings’ shall be ‘repeated’. It is not as broadly worded as some other institutional rules that authorize the newly constituted tribunal to revisit prior ‘proceedings’. While Article 11(2) is open to interpretation, it appears to allow the newly constituted tribunal to reconsider and repeat all procedural acts, and may permit it to revisit prior decisions or awards. This may depend on the effects associated with the award or decision under the applicable lex arbitri, although Article 11(2) could also be interpreted as a contractually agreed-upon exception to any principle of res judicata.

With similar language, the 1976 UNCITRAL Rules required that all hearings previously held shall be repeated if the presiding (or sole) arbitrator is replaced. At least one commentator has interpreted this provision to mean that, while proceedings may be repeated, they are not to begin anew, and thus no new evidence or submissions may be presented.

See also Ins Co of North Am v Public Serv Mutual Ins Co, No 09–3640-cv (2d Cir 23 June 2010); Sec Ins Co of Hartford v Commercial Risk Reinsurance Co, 2007 WL 4917787 (SDNY 8 May 2007) (acknowledging that the ‘start over’ rule applies in the context of resignation, but ultimately refusing to constitute a new panel because the resignation occurred prior to any substantive proceedings); Home Ins Co v Banco de Seguros del Estado (Uruguay), 1999 US Dist LEXIS 22478, *4 (SDNY 17 February 1999) (stating, without analysis, that when an ‘arbitrator dies or becomes incapacitated in medias res and the parties disagree as to how to proceed, the parties should begin arbitration anew’); Nissho-Iwai Co v Chem Carrier, Inc, 1993 WL 485614 (SDNY 23 November 1993) (holding that the entire panel must be reconstituted due to the resignation of one of the arbitrators, but without further analysis).

Article 11(2) is based on Art 14 of the 1976 UNCITRAL Rules, providing that if the sole or presiding arbitrator is replaced, any prior hearings must be repeated, but if a party-appointed arbitrator is replaced, ‘such prior hearings may be repeated at the discretion of the arbitral tribunal’.

1976 UNCITRAL Rules, Art 14. The 2010 UNCITRAL Rules, Art 15, simply provided that: ‘If an arbitrator is replaced, the proceedings shall resume at the stage where the arbitrator who was replaced ceased to perform his or her functions, unless the arbitral tribunal decides otherwise.’
Chapter 11: Article 11—Replacement of an Arbitrator (Articles 10 and 11)

11.13 The reasons for removing the previous arbitrator may affect the nature and extent of the evidence needed to be re-presented. Accordingly, the newly constituted tribunal may also consider whether an arbitrator has been removed for lack of impartiality or independence, or some other misconduct, that may have tainted the previously conducted proceedings and thus justify their repetition.\(^\text{15}\)

11.14 In any event, however, the newly constituted tribunal will need to balance the additional time and cost incurred through repeating hearings against the tribunal’s duty to respect each party’s right to be heard by an impartial, independent, and fully functioning tribunal, and to ensure, in so far as possible, that any award that it delivers is enforceable at law.

\(^{15}\) Ibid.
ARTICLE 12—REPRESENTATION

I. Introduction

Although some jurisdictions have traditionally placed restrictions on who can appear on behalf of the parties in an arbitration proceeding conducted on its territory,1 there is a clear trend in international arbitration towards allowing the parties freely to choose a representative as they deem appropriate, whether that be a local lawyer or foreign counsel, or someone not qualified as a lawyer at all.2 As with most institutional arbitration rules, Article 12 thus provides that ‘a party may be represented in the arbitration’.

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II. Textual commentary

12.02 Article 12 does not provide express guidance as to who may or may not represent a party in arbitration. It does provide, however, that each party has the right to representation and, given the liberal approach underlying modern doctrine and the ICDR Rules, this provision should be interpreted to provide each party with the freedom to select a representative of its choosing, whether that is a lawyer or a non-lawyer. This would be in line with the rules of all major arbitration institutions, which uniformly allow lawyers and non-lawyers alike to represent parties in an arbitration, irrespective of their nationality or connection to a local bar.3

12.03 There is, however, the question of what, exactly, constitutes a ‘representative’. Some international arbitration rules distinguish between party representatives, on the one hand, and legal advisers, who assist the party or its representatives, on the other; other rules appear to confl ate the two. For example, Article 21(4) of the ICC Rules specifically distinguishes ‘authorized representatives’ from ‘advisers’, specifying that parties may ‘appear . . . through duly authorized representatives’, and ‘may be assisted by advisers’.4 The 2010 UNCITRAL Rules incorporate this distinction (as did the previous version) and provide a procedure for what is required to prove that a representative is duly authorized to represent a party, which did not exist in the previous version of the rule. Specifically, Article 5 of the 2010 UNCITRAL Rules provides:

> Each party may be represented or assisted by persons chosen by it. The names and addresses of such persons must be communicated to all parties and to the arbitral tribunal. Such communication must specify whether the appointment is being made for purposes of representation or assistance. Where a person is to act as a representative of a party, the arbitral tribunal, on its own initiative or at the request of any party, may at any time require proof of authority granted to the representative in such a form as the arbitral tribunal may determine.

12.04 The LCIA Rules take a different approach, muddying any supposed distinction between party representatives and legal advisers: ‘Any party may be represented by legal practitioners or any other representative.’5 Such confl ation may be a result of the drafters finding that this is an instance of a ‘distinction without a difference’

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4 ICC Rules, Art 21(4) (emphasis added).

5 LCIA Rules, Art 18.1.
between party representatives and legal advisers for the purpose of the rule. For example, under each of the rule formulations discussed here, both party representatives and legal advisers have authority to act on the party’s behalf vis-à-vis the tribunal and the opposing party or parties. Both Article 18 of the LCIA Rules discussed above and Article 12 of the ICDR Rules, more than any of the others discussed above, seem to incorporate this practical view. Indeed, although Article 12 is silent on the matter, there is nothing in the ICDR Rules precluding a party having both.

If a party chooses to be represented in the arbitration, it is as a matter of course required to notify the other parties and the administrator, and to communicate the contact details of its representative. Once those details are communicated, service on the address of the representative is valid service on the party. Article 12 also clarifies that, once the tribunal is duly constituted, the parties’ representatives can communicate directly with the tribunal, rather than route communication through the administrator. In practice, parties will copy the administrator in all correspondence.

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6 See ICDR Rules, Art 18.
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Article 13

1. If the parties disagree as to the place of arbitration, the administrator may initially determine the place of arbitration, subject to the power of the tribunal to determine finally the place of arbitration within 60 days after its constitution. All such determinations shall be made having regard for the contentions of the parties and the circumstances of the arbitration.

2. The tribunal may hold conferences or hear witnesses or inspect property or documents at any place it deems appropriate. The parties shall be given sufficient written notice to enable them to be present at any such proceedings.

I. Introduction

Article 13 presumes that the parties to an arbitration will choose the place (or seat) of arbitration in the arbitration agreement. Parties are well advised to do so due to the important role that the seat of arbitration plays in any arbitration. In practice, a majority of arbitration agreements specifically designate a seat of arbitration.¹

For ICDR arbitrations, the US remains the most popular host country, and New York the most popular seat.

Choosing (or determining) the place (or the ‘seat’) of arbitration entails very important considerations. The law at the seat usually provides the applicable *lex arbitri*, and thus the applicable mandatory (and discretionary) procedural rules; whether and to what degree a court may intervene (in support of an arbitration agreement or otherwise), and on what grounds an award may be challenged. Article 13 provides for the situation in which the parties have failed to agree on a place of arbitration, authorizing the ICDR administrator to determine the place of arbitration for the parties. In 2009, the ICDR did so in 31 cases.

II. Textual commentary

A. The ‘place’ of the arbitration (Article 13(1))

*Article 13(1)*

> If the parties disagree as to the place of arbitration, the administrator may initially determine the place of arbitration, subject to the power of the tribunal to determine finally the place of arbitration within 60 days after its constitution. All such determinations shall be made having regard for the contentions of the parties and the circumstances of the arbitration.

1. Importance of the place (or ‘seat’) of the arbitration

Choosing the place of arbitration is not simply a matter of mere convenience in terms of climate, cuisine, or culture during the arbitration hearing; instead, choosing the ‘place’, ‘seat’, or ‘situs’ of the arbitration carries significant legal implications. It is one of the most important determinations of the arbitral process. For this reason, it is generally advisable for parties to preselect the seat in their arbitration agreement.

The law of the seat, or the *lex arbitri*, provides ‘a body of rules which sets a standard external to the arbitration agreement, and the wishes of the parties, for the conduct of the arbitration’.

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II. Textual commentary

of the arbitration’. This external body of law is determined by the parties’ choice of the seat of arbitration. Therefore, while Article 1(b) establishes that ‘[t]hese rules govern the arbitration’, the law of seat of the arbitration provides the (sometimes mandatory) law applicable to issues such as the arbitrability of a particular dispute, the ability of a tribunal to rule on its own jurisdiction, particular rules of procedure.

3 Redfern and Hunter, op cit, para 3-39.
4 See eg JD Lew, L Mistelis, and S Kröll, Comparative International Arbitration (Kluwer Law International, The Hague, 2003) paras 9-19–9-26; S Brekoulakis, ‘On Arbitrability: Persisting Misconceptions and New Areas of Concern’, in L Mistelis and S Brekoulakis (eds) Arbitrability: International and Comparative Perspectives (Kluwer Law International, The Hague, 2009) 19–46. In the US, for example, the newly proposed Arbitration Fairness Act would limit the ability to arbitrate employment disputes, franchise disputes, and disputes arising under statutes designed to protect civil rights: KD Beale, ‘American Anti-arbitration Legislation: A Threat?’, Kluwer Arbitration Blog (26 February 2009), available online at <http://kluwerarbitrationblog.com/blog/2009/02/26/american-anti-arbitration-legislation-%e2%80%93-a-threat/>. Pursuant to the French Civil Code, art 2059, ‘[a]ny person may submit to arbitration the rights of which he has full disposition’. Likewise, art 2060 of the French Civil Code provides that certain specific matters are non-arbitrable: ‘Matters regarding the civil status or capacity of a person, relating to divorce or legal separation, or disputes concerning public collectives and public establishment and generally concerning all matters involving public policy may not be submitted to arbitration.’ See also Swiss Federal Code of Private International Law, art 177 (‘1. Any dispute involving property can be the subject-matter of an arbitration. 2. If a party to the arbitration agreement is a state or an enterprise held, or an organisation controlled by it, it cannot rely on its own law in order to contest its capacity to be a party to an arbitration or the arbitrability of a dispute covered by the arbitration agreement.’); Belgian Judicial Code, art 1676(1) (‘Any dispute which has arisen or may arise out of a specific legal relationship and in respect of which it is permissible to compromise may be the subject of an arbitration agreement’); Italian Code of Civil Procedure, art 806 (‘The parties may have arbitrators settle the disputes arising between them, excepting those provided for in arts 409 [individual labour disputes] and 442 [social security and obligatory medical aid], those regarding issues of personal status and marital separation and those others that cannot be the subject of a compromise’).
5 Nearly all institutional rules recognize that the arbitral tribunal has the authority to determine its own jurisdiction, as do national laws. See eg English Arbitration Act 1996, s 30 (‘the arbitral tribunal may rule on its own substantive jurisdiction’); French Code of Civil Procedure, art 1466 (‘If, before the arbitrator, one of the parties challenges the principle or scope of the arbitrator’s jurisdiction, the arbitrator shall rule on the validity or scope of his or her jurisdiction’). The UNCITRAL Model Law, which provides the basis for many other national arbitration laws provides, at Art 16, that ‘[t]he arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement’. In the US, the FAA is silent on the doctrine of competence–competence, but US courts have definitively established the principle: see eg Howsam v Dean Witter Reynolds Inc, 537 US 79 (2002); Pacifi care Health Sys, Inc v Book, 538 US 401, 407 (2003); Oil, Chem and Atomic Workers v Am Petrofi na Co, 759 F2d 512, 515 (5th Cir 1988).
6 Indeed, one US court has remarked that ‘[t]he situs of the arbitration is of critical importance because the law of the jurisdiction in which the arbitration is conducted ordinarily provides the procedural law of the arbitration’: JSC Surgutneftegaz v President and Fellows of Harvard College, 167 FedAppx 266 (2d Cir 2006). See also GB Born, International Commercial Arbitration (Kluwer Law International, The Hague, 2009) 1,285.
interim measures, and the power of the local courts to intervene and/or assist the arbitral process. To the extent that it is mandatory, the arbitral law at the seat will override the parties’ agreement (including the ICDR Rules) and limit the arbitrators’ discretion. The law of the seat of arbitration may thus, by virtue of its mandatory procedural provisions, define the parameters of due process. It may stipulate the rights and duties of the arbitrators and the parties, including standards of impartiality and independence. The law of the seat may also provide for, or limit, the intervention of local courts in the arbitral process, as well as through its conflict of laws rules, certain mandatory provisions, or through its ordre public, influencing the substantive determination of the parties’ dispute. Indeed, in choosing certain jurisdictions as arbitral seats, the parties can expose themselves to potentially draconian or arbitrary application of mandatory provisions of local law.


8 For example, in the US, a federal statute authorizing federal courts to compel discovery in connection with foreign proceedings has been used to compel third parties to disclose documents and compel testimony for use by international arbitral panels: 28 USC s 1782. While such practice is the subject of much debate in the arbitration community, 28 USC s 1782 provides just one example of the assistance available to the arbitral process under national laws and informs parties’ contractual selections of a seat for an arbitration. See eg FT Schwarz, KD Beale, and JM Lugar, ‘Solving the 1782 Puzzle: Bringing Certainty to the Debate Over 28 USC s 1782’s Application to International Arbitration’, 47 Stan J Intl L (forthcoming 2010).


10 See J Paulsson, ‘Securing the Integrity, Impartiality and Independence of Arbitrators: Judicial Intervention’, Ysk Arb Inst SCC 91 (1993), 93; Born, op cit, 1,593 ff; English Arbitration Act 1996, s 33(1)(a) (‘The tribunal shall act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent’); UNCITRAL Model Law, Art 11(5) (providing that the national law shall ‘secure the appointment of an independent and impartial arbitrator’).

11 G Petrochilos, Procedural Law in International Arbitration (Oxford University Press, Oxford, 2004) 27 (‘When parties elect a forum they are conscious that they import the baggage of the lex fori of that court; they will at a minimum tolerate that law and at a maximum actively seek litigational advantages under it, but they are in either event making a deliberate choice’).

Importantly, the seat of arbitration provides the law and forum for applications to set aside the award, and it plays an important role in enforcement proceedings under Article V(1)(a), (d), and (e) of the New York Convention. Specifically, Article V(1)(a) of the New York Convention provides that ‘[r]ecognition and enforcement of the award may be refused . . . under the law of the country where the award is made’. Under Article V(1)(d), if the composition of the tribunal or the procedure of the arbitration ‘was not in accordance with the law of the country where the arbitration took place’, the award may not be recognized or enforced. Finally, under Article V(1)(e) of the New York Convention, an award may not be recognized or enforced if the award ‘has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made’. These various provisions regarding the recognition and enforcement of an arbitral award indicate the significance of the seat of arbitration, and underscore the need for careful consideration when choosing a seat of arbitration.

For all of these reasons, parties are well advised to consider carefully, and to agree upon in their arbitration agreement, the legal seat for their arbitration. Article 13 fully respects the parties’ autonomy to reach agreement on this important point, which is consistent with other leading institutional arbitral rules.

2. Determination of the place of arbitration

Each arbitration needs a legal seat, a place where it is hosted, with all of the consequences described above. Where the parties have failed to agree on a seat, the administrator will proceed to determine the place of arbitration on the parties’ behalf. The seat of arbitration entails significant legal consequences; if parties cannot agree, it is critical that a seat is determined at the earliest possible opportunity. In doing so, the administrator has to take into account ‘the parties’ contentions’ and ‘the circumstances of the arbitration’.

Providing an administrator with the ability to determine the seat in the first instance—before the tribunal is constituted—is a common feature of most administered arbitration rules. For example, Article 14(1) of the ICC Rules provides that the ICC Court itself will choose the seat of arbitration if the parties cannot agree or

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13 New York Convention, Art V(1)(a).
14 Ibid, (d).
15 Ibid, (e).
16 See eg 2010 UNCITRAL Rules, Art 18(1) (‘If the parties have not previously agreed on the place of arbitration, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case’); ICC Rules, Art 14(1) (‘The place of the arbitration shall be fixed by the Court unless agreed upon by the parties’); LCIA Rules, Art 16.1 (‘The parties may agree in writing the seat (or legal place) of their arbitration’); VIAC Rules, Art 2 (‘Unless the parties have agreed otherwise (a) the place of arbitration shall be Vienna’); SCC Rules, Art 20 (‘Unless agreed upon by the parties, the Board shall decide the seat of the arbitration’); SIAC Rules, Art 18 (‘The parties may agree on the seat of arbitration’).
have not otherwise agreed in their arbitration agreement. In a similar vein, Article 16.1 of the LCIA Rules provides that the LCIA will choose the seat if the parties are unable to agree.

13.10 Although the ICDR Rules provide no specific criteria for determining how an administrator shall choose the seat of arbitration, this question has been examined in some detail under Article 14 of the ICC Rules (formerly Article 12). This examination is likely to be similar to the criteria used by the ICDR administrator in applying the ICDR Rules. The ICC Court considers several factors, including the nationality of the parties and the arbitrators. Since impartiality and neutrality are central to the proper functioning of arbitration, choosing a seat that is unconnected to the parties and the arbitrators is said to ensure against possible challenges to any awards issued. Likewise, the parties’ choice of applicable substantive (or even procedural) law may guide an administrator and provide some indicia of locations that may be suited for the seat of the arbitration. Another important consideration is the locus of the dispute, including where the underlying contract was formed, or key locations within the contract, such as place of delivery and performance. Finally, the administrator may take into consideration matters of convenience, such as geographic location of the parties or their counsel, adequate facilities, and costs of particular facilities available, although these convenience factors may be more appropriate to consider for the location of an oral hearing, rather than the legal seat of arbitration, as discussed below.

13.11 In addition to these criteria, the administrator likely will choose a seat that is known to be ‘arbitration-friendly’ so as to ensure no unwanted interference from local

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17 ICC Rules, Art 14(1).
18 LCIA Rules, Art 16.1 (‘The seat of arbitration shall be London, unless and until the LCIA Court determines in view of all the circumstances, and after having given the parties an opportunity to make written comment, that another seat is more appropriate’).
19 For a more comprehensive analysis of factors that guide the ICC Court in choosing a seat in the absence of the parties’ agreement, see S Jarvin, ‘The Place of Arbitration: A Review of the ICC Court’s Guiding Principles and Practice When Fixing the Place of Arbitration’, 7(2) ICC Ct Bull 54, 54–58 (1996).
20 Like the ICDR’s requirements that the tribunal shall take into account ‘the parties’ contentions’ and the ‘circumstances of the arbitration’, the ICC Court Committee makes decisions about the place of the arbitration based on ‘consideration of any comments provided by the parties and the recommendations of the Secretariat [of the ICC Court]’: Y Derains and E Schwartz, A Guide to the ICC Rules of Arbitration (Kluwer Law International, The Hague, 2005) 213. See also H Verbist, ‘The Practice of the ICC International Court of Arbitration with Regard to the Fixing of the Place of Arbitration’, 12 Arb Intl 347, 351–57 (1996), listing, at s IV, the following criteria to which the ICC Court refers for selecting an arbitral seat if the parties fail to agree upon one:

(a) the neutrality of the Parties; (b) convenience of the place of Arbitration, [including]
   (i) equal access to the place of arbitration, (ii) origin of the parties, of counsel and, as the case may be, of the arbitrators and the chairman of the arbitral tribunal or of the sole arbitrator, (iii) the costs of the arbitration, (iv) applicable law, (v) language of the file; [and]
   (c) other considerations.
21 Derains and Schwartz, op cit, 213.
22 See below para 13.13 ff.
II. Textual commentary

courts or other obstacles. At a minimum, the administrator should choose a seat that has acceded to the New York Convention, that is generally receptive to arbitration, and, ideally, the national court system of which has a solid record of handling the often complex matters that arise in international arbitrations in an impartial and transparent manner. Amongst others, nations such as Austria, Belgium, Canada, England, France, the Netherlands, Singapore, Sweden, Switzerland, and the US are typically viewed as stable, pro-arbitration seats. The national law governing arbitration in these states typically provides that the internal procedures of an arbitration will not be regulated in any detail, but will instead be left almost entirely to the parties’ agreement and the tribunal’s discretion. It is more likely than not, then, that an administrator under ICDR Rules will select a seat that has flexible, pro-arbitration legislation to best implement the parties’ arbitration agreement.

The administrator’s determination of the seat of arbitration is binding on the parties, but it is not binding on the arbitrators; rather, the arbitrators have discretion to determine a different seat within 60 days of the tribunal’s constitution. This provision recognizes that, even after a relatively brief period of time, the arbitrators may be better placed to appreciate the particular circumstances of the case and determine the legal seat of arbitration accordingly, again taking into account ‘the parties’ contentions’ and ‘the circumstances of the arbitration’.

Article 13 thus recognizes that parties should and do have the potential to influence the final choice of the seat of arbitration. For example, a party may choose to appoint an arbitrator who may or may not have a connection to the administrator’s choice of seat, thus potentially influencing the final choice by the arbitrators to select a different seat or to retain the seat selected by the administrator. Although the parties retain some influence over the final selection of the seat by virtue of the power to select their own arbitrators, the administrator’s preliminary determination of the place of arbitration is designed merely to prevent the result of the arbitration having no legal seat for any material point in time. The last word in the matter, however, is reserved for the tribunal according to the ICDR Rules and most national laws.

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24 Born, op cit, 68.
26 Born, op cit, 1,699; see also English Arbitration Act 1996, s 3(b); UNCITRAL Model Law, Art 20(1); Swiss Federal Code on Private International Law, art 176(3).
Chapter 13: Article 13—Place of Arbitration

B. Location of hearings and procedural acts (Article 13(2))

**Article 13(2)**

*The tribunal may hold conferences or hear witnesses or inspect property or documents at any place it deems appropriate. The parties shall be given sufficient written notice to enable them to be present at any such proceedings.*

13.14 The legal seat of the arbitration does not necessarily coincide with the physical location at which the proceedings are actually conducted, entirely or in part. In that sense, the seat of arbitration has been described as a legal fiction that attaches the consequences discussed above, but which can be wholly dislocated from the physical location where the aspects of the arbitration, such as hearings, are actually conducted. In effect, ‘the seat of the arbitration is the juridical seat of the arbitration designated by the parties, or by an arbitral institution or the arbitrators themselves, as the case may be’. As such, the seat is ‘intended to be its central point or its centre of gravity. This does not mean that all the proceedings of the arbitration have to take place there, although preferably some should do so.’

13.15 Article 13(2) fully recognizes this well-established principle and permits individual procedural acts to be conducted in places other than the seat of arbitration. It specifically allows the tribunal to hold conferences, hear witnesses, or inspect property or documents at any place that it deems appropriate.

13.16 ‘Holding conferences’ is a deliberately broad term that effectively authorizes the tribunal to conduct a significant range of procedural acts at a different location from the legal seat. Unlike other rules, the ICDR Rules do not require the tribunal first to consult the parties before ordering a hearing or other procedural act at a different location. For example, the ICC Rules provide that ‘[t]he Arbitral Tribunal may, after consultation with the parties, conduct hearings and meetings at any location it considers appropriate unless otherwise agreed by the parties’. The SCC Rules similarly provide that ‘[t]he Arbitral Tribunal may, after consultation with the parties, conduct hearings at any place which it considers appropriate’.

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30 ICC Rules, Art 14 (emphasis added).
31 SCC Rules, Art 20(2) (emphasis added).
Although the corresponding ICDR Rule does not explicitly require consultation
with the parties on this issue, it is respectful of due process in this regard. For
example, although Article 20 already requires the tribunal to provide the parties
with sufficient advance notice for any hearing, Article 13(2) duplicates this mandate
by requiring the tribunal to give sufficient notice to the parties before any such
hearing to ‘enable them to be present at any such proceedings’.
ARTICLE 14—LANGUAGE

I. Introduction

Article 14 recognizes as binding the parties’ agreement, in the arbitration clause or otherwise, on a particular language in which the arbitration shall be conducted. However, where the parties have not specified the language of the arbitration, Article 14 provides that the language of the ‘documents’ that contain the arbitration agreement—typically, the underlying commercial contract(s)—is determinative, in principle, of the language of the proceedings. In 2009, some 95 per cent of all arbitrations under the ICDR Rules were conducted in the English language, with the remaining 5 per cent in Spanish.¹

¹ Discussion with ICDR senior management (October 2010).
II. Textual commentary

A. Default rule provides predictability and efficiency

Article 14 differs slightly from the language provisions found in most other major arbitral rules. These typically leave it to the arbitrators’ discretion, absent agreement by the parties, to determine the language of the arbitration, and the arbitrators would, in such instance, almost certainly take into account the language of the parties’ commercial contract, as Article 14 provides explicitly. Although this may seem more of a distinction than a difference from the ICDR Rules, the solution adopted by Article 14—of providing a default language of the language(s) of the documents containing the arbitration agreement—has the advantage of legal certainty: the language(s) of the arbitration can easily be ascertained by the parties even before the arbitral tribunal is constituted. This practice is also commercially sensible. By choosing a particular language for the main contract, the parties have already indicated that they are comfortable to conduct business with each other in that language, which may be taken as a strong indicator of their comfort in conducting an arbitration in that language.

B. In-built discretion and input by the parties provides flexibility

Article 14 also provides for some flexibility in circumstances in which a language other than that of the contract(s) may be more appropriate for the arbitration.

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2 See eg ICC Rules, Art 16 (‘In the absence of an agreement by the parties, the Arbitral Tribunal shall determine the language or languages of the arbitration, due regard being given to all relevant circumstances, including the language of the contract’); 2010 UNCITRAL Rules, Art 19, with a now fairly elaborate regime for the applicable language and translations; LCIA Rules, Art 17.3 (‘Upon the formation of the Arbitral Tribunal and unless the parties have agreed upon the language or languages of the arbitration, the Arbitration Tribunal shall decide upon the language(s) of the arbitration, after giving the parties an opportunity to make written comment and taking into account the initial language of the arbitration and any other matter it may consider appropriate in all the circumstances of the case’); SCC Rules, Art 21(1) (‘Unless agreed upon by the parties, the Arbitral Tribunal shall determine the language(s) of the arbitration’); SIAC Rules, Art 19.1 (‘Unless the parties have agreed otherwise, the Tribunal shall determine the language to be used in the proceedings’). For further commentary, see GB Born, International Arbitration and Forum Selection Agreements: Drafting and Enforcing (3rd edn, Kluwer Law International, The Hague, 2010) 78–79; GB Born, International Commercial Arbitration (Kluwer Law International, The Hague, 2009) 178, 1,454–55, 1,807–08; E Gaillard and J Savage, Fouchard, Gaillard, Goldman on International Commercial Arbitration (Kluwer Law International, The Hague, 1999) 1,244. See also Born, op cit (2009) 1,679–89; N Blackaby, C Partasides, A Redfern, and M Hunter, Redfern and Hunter on Law and Practice of International Commercial Arbitration (5th edn, Oxford University Press, Oxford, 2009) para 2-81; D Caron, L Caplan, and M Pellonpää, The UNCITRAL Arbitration Rules: A Commentary (Oxford University Press, Oxford, 2006) 352–63.
In such case, the arbitrators can rely upon the broad discretion granted to them by Article 14 to determine that a language that differs from the ‘documents’ shall be the language of the arbitration, instead.

Under Article 14, the tribunal may determine a different language ‘based upon the contentions of the parties’. This seems to suggest that the parties should be heard on the matter before the arbitrators reach a decision. Determining what language(s) shall apply to an arbitration typically will involve a balancing of the parties’ nationality (and the language of those nationalities), the language of their previous correspondence, the language (if known) of likely witnesses and documentary evidence (as well as the attendant costs of translation), and other considerations that bear on the fairness and efficacy of the proceedings. The arbitrators’ discretion is limited only by considerations of due process, because the determination of a language should not impede a party’s right to be heard, which right might be impacted by imposing prohibitive costs for interpretation and translations on a party. All of these factors must be assessed on a case-by-case basis. Therefore, no single, rigid rule for determining the language of an arbitration could provide a better outcome than Article 14 of the ICDR Rules, which both provides a default (for predictability, ease, and efficiency) and broad discretion for the arbitrators to alter the default if a particular case warrants it.

Article 14 also permits the arbitrators to determine the ‘language(s)’ of the arbitration, recognizing that it may be appropriate, in some cases, to conduct the arbitration in more than one language. It is not uncommon, for example, to require the parties to make submissions in one language (for example, English), but to allow them to produce documents or witness statements in other languages without having to provide a translation (for example, French or German, especially in circumstances in which one or more of the arbitrators and both party representatives are fluent in that tongue). Any directions on the language of the arbitration will typically be in the form of a procedural order and should be given at the outset of the proceedings in order to permit the parties to prepare their case accordingly.

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3 Born, op cit (2009) 1,808.
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ARTICLE 15—PLEAS AS TO JURISDICTION

I. Introduction

An arbitral tribunal must consider whether it has jurisdiction over the subject matter of any dispute that comes before it. The tribunal’s jurisdiction depends on whether a valid arbitration agreement exists, and if so, on whether the dispute falls within its scope. Article 15 provides the tribunal with authority to determine this preliminary question by deciding any objections to its jurisdiction relating to the ‘existence, scope or validity of the arbitration agreement’.

Article 15(2) provides a mechanism to resolve meaningfully, through arbitration, the question of whether an underlying substantive agreement, which contains the...
Chapter 15: Article 15—Pleas as to Jurisdiction

arbitration clause, is null, void, or incapable of being performed, and yet preserve
the tribunal’s jurisdiction. Article 15(2) is based on the doctrine (or presumption)\(^1\)
of separability, which presumes that parties to a contract containing an arbitration
agreement intend for the arbitration agreement to be a separate agreement from the
underlying contract. Without that presumption, a determination that an underly-
ing contract is null or void might destroy the arbitration agreement that is contained
in that underlying contract and thus deprive the tribunal’s determination of a juris-
dictional basis.

**15.03** Under Article 15(3), jurisdictional objections must be made no later than the filing
of the statement of defence (or in response to any counterclaim). Article 15(3) also
provides that a tribunal may bifurcate proceedings regarding jurisdictional pleas
into a jurisdiction and a merits phase, for example. This corresponds to the tribu-
nal’s discretion to conduct the proceedings as it sees fit (and in accord with the
parties’ agreement) under Article 16(3).

## II. Textual commentary

### A. Competence-competence (Article 15(1))

**Article 15(1)**

*The tribunal shall have the power to rule on its own jurisdiction, including any objections
with respect to the existence, scope or validity of the arbitration agreement.*

**15.04** Article 15(1) specifically recognizes that the tribunal has authority to decide
disputes regarding its own jurisdiction, including disputes over the existence,
validity, legality, and scope of the parties’ arbitration agreement. This authority is
usually referred to as the arbitrator’s ‘competence-competence’ (also referred to as
‘Kompetenz-Kompetenz’),\(^2\) a term of art so-called because the presumption recog-
nizes the tribunal’s *competence* to decide upon its own *competence* to hear a particular
dispute.\(^3\) Under this doctrine, international arbitration tribunals are understood to

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1. GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 311–407. Born states that “[a]n international arbitration agreement is almost invariably treated as presumptively “separable” or “autonomous” from the underlying contract within which it is found. This result is generally referred to as an application of the “separability doctrine”, or, more accurately, the “separability presumption” (311–12).

2. Ibid, 854 (‘In Germany, where the formula originated, the “Kompetenz-Kompetenz” doctrine was historically understood as recognizing an arbitral tribunal’s jurisdiction to finally decide questions regarding its own jurisdiction . . .’).  

3. See eg Dell Computer Corp v Union des Consommateurs [2007] 2 SCR 801 (‘In a case involving an arbitration agreement, any challenge to the arbitrator’s jurisdiction must be resolved first by the
have the power to decide the existence and extent of their own jurisdiction. The ICDR Rules are not alone in stipulating that arbitrators may decide on their own jurisdiction. All major arbitral rules include a provision that gives effect to the competence-competence principle. However, the principle of competence-competence often does not apply unconditionally: most national laws provide for some sort of review of the arbitrator’s decision through the national courts, making those courts the final arbiter of the tribunal’s jurisdiction.

It is undisputed that the arbitration agreement serves as the basis for the tribunal’s jurisdiction. The arbitration agreement indicates that the parties intended for a tribunal to hear and decide disputes arising out of or in connection with the arbitrator in accordance with the competence-competence principle’); Cour de Cassation [Supreme Court], First Civil Chamber, 21 November 2006, Appeal No 05-21818, in A.J van den Berg (ed) Yearbook Commercial Arbitration Vol XXXII—2007 (Kluwer Law International, The Hague, 2007) 294–96:

According to French law, the combination of the principles of validity of international arbitration agreements and competence-competence prevents state courts from deciding on the existence, validity and scope of an arbitration clause before the arbitrator renders a decision on this issue, save in the case of nullity and manifest inapplicability of the clause.

Rogers Wireless Inc v Muroff [2007] 2 SCR 921, 2007 SCC 35 (‘An arbitrator has exclusive jurisdiction to undertake such an inquiry and for a court to do so would . . . deprive the arbitrator of jurisdiction to rule on its own jurisdiction’). See also E Gaillard and J Savage, Fouchard, Gaillard, Goldman On International Commercial Arbitration (Kluwer Law International, The Hague, 1999) 416 (‘One of the fundamental principles of arbitration law is that arbitrators have the power to rule on their own jurisdiction’); J Lew, L Mistelis, and S Kröll, Comparative International Commercial Arbitration (Kluwer Law International, The Hague, 2003) 14–16 (‘It is a legal fiction granting arbitration tribunals the power to rule on their own jurisdiction’).

LCIA Rules, Art 23(1) (‘The Arbitral Tribunal shall have the power to rule on its own jurisdiction, including any objection to the initial or continuing existence, validity or effectiveness of the Arbitration Agreement’); 2010 UNCITRAL Rules, Art 23(1) (‘The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement’); ICC Rules, Art 6(4) (‘Unless otherwise agreed, the Arbitral Tribunal shall not cease to have jurisdiction by reason of any claim that the contract is null and void or allegation that it is non-existent, provided that the Arbitral Tribunal upholds the validity of the arbitration agreement. The Arbitral Tribunal shall continue to have jurisdiction to determine the respective rights of the parties and to adjudicate their claims and pleas even though the contract itself may be non-existent or null and void’); SIAC Rules, Art 25.2 (‘The Tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, termination or validity of the arbitration agreement. For that purpose, an arbitration agreement which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the Tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration agreement’); VIAC Rules Art 19(2) (‘The sole arbitrator (arbitral tribunal) shall rule on its own jurisdiction’).

First Options of Chicago v Kaplan, 514 US 938, 943 (1995) (‘[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration’). See also N Blackaby, C Partasides, A Redfern, and M Hunter, Redfern and Hunter on Law and Practice of International Commercial Arbitration (5th edn, Oxford University Press, Oxford, 2009) paras 5–85 (‘[T]he authority or competence of the arbitral tribunal comes from the agreement of the parties; indeed, there is no other source from which it can come’) and 5-94 (‘[The arbitration clause] provides a legal basis for the appointment of an arbitral tribunal’); R Merkin, Arbitration Law (LLP, London, 2004) para 5-1 (‘[T]he agreement to arbitrate . . . is the foundation of the principle that arbitrators may consider their own jurisdiction’).
underlying contract. The parties’ selection of a particular set of arbitral rules reinforces the parties’ choice for their disputes to be resolved by arbitration, and incorporates the powers and duties of the arbitrators, including the mechanism for arbitrators to determine their own jurisdiction, as in Article 15.

As a matter of logic, any decision by the tribunal that a valid arbitration agreement does not exist would include, at the same time, a corollary finding that the tribunal lacked jurisdiction in the first place. The absence of a valid arbitration agreement means that there is no basis for the tribunal’s jurisdiction. The doctrine of competence-competence overcomes the conceptual problems arising out of any decision by the arbitrator on his or her own jurisdiction. It allows arbitrators to decide on

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7 According to Born, there is generally a pro-arbitration presumption that ‘is particularly true where an arbitration clause encompasses some of the parties’ disputes and the question is whether it also applies to related disputes, so that all such controversies can be resolved in a single proceeding (rather than in multiple proceedings in different forums)’: GB Born, International Commercial Arbitration (Kluwer Law International, The Hague, 2009) 853; Dell Computer Corp v Union des Consommateurs, 2007 SCC 34, [51] (Canadian Ct) (‘[A]rbitration is a creature that owes its existence to the will of the parties alone’); Suprema Corte de Justicia de la Nación [Federal Supreme Court of Justice], First Chamber, 11 January 2006, Appeal No 3836/2004 in AJ van den Berg (ed) Yearbook Commercial Arbitration Volume XXXII—2007 (Kluwer Law International, The Hague, 2007) 410–21 (‘The arbitrators receive their powers directly from the parties. They act as judges only in respect of the parties and may only decide the issues submitted by the parties . . . [T]he jurisdiction and competence of the arbitrators ensues from the autonomy of the will of the parties’).

8 See eg Himpurna Calif Energy Ltd v PT (Persero) Perusahaan Listrik Negara, Final Ad Hoc Award (4 May 1999), XXV YB Comm Arb 13, 26 (2000) (the Arbitral Tribunal is bound to follow the agreement of the Parties, which in this case means the UNCITRAL Arbitration Rules to which their contract refers); Diemaco v Colt’s Mfg Co, 11 FSupp2d 228, 232 (DConn 1998) (‘When parties agree to arbitrate before the AAA and incorporate the Commercial Arbitration Rules into their agreement, they are bound by those rules and by the AAA’s interpretation’); Judgment of Société, Philipp Brothers v S Société Icco, 1990 Rev Arb 880, 883 (Paris Cour d’Appel) (‘The choice of a professional arbitral institution of this kind implies that the parties intended to submit their disputes to the judgment of those members of the profession chosen by the arbitral institution’).

9 See Contec Corp v Remote Solution, Co, Ltd 398 F3d 205, 208 (2d Cir 2005) (‘We have held that when, as here, parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties’ intent to delegate such issues to an arbitrator’); cf J Lew, L Mistelis, and S Kröll, Comparative International Commercial Arbitration (Kluwer Law International, The Hague, 2003) para 14-14 (‘If the parties never entered into an arbitration agreement they also never agreed on the arbitration rules’). It is important to note, however, that the arbitration rules that are agreed upon by the parties must conform with the applicable legal systems. See E Gaillard and J Savage, Fouchard, Gaillard, Goldman On International Commercial Arbitration (Kluwer Law International, The Hague, 1999) 656 (‘[U]nlike national laws, arbitration rules are contractual in nature and therefore cannot resolve the apparent contradiction which allows arbitrators to determine whether or not they have jurisdiction’).

10 Clarium Capital Management LLC v Choudhury, 2009 WL 351588 *5 (ND Cal 11 February 2009) (‘In the instant case, the arbitration clause explicitly incorporates [Article 15 of the ICDR rules] . . . The incorporation of the AAA rules in the arbitration agreement is ‘clear and unmistakable’ evidence of the parties’ intent to delegate the issue of arbitrability to the arbitrator’).

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all jurisdictional issues, and thus avoids the effect that jurisdictional objections have to be litigated in state courts.\textsuperscript{12}

The competence-competence principle is also acknowledged in major international instruments that have set a framework for national arbitration legislation. Article 16(1) of the UNCITRAL Model Law on International Commercial Arbitration, an instrument that has been adopted by over 70 jurisdictions, states that ‘\textit{the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement}’.\textsuperscript{13} Similarly, Article V of the European Convention on International Commercial Arbitration states:

\begin{quote}
Subject to any subsequent judicial control provided for under the \textit{lex fori}, the arbitrator whose jurisdiction is called in question shall be entitled to proceed with the arbitration, to rule on his own jurisdiction and to decide upon the existence or the validity of the arbitration agreement or of the contract of which the agreement forms part.\textsuperscript{14}
\end{quote}

National laws have also recognized that the competence-competence principle is central to modern international commercial arbitration. The English Arbitration Act 1996 states that ‘\textit{unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction}’.\textsuperscript{15} Under the French New Code of Civil Procedure, ‘\textit{if, before the arbitrator, one of the parties challenges the principle or scope of the arbitrator’s jurisdiction, the arbitrator shall rule on the validity or scope of his or her jurisdiction}’.\textsuperscript{16} Even where the principle is not as clearly stated in national legislation (or the parties’ agreement, including by reference to a set of institutional rules), national courts have given effect to the principle of competence-competence when construing their national arbitration laws. For example, in the US, even though the FAA does not expressly refer to the competence-competence principle, ‘US courts have consistently acknowledged the power of arbitral tribunals to consider their own jurisdiction’.\textsuperscript{17}

International arbitration awards also recognize the central importance of the doctrine of competence-competence. According to one award, ‘\textit{the principle of

\begin{justify}
\textsuperscript{12} GB Born, \textit{International Commercial Arbitration} (Kluwer Law International, The Hague 2009) 854 (‘In Germany, where the formula originated, the “Kompetenz-Kompetenz” doctrine was historically understood as recognizing an arbitral tribunal’s jurisdiction to finally decide questions regarding its own jurisdiction, \textit{without the possibility of subsequent judicial review}’) (emphasis added).

\textsuperscript{13} UNCITRAL Model Law, Art 16(1).

\textsuperscript{14} European Convention, Art 5.

\textsuperscript{15} English Arbitration Act 1996, s 30(1).

\textsuperscript{16} French New Code of Civil Procedure, art 1466.

\end{justify}
“compétence-compétence” . . . is widely recognized by doctrine and jurisprudence’. 18

Another award proclaimed that, ‘[t]he principle of compétence/compétence is an accepted legal principle: it is well established that an arbitral, properly constituted, is competent to decide whether or not it has jurisdiction over a particular dispute or disputes’. 19

15.10 Although a complete exposition of competence-competence is outside the scope of this commentary, this jurisdictional principle is important because, among other things, it allows arbitration proceedings to continue even while a party is challenging the tribunal’s jurisdiction. 20 Crucially, it also permits jurisdictional decisions to be joined to merits, thereby allowing the tribunal the discretion to make decisions on when, during the course of a proceeding, to hear jurisdictional matters. This discretion allows the tribunal the flexibility to craft an efficient and fair arbitration proceeding that does justice to the individual requirements of the dispute and the parties. 21

15.11 Although the arbitral tribunal has the power to rule on its own jurisdiction, any decision that the tribunal might make on jurisdiction will typically be subject to later challenge by the local courts of the seat of arbitration. 22 Because local courts do reserve this power to review the decisions of arbitral tribunals, it would be more

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21 ‘It is, for example, not uncommon for a tribunal to request separate briefing on the subject of jurisdiction, and to hear evidence and oral submissions, before issuing an interim award confined to jurisdiction’: Born, op cit, 1,816. See also Gaillard and Savage (eds), op cit, 658: The competence-competence principle enables the arbitral tribunal to continue with the proceedings even where the existence or validity of the arbitration agreement has been challenged by one of the parties for reasons directly affecting the arbitration agreement, and not simply on the basis of allegations that the main contract is void or otherwise ineffective.

22 GB Born, International Commercial Arbitration: Commentary and Materials (2nd edn, Kluwer Law International, The Hague, 2001) 6. See also KH Schwab and G Walter (eds) Schiedsgerichtsbarkeit (7th edn, CH Beck, Munich, 2005) ch 6, s 9 ff; JF Poudret and S Besson, Comparative Law of International Arbitration (Sweet and Maxwell, London, 2007) para 457 (‘The tribunal’s ruling on its own jurisdiction] is generally not final, but subject to the control of the courts of the seat of the arbitration’); R Merkin, Arbitration Law (LLP, London, 2004) para 5-40 (stating that a decision by the tribunal under the principle of competence-competence ‘is provisional in the sense that either party has the right to apply to the court to have the jurisdictional matter reopened and reconsidered in full’).

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appropriate to replace the term of competence-competence with ‘preliminary competence’ of the arbitral tribunal to rule on its own jurisdiction.\(^{23}\)

The US Supreme Court in *First Options of Chicago v Kaplan*, for example, recognized a long line of case law developing the competence-competence doctrine, noting that a court should defer to determinations on jurisdiction as long as this is in line with arbitral tribunals, parties’ agreement, intent, and other circumstances.\(^{24}\) US courts have refined the *First Options* analysis,\(^{25}\) repeatedly holding that contracting for specific institutional rules evidenced the parties’ intent to have the tribunal determine questions of jurisdiction in accord with the competence-competence doctrine.\(^{26}\) In *Buckeye Check Cashing Inc, v Cardenga*, the US Supreme Court has more recently renewed its commitment to the competence-competence doctrine, holding that ‘unless [a party’s] challenge is to the arbitration clause itself, the issue of the contract’s validity is considered by the arbitrator in the


> Ironically, and although not acknowledged by the US Supreme Court, its analysis in *First Options* closely tracked the historic approach of German courts to the question of competence-competence; perhaps more ironically, the German legislature was in the process, at the moment *First Options* was decided, of abandoning its historic Kompetenz-Kompetenz approach (permitting binding agreements to arbitrate jurisdictional objections) in favor of a modified version of the UNCITRAL Model Law, which prescribed in mandatory terms the allocation of jurisdictional competence between arbitral tribunals and national courts.


\(^{24}\) *First Options of Chicago v Kaplan*, 514 US 938 (1995) (‘After all, the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes . . . but to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms . . . and according to the intentions of the parties’); see also *ibid*, 943 (‘Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, . . . so the question [of] who has the primary power to decide arbitrability turns upon what the parties agreed about that matter. Did the parties agree to submit the arbitrability question itself to arbitration?’). See also Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 911–60.

\(^{25}\) The *First Options* analysis embraced the Supreme Court’s earlier decision in *AT&T Technologies, Inc v Communications Workers*, 475 US 643, 649 (1986) (holding that courts should not assume that the parties agreed to arbitrate the existence, scope, and validity of an arbitration agreement unless there is ‘clear[ ] and unmistakabl[ ] evidence that they did so’). Subsequent case law clarified that, among other things, the selection of institutional rules manifested ‘clear and unmistakable' evidence of the parties’ agreement to have the tribunal decide its own jurisdiction. See Born, op cit, 935–37.

\(^{26}\) For a comprehensive discussion on ‘broad’ and ‘narrow’ arbitration clauses under US case law, and how they relate to jurisdiction, see *ibid*, 935–37. For specific cases, see *ibid* at nn 424–27.
first instance’. This holding necessarily implicates the separability presumption under US law as well. The Supreme Court stated that ‘only where a jurisdictional objection is directed “specifically” at the arbitration agreement itself, and not also “generally” at the underlying contract, does the US separability presumption permit initial judicial review of the objection’.28

15.13 These two US Supreme Court cases establish that US law certainly recognizes and applies the competence-competence doctrine. Nevertheless, they complicate, rather than clarify, the contours of the doctrine as it applies under US law. As one leading US commentator remarks:

reconciling these various US competence-competence decisions is difficult and, in some instances, impossible. In turn, that confusion raises serious questions as to the usefulness of the US approach of linking questions of competence-competence tightly to the categorization of jurisdictional challenges (as directed ‘specifically’ or ‘only’ at the agreement to arbitrate).29

A comprehensive examination of the doctrine under US law is outside the scope of this commentary, but a recent US case provides some insight into how a US court might apply Article 15(1) of the ICDR Rules.

15.14 According to the court in *T Co Metals v Dempsey Pipe and Supply*:

ICDR Article 15(1) more specifically empowers the arbitrator to decide questions of arbitrability, extending to the arbitrator ‘the power to rule on [his or her] own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.30

Because the institutional rules that the parties selected in the underlying arbitration clearly include the doctrine of competence-competence, the court deferred to the decision of the tribunal on both (1) the issue of the existence, scope, and validity of the arbitration agreement, and (2) its own jurisdiction, noting that an ‘arbitration agreement’s incorporation of a rule containing substantially equivalent language constituted clear and unmistakable evidence of the parties’ intent to arbitrate questions of arbitrability’.31 Therefore, US case law indicates that the selection of the ICDR Rules is sufficient to ensure that arbitrators may rule upon their own jurisdiction both when the underlying contract is challenged in general and when specifically the existence of the arbitration agreement is disputed.

28 Born, op cit, 956.
29 Ibid, 948.
30 *T Co Metals v Dempsey Pipe and Supply*, 592 F3d 329, 345 (2nd Cir 2010).
31 Ibid.
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B. Separability (Article 15(2))

**Article 15(2)**

The tribunal shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the tribunal that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

Article 15(2) also recognizes specifically that ‘an arbitration clause shall be treated as an agreement independent of the other terms of the contract’. As such, Article 15(2) expressly incorporates the doctrine of separability. In international commerce, it is justified to assume that parties would have intended to resolve all of their disputes through arbitration, rather than by submitting certain disputes, such as disputes about the validity of the main contract, to the state courts. Thus commercial parties should be presumed to intend that an arbitration agreement remain valid and binding even though the underlying contract is claimed (or subsequently found) to be invalid, void, illegal, or that it has been terminated. In line with this rationale and general commercial sensibility, the presumption of separability arises and refers to the principle that an arbitration agreement is, at the outset, treated as separate and distinct from its underlying contract.

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33 See UK Department of Trade and Industry, Consultation Document on Proposed Clauses and Schedules for an Arbitration Bill, reprinted in 10(2) Arb Intl 189, 227 (1994) (‘Whatever degree of legal fiction underlying the doctrine, it is not generally considered possible for international arbitration to operate effectively in jurisdictions where the doctrine is precluded . . . [I]nternational consensus on autonomy has now grown very broad’). See also P Mayer, ‘Les limites de la séparabilité de la clause compromissoire’, Rev Arb 359, 362 [1997]:

T]he choice-of-law clause escapes the nullity of the contract because it is its very purpose to specify the applicable law according to which the judge or arbitrator will decide whether the contract is void. And for the same reason, the arbitration clause must be respected if it implies the parties’ will to confide the question of whether the contract is valid or void to an arbitrator.


[T]he arbitral clause is autonomous and juridically independent from the main contract in which it is contained either directly or by reference, and its existence and validity are to be ascertained, taking into account the mandatory rules of national law and international public policy, in the light of the common intention of the parties, without necessarily referring to a state law.

15.16 Denying the presumption of separability would invite obstructive parties to avoid arbitration simply by declaring that the main contract, which contains the arbitration clause, is void. The subsequent risk of having to litigate the validity of the underlying contract not in the contractually agreed-upon setting of arbitration, but in a potentially inhospitable national court forum, with the attendant risks of delay and partisan decisions, is unacceptable in the context of international trade. Reasonable commercial parties cannot be presumed to desire such effects. Article 15(2)—which is, of course, incorporated into the parties’ arbitration agreement by reference to the ICDR Rules—confirms that presumption.

15.17 Accordingly, treating the arbitration agreement as a separate agreement from the underlying contract has significant consequences. Above all else, it immunizes the arbitration agreement from challenges to the underlying contract, alleging that the contract at issue is invalid, void, or illegal. Furthermore, the doctrine of separability recognizes that different substantive legal rules may be applicable to the arbitration agreement as opposed to the underlying contract.

15.18 In international doctrine, the principle of separability is widely acknowledged. Article 16(1) of the UNCITRAL Model Law provides that ‘an arbitration clause which forms part of the contract . . . shall be treated as an agreement independent of the other terms of the contract’, and both Article II and Article V(1)(a) of the European Convention treat arbitration agreements as distinct agreements that, at least implicitly, exist separately from the parties’ underlying contracts. Article V(3) of the European Convention authorizes arbitrators to examine the ‘existence or the validity of the arbitration agreement or of the contract of which the agreement forms part’, and Article VI(2) of the European Convention provides for specific choice-of-law rules for arbitration agreements.

35 JF Poudret and S Besson, *Comparative Law of International Arbitration* (Sweet and Maxwell, London, 2007) 163 (‘[S]eparability (or severability) means that the validity of the arbitration clause must be assessed separately from that of the main contract—or the legal relationship—of which it forms a part. As a result, the arbitrator has the authority to determine . . . the validity or existence of the contract’); J Lew, L Mistelis, and S Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, The Hague, 2003) para 14-19 (‘Any challenge to the main agreement does not affect the arbitration agreement: the tribunal can still decide on the validity of the main contract’); Merkin, op cit, para 5-40 (‘[U]nder the concept of separability, . . . disputes as to the scope, or even the existence, of the main contract can be arbitrated’).

36 Poudret and Besson, op cit, 141, 178 (‘The principle of separability not only entails that the validity of the contract and of the arbitration agreement must be determined separately, but also that they can—and often are—governed by different laws. This is a result both of their different natures and of the freedom generally conferred on the parties to choose the applicable law’).

37 UNCITRAL Model Law, Art 16(1).


39 European Convention on International Commercial Arbitration, Arts V(3) and VI(2).
Similarly, other institutional rules expressly acknowledge the principle of separability, including the ICC Rules, LCIA Rules, and the UNCITRAL Rules. Likewise, Article 15(2)’s recognition of the separability doctrine also facilitates the doctrine of competence-competence by explicitly identifying that the ‘arbitration clause shall be . . . independent of the other terms of the contract.’ The separability and competence-competence doctrines frequently overlap each time a tribunal determines the validity of an arbitration agreement while continuing the arbitration proceedings to determine a dispute over the validity of the underlying contract: the separability presumption is the substantive principle that finds its procedural expression in the tribunal’s power to decide its own jurisdiction, even where the underlying contract is said to be void. In a similar way, courts have used the separability doctrine to consider an arbitration clause separately from the underlying contract so that they can resolve whether a court or tribunal must decide the jurisdictional issue.

40 ICC Rules, Art 16(4):

 Unless otherwise agreed, the Arbitral Tribunal shall not cease to have jurisdiction by reason of any claim that the contract is null and void or allegation that it is non-existent, provided that the Arbitral Tribunal upholds the validity of the arbitration agreement. The Arbitral Tribunal shall continue to have jurisdiction to determine the respective rights of the parties and to adjudicate their claims and please even though the contract itself may be non-existent or null and void.

41 LCIA Rules, Art 23(1) (‘[A]n arbitration clause which forms or was intended to form part of another agreement shall be treated as an arbitration agreement independent of that other agreement’).

42 2010 UNCITRAL Rules, Art 23(1) (‘For that purpose, an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null shall not entail automatically the invalidity of the arbitration clause’).

43 N Blackaby, C Partasides, A Redfern, and M Hunter, Redfern and Hunter on Law and Practice of International Commercial Arbitration (5th edn, Oxford University Press, Oxford, 2009) para 5-94 (‘Closely linked to the question of who decides a total jurisdictional challenge is another issue, namely whether the arbitration clause can be regarded as having an independent existence of its own, or only as a part of the contract in which it is contained’); E Gaillard and J Savage (eds) Fouchard, Gaillard, Goldman on International Commercial Arbitration (Kluwer Law International, The Hague, 1999) 416 (‘[I]t is clear that while the two principles are closely linked and have a similar objective, they only partially overlap’); JF Poudret and S Besson, Comparative Law of International Arbitration (Sweet and Maxwell, London, 2007) 457 (‘[Competence-competence] is frequently assimilated to the principle of separability, although it is not identical with it’).


45 Gaillard and Savage (eds), op cit, 658 (‘The principle that the arbitration agreement is autonomous of the main contract is sufficient to resist a claim that the arbitration agreement is void because the contract containing it is invalid, but it does not enable the arbitrators to proceed with the arbitration where the alleged invalidity directly concerns the arbitration agreement’); see also J Lew, L Mistelis, and S Kroll, Comparative International Commercial Arbitration (Kluwer Law International, The Hague, 2003) para 14-19 (‘Without the doctrine of separability, a tribunal making use of its competence-competence would potentially be obliged to deny jurisdiction on the merits since the existence of the arbitration clause might be affected by the invalidity of the underlying contract’).

46 Prima Paint Corp v Flood and Conklin Mfg Co, 388 US 395, 404 (1967) (‘We hold, therefore, that . . . a federal court may consider only issues relating to the making and performance of the
Article 15(2) is based on the principle that, where there is an arbitration agreement within a contract, the parties to such a contract intended for disputes arising out of the contract to be submitted to arbitration.\(^{47}\) Article 15(2) further embraces the separability doctrine by providing that an arbitration agreement may survive a determination that the underlying contract is invalid.\(^ {48}\) Courts in the US and in England, among other jurisdictions, acknowledge that arbitration clauses are separable from the underlying contract even if the contract itself is unconscionable or illegal.\(^ {49}\)
As recently as 2006, the US Supreme Court reinforced the presumption of separability in *Buckeye Check Cashing Inc v Cardegna*. At issue in *Buckeye* was a loan agreement that violated the state of Florida’s usury laws and thus was void. The loan contract included an arbitration clause and the question arose as to whether the arbitration agreement contained within the void loan agreement was also void. Relying on an earlier decision that touched upon the issue of separability, the Court in *Buckeye* reversed the Florida state law decision; instead, it held that there was a presumption of separability even when the underlying contract was void. Therefore, it found that the arbitration clause was valid and enforceable. The *Buckeye* case reaffirmed the presumption of separability in the US.

Properly analysed, then, the separability doctrine is a powerful conceptual tool available to parties that may find themselves confronted with a potentially invalid underlying contract. It also offers predictability, because nearly all jurisdictions recognize the presumption. In short, Article 15 adheres to the fundamental arbitral principles of party autonomy and deference to the parties’ choices, allowing a tribunal to examine whether the parties actually consented to arbitrate if (or rather, even if) the validity of their main contractual relationship is in doubt.

Despite clarity surrounding the existence of and application of the presumption of separability, it is nevertheless inaccurate to describe the arbitration clause as entirely ‘autonomous’ or ‘independent’ from the parties’ underlying contract. Article 15(2) has its natural limits. The parties’ lack of consent to enter into an agreement can extend to the arbitration clause contained therein. In these cases, it is just and proper that the separability doctrine cannot cure the parties’ lack of consent.

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52 See GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 331, n 100, citing *Ferro Corp v Garrison Indus, Inc*, 142 F3d 926 (6th Cir 1998) (‘[T]he arbitration agreement is effectively considered as a separate agreement which can be valid despite being contained in a fraudulently induced contract’); *Matterhorn, Inc v NCR Corp*, 763 F2d 866, 868–69 (7th Cir 1985) (‘An arbitration clause will often be ‘severable’ from the contract in which it is embedded, in the sense that it may be valid even if the rest of the contract is invalid’); *Torrance v Aames Funding Corp*, 242 FSupp2d 862, 868–69 (D Ore 2002) (‘an arbitration clause may be enforced even though the rest of the contract is later held invalid by the arbitrator’); *Solar Planet Profit Corp v Hymer*, 2002 WL 31399601, *2 (ND Cal 2002) (‘an arbitration clause in a voidable contract remains valid’); *Cline v HE Butt Grocery Co*, 79 FSupp2d 730, 732 (SD Tex 1999) (‘Questions related to the enforceability of a contract as a whole are properly referable to an arbitrator; it is only when an attack is made on the arbitration clause itself that a court, rather than an arbitrator, should decide questions of validity. The arbitration clause itself is supported by valid consideration: each party promised to relinquish their legal right to have a judicial forum adjudicate their disputes’); *Hodge Bros, Inc v DeLong Co*, 942 FSupp 412, 417 (WD Wisc 1996); *Hodrick v Mgt Recruiters Int'l, Inc*, 738 FSupp 1434 (ND Ga 1990) (‘[I]f the arbitration clause is valid, the Court must enforce it, even if the underlying contract might be declared invalid’).

The scenario in which an arbitration clause most clearly would not be severed, and hence would be invalid, is where the assent of one of the Parties is lacking. If the person to whom
doctrine, therefore, cannot provide any basis for the arbitrators’ jurisdiction where the main contract is void for lack of consent, if that lack of consent is shown to extend to the arbitration clause as well.\(^{54}\)

**15.24** As a textual matter, Article 15(2) provides that arbitration agreements ‘shall be treated’ as separate from the underlying contract. On the one hand, the use of the word ‘shall’ seems to indicate the mandatory nature of this provision, compelling the arbitrators, without leaving room for a contrary determination, to treat the arbitration agreement as a separate and independent contract. On the other hand, the words ‘be treated as’ (as opposed to ‘actually is’) indicate a presumption. The question arises, therefore, whether this presumption can be refuted in individual cases. This view would have very strong underlying reasons. Where there is compelling evidence, as a matter of contract interpretation under applicable law, that the parties did not intend to conclude the arbitration agreement as a separate contract and instead intended for the arbitration agreement to share the legal fate of the main contract, the tribunal should be free to so find.

**C. Timely objection (Article 15(3))**

**Article 15(3)**

* A party must object to the jurisdiction of the tribunal or to the arbitrability of a claim or counterclaim no later than the filing of the statement of defense, as provided in Article 3, to the claim or counterclaim that gives rise to the objection. The tribunal may rule on such objections as a preliminary matter or as part of the final award.

**15.25** Article 15(3) balances the tension between the propensity for respondents to use jurisdictional objections to delay and obstruct the enforcement of the claimant’s rights, and the maxim that no party can be forced into arbitration without its consent. As do all major institutional arbitration rules and modern arbitration laws, Article 15(3) therefore provides that a party must object to the jurisdiction of the tribunal (or to the arbitrability of a claim) no later than with its statement of defence under Article 3, or, if the claimant is objecting to the tribunal’s jurisdiction

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to hear a counterclaim, with its response to the counterclaim.Absent a timely objection, subject to applicable arbitration law, the jurisdictional objection is deemed to have been waived.

The tribunal may make a decision as ‘a preliminary matter or as part of the final award’. Often, it is preferable for reasons of legal certainty and efficiency to address jurisdictional objections at the outset of the arbitration—and, in some instances, to order bifurcation of the jurisdictional and merits determinations. In some cases, however, the issue of jurisdiction is so closely intertwined with the merits of the case that due process and efficiency require that both be heard together. For such cases, the tribunal retains the discretion to address the issue of jurisdiction together with its final determination of the merits.

55 See eg LCIA Rules, Art 23(3):
A plea by a Respondent that the Arbitral Tribunal does not have jurisdiction shall be treated as having been irrevocably waived unless it is raised not later than the Statement of Defence; and a like plea by a Respondent to Counterclaim shall be similarly treated unless it is raised no later than the Statement of Defence to Counterclaim. A plea that the Arbitral Tribunal is exceeding the scope of its authority shall be raised promptly after the Arbitral Tribunal has indicated its intention to decide on the matter alleged by any party to be beyond the scope of its authority, failing which such plea shall also be treated as having been waived irrevocably. In any case, the Arbitral Tribunal may nevertheless admit an untimely plea if it considers the delay justified in the particular circumstances.

See also 2010 UNCITRAL Rules, Art 23(2) (‘plea that the arbitral tribunal does not have jurisdiction shall be raised no later than in the statement of defence or, with respect to a counterclaim or a claim for the purpose of a set-off, in the reply to the counterclaim or to the claim for the purpose of a set-off’).

56 See also para 16.19.
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ARTICLE 16—CONDUCT OF THE ARBITRATION

I. Introduction

Article 16 sets the tone for the heart of the arbitration: it regulates the procedure by which the parties will conduct their arbitration before the tribunal. Article 16 is said to grant the tribunal more discretion in this regard than the majority of other institutional rules. Still, in practice, the parties have significant influence...
over the process. Article 16 also provides a mandate to the tribunal to expedite the procedure to the extent possible and consistent with providing the parties due process and a fair opportunity to be heard.

II. Textual commentary

A. The tribunal’s discretion to conduct the proceedings (Article 16(1))

Article 16(1)

Subject to these rules, the tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.

1. The tribunal’s discretion and the parties’ agreement on procedural matters

16.02 Under Article 16(1), the arbitrators enjoy free discretion to conduct the arbitration as they deem appropriate, which has been described as ‘arguably somewhat less accommodating of the parties’ preferences’ than other institutions’ rules. In contrast with Article 16(1) of the ICDR Rules, which explicitly allows the parties only ‘the right to be heard’ regarding the conduct of the proceedings, other institutional rules, such as those under the ICC, LCIA, and SCC, all give more deference to the parties’ decisions. For example, the LCIA Rules provide that ‘[t]he parties may agree on the conduct of their arbitral proceedings and they are encouraged to do so’,\(^1\) and the ICC Rules provide that ‘the proceedings before the Arbitral Tribunal shall be governed by these Rules and, where these Rules are silent, by any rules which the parties or, failing them, the Arbitral Tribunal may settle on, . . . ’.\(^3\) The SCC Rules also are deferential to the parties’ choice, providing that ‘[s]ubject to these Rules and any agreement between the parties, the Arbitral Tribunal may conduct the arbitration in such manner as it considers appropriate’.\(^4\)

16.03 Institutional rules that are modelled on the 1976 UNCITRAL Rules are more aligned with the ICDR approach, however. For example, the 1976 UNCITRAL Rules provided that ‘[s]ubject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate . . . ’.\(^5\) In a similar vein, the

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2 LCIA Rules, Art 14(1).
3 ICC Rules, Art 15.
4 SCC Rules, Art 19(1) (emphasis added).
5 1976 UNCITRAL Rules, Art 15(1).
II. Textual commentary

SIAC Rule regarding conduct of proceedings provides that ‘[t]he Tribunal shall conduct the arbitration in such manner as it considers appropriate, after consulting with the parties’. 6 The VIAC Rules, too, are similar, with the relevant rule stating that ‘[i]n the context of the Vienna Rules and the agreements between the parties, the sole arbitrator (arbitral tribunal) may conduct the arbitration proceedings at his (its) absolute discretion’. 7

Despite the strong focus on arbitral discretion under the ICDR rule as written, ‘arbitrators under [. . . ] ICDR Rules will virtually always affirmatively seek agreement by the parties on procedural issues and will only in the rarest of cases overrule such agreement’. 8 This is, at the very least, a matter of good practice: a procedure that is agreed with the parties will often be perceived as fairer than one that is imposed, will increase the identification of the parties with the process, and will limit any subsequent complaints or challenges to the award. 9

In any event, despite the broad language of Article 16, there are several limitations to the discretion of the arbitral tribunal in conducting the proceedings. 10 First, although Article 16 does not expressly address this issue, the arbitrators’ discretion is typically thought to be limited by the parties’ agreement, 11 as a necessary corollary to the principle of party autonomy. 12 Where the parties affirmatively agree on an issue, the arbitrators—who derive their authority from the parties—cannot conduct the proceedings otherwise (unless the parties’ agreement would conflict with applicable law, including by violating due process).

Thus the European Convention provides, in Article IV(1)(b)(iii), that parties shall be free ‘to lay down the procedure to be followed by the arbitrators’, 13 and

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6 SIAC Rules, Art 16(1).
7 VIAC Rules, Art 20(1).
8 Born, op cit, 1,754–55.
9 This is not to discourage arbitrators from imposing a procedure where no agreement can be reached.
10 For a general discussion, see F Schwarz, The Limits of Party Autonomy in International Commercial Arbitration (Eleven Publishing, 2010).
11 See generally GB Born, International Commercial Arbitration (Kluwer Law International, The Hague, 2009) 1,756–58. The 1923 Geneva Protocol required in Art 2 that ‘the arbitral procedure, including the constitution of the arbitral tribunal shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place’. As discussed above, this provision was understood as requiring compliance with the procedural law of the arbitral seat.
12 However, where the circumstances change, an arbitrator enjoys discretion to make a ruling that supplements the original, now obsolete, agreement of the parties—eg on a procedural timetable that was agreed, but can no longer be followed. See Award in ICDR Case No 251-04, 2005 WL 6346380 (ICDR).
13 European Convention, Art IV(1)(b)(iii). As discussed below, Art IV(4)(d) also provides that, where the parties have not agreed upon the arbitral procedure, the arbitral tribunal shall determine the arbitral rules. Like Art V(1)(d) of the New York Convention, Art IX(1)(d) of the European Convention provides for the non-recognition of arbitral awards if the procedure followed by the tribunal departed from that agreed by the parties. See DT Hascher, ‘European Convention on International Arbitration (1961)’ (1995) XX YB Comm Arb 1006, 1017 ff; E Gaillard and J Savage (eds) Fouchard, Gaillard,
Chapter 16: Article 16—Conduct of the Arbitration

Article V(1)(d) of the New York Convention permits a state to refuse the recognition or enforcement of an award on the basis that ‘the arbitral procedure was not in accordance with the agreement of the parties’.

This view also does most justice to the consensual nature of arbitration, which, unlike any state court procedure, cannot be imposed on one of the parties. As the US Supreme Court has recognized:

An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute. The invalidation of such an agreement in the case before us would not only allow the respondent to repudiate its solemn promise but would, as well, reflect a ‘parochial concept that all disputes must be resolved under our laws and in our courts . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.’

Another (lower) court in the US aptly articulated the parties’ autonomy in choosing their procedure: ‘[p]arties may choose to be governed by whatever rules they wish regarding how an arbitration itself will be conducted’, including that:

short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes; parties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contracts.

Under the proposed Revised Uniform Arbitration Act, which was drafted to promote the uniformity of US state arbitration law, the arbitral process is described as:

a consensual process in which autonomy of the parties who enter into arbitration agreements should be given primary consideration, so long as their agreements conform to notions of fundamental fairness. This approach provides parties with the opportunity in most instances to shape the arbitration process to their own particular needs.

Indeed, parties choose arbitration specifically because they enjoy the freedom to agree upon a procedure that is flexible and efficient, and customized to fit their
II. Textual commentary

individual case, and which avoids the formalities of state court litigation. Thus the parties’ express agreement on procedural issues would only be disregarded if it were to force the arbitrators to violate applicable law or fundamental principles of due process.

Second, as Article 16(1) expressly provides, the arbitrators’ discretion is ‘subject to these Rules’. This is a logical extension of the principle of party autonomy, in that the parties have agreed to the application of the ICDR Rules and the arbitrator has accepted the mandate on that basis. Hence, the arbitrators must discharge their mandate as they have accepted it and can therefore only exercise their procedural discretion within the framework of the ICDR Rules. As a result, the tribunal must conduct the arbitration bearing in mind, inter alia, that ‘[a]rbitrators acting under these Rules shall be impartial and independent’, and will diligently implement the procedural framework for written submissions outlined in Articles 2, 3, and 4 of the ICDR Rules.

Third, the arbitrators’ discretion is also limited by the applicable mandatory law at the seat of the arbitration. In the pro-arbitration jurisdiction of England and Wales, for example, the English Arbitration Act 1996 provides that a mandatory general duty of a tribunal exists to:

act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and [to] adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

Other pro-arbitration jurisdictions reflect minimum mandatory law provisions that seek to ensure fairness, impartiality, and the exercise of discretion that is in accord with these general notions of due process.

21 ICDR Rules, Art 7(1).
23 English Arbitration Act 1996, s 33(1) and (2).
24 See eg UNCITRAL Model Law, Art 18 (‘[t]he parties shall be treated with equality and each party shall be given a full opportunity of presenting his case’); Belgian Judicial Code, arts 1693(1),
2. Limits imposed by due process

16.10 The notion of due process and fair trial is an accepted and fundamental feature acknowledged in all major jurisdictions and international instruments. It limits both the parties’ autonomy to agree on procedural matters and the arbitrators’ discretion. Indeed, it has often been said that, in international arbitration, ‘there is often greater attention to such matters than in many national courts’. The equal and fair treatment of the parties, as recognized in Article 16(1), is an important part of due process, together with the right to be heard. Together, these essential values have been said to represent ‘foundation pillars of any judicial procedure’. In most countries, a violation of these principles may give rise to the setting aside of the award, bearing in mind that, in such pro-arbitration nations, the threshold is quite high.

16.11 Equal treatment, however, must not be understood formalistically. Equality, as a function of procedural fairness, cannot be reduced to a mathematical formula, does not necessarily mean that the parties are entitled to identical treatment in a formulaic sense, and is instead informed by the circumstances of the case.

1694; Netherlands Code of Civil Procedure, arts 1036, 1039(1)−(2); French New Code of Civil Procedure, arts 1502(4), 1502(5); Singapore International Arbitration Act, s 15A(1).


28 Redfern and Hunter, op cit, para 10.49:

Each national system usually works well according to its own concepts. US Federal Courts, for example, have regarded the failure to give the parties an oral hearing as a violation of due process, and they recognise this as a ground for setting aside an award or for refusing recognition and enforcement under the New York Convention. In civil law systems, the right of the parties to have a full opportunity to present their case, the classic droit de la défense, often incorporates the principe du contradictoire, which requires that no evidence or argument serve as a basis for a decision unless it has been subject to the possibility of comment and contradiction by the parties.

See also GB Born, International Commercial Arbitration (Kluwer Law International, The Hague, 2009) 2,573 ff. For examples of cases upholding an award in spite of due process/procedural fairness challenges, see Isidor Patiewonsky Assoc, Inc v Sharp Prop, Inc, 998 F2d 145 (3d Cir 1993) (holding that there was no due process violation for failing to hear a party's arguments in an arbitration where the party did not request a hearing); Margulead Ltd v Exide Tech [2004] EWHC 1019 (QB) (in which the court rejected a party's challenge to an award on the grounds that the claimant was denied the right to reply in oral submissions); Generica Ltd v Pharmaceutical Basics, Inc, 125 F3d 1123, 1131 (7th Cir 1997) (holding that the arbitrator had discretion in determining the weight of evidence and limiting the cross-examination of a particular witness).

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Similarly, the right to be heard does not mean that a party is permitted to make endless submissions, but rather that it must receive a fair opportunity to present its case. As one US court has observed:

It is clear that an arbitrator must provide a fundamentally fair hearing [, but] an arbitrator is not bound to hear all of the evidence tendered by the parties . . . he must give each of the parties to the dispute an adequate opportunity to present its evidence and arguments [in accordance with the arbitration agreement].

In arbitral proceedings and in line with the court’s reasoning, the right to be heard is therefore not an unlimited right. Indeed:

A party’s choice to accept arbitration entails a trade-off. A party can gain a quicker, less structured way of resolving disputes; and it may also gain the benefit of submitting its quarrels to a specialized arbiter . . . Parties lose something, too: the right to seek redress from the courts for all but the most exceptional errors at arbitration.

It bears emphasis therefore that the parties must only be afforded a ‘fair’ opportunity; the arbitrators are not required to wait until a party actually avails itself of the right to be heard. Thus a party cannot insist on the inclusion of evidence that the tribunal considers irrelevant. Equally, a party who simply disregards the opportunities given to it by the tribunal to present its case cannot later complain that its right to be heard has been violated. For example, a Canadian court held that a Mexican party to an arbitration that strategically chose to boycott the arbitration could not later challenge the award because the Mexican party forfeited its opportunity to be heard. Similarly, a party is entitled to a fair opportunity to present its

29 Redfern and Hunter, op cit, para 10-47 (‘[T]he aim is to ensure that the parties are treated with equality and are given a fair hearing, with a full and proper opportunity to present their respective cases’); Born, op cit, 1,742–43 (‘Parties agree to international arbitration, among other things, in order to obtain fair and objective procedures guaranteeing both parties an equal opportunity to be heard. This objective is inherent in the adjudicative character of international arbitration, in which the arbitrators are obligated to decide the parties’ dispute impartially and objectively, based upon the law and the evidence the parties present’). See also KP Berger, International Economic Arbitration (Kluwer Law International, The Hague, 1993) 663; J Lew, L Mistelis, and S Kröll, Comparative International Commercial Arbitration (Kluwer Law International, The Hague, 2003) para 25-36 (discussing ‘minimum standards’); UNCITRAL Model Law, Art 18 (‘[E]ach party shall be given a full opportunity of presenting his case’); New York Conventions, Art V(1)(b) (providing grounds for setting aside an award if the ‘party against whom the award is invoked . . . was otherwise unable to present his case’).

30 Generica Ltd v Pharmaceutical Basics, Inc, 125 F3d 1123, 1130 (7th Cir 1997).


32 Dean v Sullivan, 118 F3d 1170, 1173 (7th Cir 1997).

33 See below para 16.17 ff.

case, but is not entitled to an endless procession of written submissions or oral argument. For this reason, the tribunal is entitled to limit the parties’ written submissions and the offering of evidence to what is appropriate, as long as the parties are put on advance notice of any cut-off date or comparable mechanism.

B. Duty of expedition (Article 16(2))

**Article 16(2)**

The tribunal, exercising its discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute. It may conduct a preparatory conference with the parties for the purpose of organizing, scheduling and agreeing to procedures to expedite the subsequent proceedings.

16.14 Article 16(2) serves as a reminder to the arbitrator to conduct the arbitration expeditiously. Of course, speed must not be confused with haste, and the parties must be given a fair opportunity to present their case. Further, arbitrators have duties imposed upon them by both national and international law, including the duty to act promptly. Because justice delayed is justice denied, ‘[s]ome systems of law endeavour to ensure that an arbitration is carried out with reasonable speed by setting a time limit within which the arbitral tribunal must make its award’.

16.15 As an example for expeditious and proper organization, Article 16(2) also provides for the instrument of a preparatory conference to discuss the precise conduct of the arbitration. Indeed, the arbitral process is more flexible than highly regulated

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36 See eg ICC Rules, Art 18(4) (‘Any subsequent modifications of the provisional timetable shall be communicated to the Court and the parties’).

37 Redfern and Hunter, op cit, paras 5-65–5-66. See also Born, op cit, 1,623 (‘In addition to exercising reasonable care and skill, arbitrators are obligated to conduct an arbitration with diligence and expedition’).

38 Redfern and Hunter, op cit, para 5-65, citing the Italian Code of Civil Procedure, as amended in 2006, arts 813 and 820 (240 days from the date of acceptance of appointment by the tribunal) and the Ecuadorian Law of Arbitration, art 25 (150 days from the final hearing).

39 According to Redfern and Hunter, op cit, para 6-27, ‘especially where the parties and their representatives come from different legal systems or different cultural backgrounds, it is sensible for the tribunal to convene a meeting with the parties as early as possible in the proceedings’. It is also common amongst many of the arbitral institutions to conduct at least a preliminary conference, sometimes by teleconference, in-person meetings, or through written procedural timetables. See eg ICC Rules, Art 18(4) (providing for a ‘terms of reference’ followed by a ‘provisional timetable that [the parties and the tribunal] intends to follow for the conduct of the arbitration’); SCC Rules, Art 23 (‘[T]he Arbitral Tribunal shall promptly consult with the parties with a view to establishing a provisional timetable for the conduct of the arbitration. The Arbitral Tribunal shall send a copy of the provisional timetable to the parties and to the Secretariat’); ICSID Rules, Art 20(1) (‘As early as possible after the constitution of a Commission, its President shall endeavour to ascertain the views of the parties regarding questions of procedure. For this purpose he may request the parties to meet him’);
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proceedings before state courts, but by the same token requires a higher degree of organization from the parties and the arbitrators. This is usually done through a preliminary (or ‘preparatory’, or ‘case management’) hearing or conference.

Skilled arbitrators will use the preparatory conference to establish the ground rules that govern the proceeding at the very outset of the arbitration. If properly done, the preliminary hearing will ensure that both parties know how and when exactly they are expected to present their case—which is particularly important when the parties come from different legal traditions with different expectations as to a fair process. Most arbitrators therefore insist on such an early meeting to discuss the organization of the proceedings, in person, or remotely (over the telephone, or through video link), often following the guidance provided in the UNCITRAL Notes. In the practice of the ICDR, arbitrators are provided a Preliminary Hearing and Scheduling Order, which invites discussion with the parties of essential elements of the case, such as: deadlines for any amendments to the claims or counterclaims; a stipulation of uncontested facts by a certain date; an early notification of witnesses that a party intends to proffer; the exchange of information and documentary evidence by a certain date; and the date of the hearing.

C. Evidence (Article 16(3))

Article 16(3)

The tribunal may in its discretion direct the order of proof, bifurcate proceedings, exclude cumulative or irrelevant testimony or other evidence, and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.

Article 16(3) reinforces the arbitrators’ broad discretion in establishing the facts and taking evidence as they deem appropriate. By way of example, but in no way limiting the general discretion conferred on the arbitrators by virtue of Article 16(1), Article 16(3) addresses the tribunal’s authority with respect to several important elements of the arbitral procedure.

CPR Rules, Art 9(3) (‘The Tribunal shall hold an initial pre-hearing conference for the planning and scheduling of the proceeding’); SIAC Rules, Art 16(3) (‘As soon as practicable after the appointment of all arbitrators, the Tribunal shall conduct a preliminary meeting with the parties, in person or by any other means, to discuss the procedures that will be most appropriate and efficient for the case’).

Redfern and Hunter, op cit, para 6-27 ff (discussion of preliminary meetings and their role and importance). See also UNCITRAL Report of the Secretary-General on the Revised Draft Set of Arbitration Rules, Ninth Session, Addendum 1 (Commentary), UN Doc A/CN.9/112/Add. 1 (1975), (1976) VII UNCITRAL YB 166, 175 (Art 25(3) of the UNCITRAL Rules ‘deals with certain preparatory measures for hearings that the arbitrators must take in order to ensure that the hearings run smoothly’).

For international instruments, see the 1996 UNCITRAL Notes on Organizing Arbitral Proceedings (‘UNCITRAL Notes’).
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16.18 First, the tribunal may, in its discretion, direct the order of proof. Thus the tribunal is entitled, on its own accord and without application from the parties, to request the parties to offer certain evidence that the tribunal considers relevant for the case. Included in that authority is, of course, the power to order the production of documents by way of disclosure, either upon a party’s request or, again, if the tribunal, of its own volition, deems it appropriate in the circumstances of the case.42

16.19 Second, the tribunal may bifurcate proceedings where it deems that segmenting the arbitration into different phases would make the proceedings more expeditious.43 For example, proceedings can often be bifurcated in a jurisdictional phase and a phase on the merits. In the practice of international arbitration, regardless of the applicable institutional rules chosen by the parties, ‘[i]t is, for example, not uncommon for a tribunal to request separate briefing on the subject of jurisdiction, and to hear evidence and oral submissions, before issuing an interim award confined to jurisdiction’.44 The ICDR Rules, of course, contemplate this common practice, providing, in Article 15(3), that ‘[t]he tribunal may rule on such [jurisdictional] objections as a preliminary matter or as a part of the final award’.45 Following a finding that the tribunal may validly exercise jurisdiction over the dispute, the tribunal ordinarily would proceed to a hearing on the merits in accordance with the parties’ agreement and the institutional rules that govern.

16.20 Proceedings may also be bifurcated into separate phases on liability and on quantum. In this regard, some commentators recognize that:

In many modern disputes arising out of international trade, the quantification of claims is a major exercise . . . [that] may involve both the parties and the arbitral tribunal considering large numbers of documents, as well as complex technical matters involving experts appointed by the parties, or by the arbitral tribunal, or both.46

Bifurcating the case in some cases may expedite and clarify the presentation of issues in an arbitration.

16.21 In addition, the tribunal may direct the parties to ‘focus their presentations on issues the decision of which could dispose of all or part of the case’.47 Similar to the rationale underlying the bifurcation of the proceedings, it may not make sense to hear the entire case if the claim stands or falls on jurisdiction, time bar, or other

42 See also ICDR Rules, Art 19 (for a discussion of the ICDR Guidelines for Arbitrators Concerning Exchanges of Information).
43 Redfern and Hunter, op cit, paras 6-43–6-53.
45 ICDR Rules, Art 15(3).
46 Redfern and Hunter, op cit, para 6-43.
47 ICDR Rules, Art 16(3).
dispositive preliminary issues that can be heard separately without wasting the resources associated with hearing the entire case.

Finally, the tribunal can also ‘exclude cumulative or irrelevant testimony or other evidence’. As Article 16(3) confirms, emphasizing again the arbitrators’ duty to conduct the arbitration expeditiously, a party is not entitled, in the guise of its right to be heard, to make factual assertions or produce evidence that is irrelevant or immaterial to the dispute at bar.48 Thus the right to be heard is not violated if the arbitrators, either ex officio or upon the request of a party, exclude or dismiss factual allegations or evidence that fail(s) to make a material contribution to the resolution of the case.

Again, these powers are listed in Article 16(3) only by way of example. Beyond those powers, the tribunal enjoys broad discretion under Article 16(1) to conduct the proceedings as appropriate in the individual circumstances of the case49 and under applicable law. Under US law, for example:

An arbitrator enjoys wide latitude in conducting an arbitration hearing. Arbitration proceedings are not constrained by formal rules of procedure or evidence; the arbitrator’s role is to resolve disputes, based on his consideration of all relevant evidence, once the parties to the dispute have had a full opportunity to present their cases.50

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48 Article 9(2) of the IBA Rules provides: ‘The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any document, statement, oral testimony or inspection for any of the following reasons: (a) lack of sufficient relevance or materiality.’ Likewise, the UNCITRAL Model Law, Art 19(2), provides that ‘[t]he power conferred upon the arbitral tribunal includes the power to determine the relevance, materiality and weight of any evidence’. The vast majority of national laws also recognize the discretion of a tribunal to determine the relevance and materiality of evidence. See eg Austrian ZPO, s 599(1); English Arbitration Act 1996, s 34(1) and (2); German ZPO, s 1042(4); Hong Kong Arbitration Ordinance, art 34C(1); Japanese Arbitration Law, art 26(3). Case law in the US also recognizes these evidentiary principles. For a full selection of US cases, see GB Born, International Commercial Arbitration (Kluwer Law International, The Hague, 2009) 1,852, n 575. See eg Intl Chem Workers Union v Columbian Chem Co, 331 F3d 491 (5th Cir 2003) (‘Arbitrators have broad discretion to make evidentiary decisions’); Generica Ltd v Pharm Basics, Inc, 125 F3d 1123, 1130 (7th Cir 1997) (‘[A]rbitrators are not bound by the rules of evidence’); Petroleum Separating Co v Interamerican Refining Corp, 296 F2d 124 (2d Cir 1961); Compania Panamena Maritima San Gerassimo, SA v JE Hurley Lumber Co, 244 F2d 286 (2d Cir 1957); Reichman v Creative Real Estate Consultants, Inc, 476 FSupp 1276 (SDNY 1979).

49 In one of the reported ICDR awards, ICDR Case No 251-04, 2005 WL 6346380 (ICDR), the tribunal admitted the witness statements of witnesses even though those witnesses did not appear at the hearing. However, the tribunal afforded those written statements decreased probative value because neither the tribunal nor the other side had the opportunity to question the witnesses orally. See also N Blackaby, C Partasides, A Redfern, and M Hunter, Redfern and Hunter on Law and Practice of International Commercial Arbitration (5th edn, Oxford University Press, Oxford, 2009) paras 6-82–6-180; Born, op cit, 1,828–30.

50 Hoteles Condado Beach, La Concha and Convention Centre v Union De Tronquistas, 763 F2d 34, 38 (1st Cir 1985).
Section 16: Article 16—Conduct of the Arbitration

D. Notification of information to the other parties (Article 16(4))

**Article 16(4)**

*Documents or information supplied to the tribunal by one party shall at the same time be communicated by that party to the other party or parties.*

16.24 As a matter of course, all information that one party provides to the tribunal must simultaneously also be provided to each other party. This is both a function of the prohibition on *ex parte* communications with the tribunal (discussed above at Chapter 7), and due process, which requires that each party is afforded an opportunity to comment on the evidence before the tribunal.
ARTICLE 17—FURTHER WRITTEN STATEMENTS

I. Introduction

Article 17 explains that written statements beyond the statements of claims and counterclaims and statements of defence may be submitted only at the discretion of the tribunal. Such statements might include a claimant’s reply to the statement of defence, a respondent’s rejoinder to the claimant’s reply, pre-hearing and/or post-hearing briefs, submitted by the parties either simultaneously or consecutively. Article 17(2) sets an aspirational time limit of 45 days for the parties to submit such statements, but the arbitration tribunal may extend that time limit in circumstances that it deems justified. When combined with the tribunal’s discretion to order the time and scope of any additional written statements, 45 days suggests a reasonable, but flexible, time limit within which to make any further submissions.
Chapter 17: Article 17—Further Written Statements

II. Textual commentary

A. Additional written statements (Article 17(1))

**Article 17(1)**

The tribunal may decide whether the parties shall present any written statements in addition to statements of claims and counterclaims and statements of defense, and it shall fix the periods of time for submitting any such statements.

17.02 There is a clear trend in current arbitration practice to focus heavily on written materials in order to enhance efficiency.1 Thus, almost invariably, tribunals include further written statements such as a reply, rejoinder, and post-hearing briefs within arbitration procedural schedules.

17.03 Requiring the parties to submit written statements of claim, defence, and counterclaim, as the ICDR Rules do in Articles 2 and 3, and providing the tribunal the discretion to order submission of further written statements, as in Article 17, avoids the costs and inefficiencies that would result from bringing the parties, witnesses, experts, and their lawyers, often all from different countries, together for a lengthy, in-person meeting without the tribunal having the benefit of detailed briefing on the law and the facts.

17.04 Article 17 assumes that, normally, the claimant and respondent will file only a statement of claims, and a statement of defence and counterclaims, respectively. The tribunal has to approve the filing of additional submissions, re-emphasizing the rationale of Article 16(2) to ensure streamlined proceedings. In practice, in particular in larger cases, the parties will normally file further written submissions with the tribunal,2 in addition to the statement of claims and the memorandum

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2 See the UNCITRAL Report of the Secretary-General on the Revised Draft Set of Arbitration Rules, Ninth Session, Addendum 1 (Commentary), UN Doc A/CN.9/112/Add 1 (1975), (1976) VII UNCITRAL YB 166, 173 (1976) (under Art 19(2), the respondent's defence is 'without prejudice to his right to present additional or substitute documents at a later stage in the arbitral proceeding'); Caron, Caplan, and Pellonpää, op cit, 498 ('In most international arbitrations, further written submissions are likely to be useful, unless the case is disposed of on jurisdictional or other preliminary grounds. Provision should therefore usually be made for a second round of written pleadings, consisting of a reply (replique) by the claimant to the statement of defence (and any counterclaim) and a rejoinder (duplique) to this by the respondent'); W Wilberforce, 'Written Briefs and Oral Advocacy', 5(4) Arb Intl 348 (1989).
in reply. This can be efficient, as well, if these submissions properly prepare the case to the fullest extent, and thus reduce the need for, and ultimately the length of, any oral hearing. Such written submissions will typically contain a detailed description of the factual allegations and will elaborate in detail on the applicable substantive law.

Written submissions are important for several reasons. First, hearings frequently focus on evidentiary matters as opposed to oral argument;\(^3\) thus, it is vital that the arguments have been laid out clearly before any oral hearing, so that the context of the witness and expert examination is well framed for the arbitration tribunal. Second, comprehensive and responsive statements may eliminate or reduce the need for, or the length of, oral hearings. Some parties choose to conduct a ‘document-only’ arbitration process in which arbitration is conducted without hearings.\(^4\) In certain disputes, such as those in which witness and expert testimony may play less of a role, this can be a timely and cost-effective mode of achieving a satisfactory resolution. Written submissions are, therefore, of central importance in international arbitration.\(^5\)

Written statements are usually submitted consecutively, meaning that each party has the opportunity to read and review the opposing party’s last statement before responding.\(^6\) Sometimes, written briefs are not submitted consecutively, but simultaneously by both parties.\(^7\) This is often done to expedite the arbitration, but exchanging the parties’ written briefs on the same day means that neither party can properly respond to the other side’s case.\(^8\) Because of this, sequential pre-hearing written filings are usually preferable,\(^9\) with the claimant making the first submission.\(^10\) For this

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\(^5\) Caron, Caplan, and Pellenpää, op cit, 392 (‘In an overwhelming majority of cases, the arbitral procedure begins with an exchange of written submissions. Written pleadings are often given primary emphasis throughout the proceedings, with a short oral hearing or no hearing at all’); J Crawford, ‘Advocacy Before the International Court of Justice and Other International Tribunals in State-to-State Cases’, in RD Bishop (ed) *The Art of Advocacy in International Arbitration* (Juris Publishing, Huntington, NY, 2004) 11, 28.


\(^7\) Lew, Mistelis, and Kröll, op cit, para 21-57.

\(^8\) V Mani, *International Adjudication: Procedural Aspects* (Martinus Nijhoff Publishers, The Hague, 1980) 107 (stating that ‘where the plaintiff-defendant relationship is discernible simultaneous presentation is illogical in that it requires the defendants to produce a complete defence without knowing fully in advance of the arguments of the claimant’).

\(^9\) Born, op cit, 1,824.

\(^10\) In some arbitrations, a mixed approach is adopted. Even where pre-hearing memorials are submitted in an alternating order by the claimant and the respondent, respectively, post-hearing briefs will be submitted by both parties on the same day.
reason, permitting additional written statements, such as the claimant’s reply to the respondent’s statement of defence, and the respondent’s rejoinder to the claimant’s reply, can be an effective manner of refining and clarifying the ultimate issues in dispute before the oral hearing. Instead of, or in addition to, oral closing arguments, written submissions are often also submitted after the hearing (so-called ‘post-hearing briefs’). These present the parties with the opportunity to summarize their cases and to apply the facts, as established in their view by the evidence taken throughout the arbitration and specifically at the oral hearing, to the law. Since post-hearing briefs are usually prepared after both sides have heard all of the arguments and seen all of the evidence, the tribunal may direct that the briefs be submitted simultaneously. In some instances, the tribunal may permit the parties to submit replies to the post-hearing briefs as well.

17.07 The ICDR rule on written submissions is similar to Articles 22 and 23 of the 1976 UNCITRAL Rules, but the prescriptive text differs from the broad discretion granted to the arbitral tribunal that exists in the corresponding ICC rule. ICC Article 20(1) very broadly grants the arbitral tribunal the discretion to ‘establish the facts of the case by all appropriate means’. This permissive mandate would encompass the discretion to order additional written statements tailored to the needs of the particular dispute and parties. Although textually different, these rules on further written submissions all achieve the same objective: to provide the arbitral tribunal with maximum discretion to order whatever written submissions that might assist in setting forth the facts, law and/or argument to frame a particular dispute properly, and to do so in a short time frame.

B. Time limits (Article 17(2))

**Article 17(2)**

The periods of time fixed by the tribunal for the communication of such written statements should not exceed 45 days. However, the tribunal may extend such time limits if it considers such an extension justified.

17.08 Article 17(2) provides for a time limit of 45 days for additional written submissions. Those default time limits are designed to expedite the proceedings, but would be considered ambitious in many arbitration proceedings. For that reason, Article 17 provides the necessary flexibility for an arbitration tribunal to craft a schedule that fits the particular dispute before it.

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11 In large arbitrations, the arbitrators increasingly require parties to file very comprehensive post-hearing briefs, which then become the central point of reference (containing all facts, evidentiary conclusions, and legal arguments) for the arbitrators’ deliberations.
12 Born, op cit, 1,824.
13 ICC Rules, Art 20(1).
II. Textual commentary

Time limits are set to facilitate efficiency while preserving each party's opportunity to present fully its claims and defences. In many cases, a time limit of 45 days for replies, rejoinders, and/or post-hearing briefs may be fully appropriate. In large arbitrations, written statements are likely to be longer, more complicated, and take more time to produce,\textsuperscript{14} which might thus warrant a longer time period than 45 days. The tribunal has the discretion, in such cases or if otherwise appropriate, to provide for a more extended timetable.

After the tribunal sets the time limits for submissions, if a party wishes to extend a deadline to submit a further written statement and the adverse party or parties do not agree, it would have to request an extension from the arbitration tribunal. The party requesting the extension should support its request with an explanation of why it needs an extension and whether the opposing party or parties would be prejudiced by any such extension.

\textsuperscript{14} Born, op cit, 1,823.
ARTICLE 18—NOTICES

I. Introduction

The arbitral tribunal and the parties to an arbitration must communicate in an effective and pre-agreed manner to ensure the smooth conduct of arbitral proceedings. Article 18(1) addresses the practicalities regarding notification of all communications between the parties. Notably, Article 18(1) addresses the variety of forms of modern communication, paying particular attention to forms of electronic communication. Likewise, Article 18(1) is drafted in sufficiently broad terminology that permits (rather than limits) the parties and the tribunal to communicate in a variety of ways.

Article 18(2) sets forth the calculation of periods of time and time limits to ensure that the parties understand the tribunal’s procedural orders and other directions.
By specifically defining when notice periods begin to run, and anticipating holiday and other interruptions, Article 18(2) pre-empts possible dilatory tactics and sets the parties’ expectations for prompt notification, service of documents, and other communications that are essential to the prompt and effective functioning of an arbitration.

II. Textual commentary

A. Method of communication (Article 18(1))

Article 18(1)

Unless otherwise agreed by the parties or ordered by the tribunal, all notices, statements and written communications may be served on a party by air mail, air courier, facsimile transmission, telex, telegram or other written forms of electronic communication addressed to the party or its representative at its last known address or by personal service.

Article 18 allows for a wide range of methods to communicate written submissions and correspondence to the opposing party. It is preferable to use a method that provides a record of transmission, in order to avoid disputes about whether the submission was properly sent, either at all or in time. Tribunals will therefore often order specific methods of delivery in their first procedural order, usually encouraging electronic submission of pleadings, followed by courier delivery of hard-copy documents, including submissions, witness statements, and documentary exhibits.

Communications can be validly served on both the party and/or the party representative, if such a representative has been communicated pursuant to Article 12. Often, tribunals will order at the outset that communications are only served on the parties’ legal representatives. In any case, service must be effected either ‘at [the] last known address’, protecting the parties from sudden undisclosed changes of address, or ‘by personal service’, in which case, the submission has been actually handed over in person, and there is no dispute about whether and when it is received.

B. Calculating time periods (Article 18(2))

Article 18(2)

For the purpose of calculating a period of time under these rules, such period shall begin to run on the day following the day when a notice, statement or written communication is received. If the last day of such period is an official holiday at the place received, the period is extended until the first business day which follows. Official holidays occurring during the running of the period of time are included in calculating the period.
Time periods start to run on the day after a submission is received. If the last day of a period falls on a holiday—importantly, at the place where the submission is received—the period is extended to the next business day. Likewise, when dealing with procedural matters, tribunals are generally limited only by their own discretion to extend deadlines on a case-by-case basis, bearing in mind the overall aim to provide for just and fair determination of the claims before the tribunal. It is also worth drawing attention to Article 31, which deals with the apportionment of costs, because any derogation from procedural time limits set by Article 18(2) and/or the tribunal may inform the tribunal’s decisions regarding cost allocations.
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1. Each party shall have the burden of proving the facts relied on to support its claim or defense.

2. The tribunal may order a party to deliver to the tribunal and to the other parties a summary of the documents and other evidence which that party intends to present in support of its claim, counterclaim or defense.

3. At any time during the proceedings, the tribunal may order parties to produce other documents, exhibits or other evidence it deems necessary or appropriate.

I. Introduction

The decisions of tribunals to admit or refuse to admit evidence are crucial to both the arbitral process and the determination of a claim. Therefore, presenting evidence in support of a party’s claim before a tribunal is at the very heart of the arbitral process. Indeed, the function of an arbitral tribunal is to assess the evidence presented by the parties, and make an informed and impartial determination as to the merits of the claims and counterclaims presented. Accordingly, Article 19(1) outlines that each party bears the burden of proving the relevant facts on which it relies to support any claim or counterclaim or to establish any defence.

Article 19(2) and (3) provides that the tribunal controls the evidentiary process, and may require the parties to produce documents that will assist the tribunal in
its determinations. The tribunal has substantial discretion to control the scope and extent of disclosure of documents, and given the 2008 ICDR Guidelines for Arbitrators Concerning Exchanges of Information, tribunals are well equipped to ensure that the parties obtain a fair and just opportunity to present their evidence, yet in a prompt and efficient manner that does not undo the perceived temporal advantage of choosing arbitration over litigation.

II. Textual commentary

A. Burden of proof (Article 19(1))

Article 19(1)

Each party shall have the burden of proving the facts relied on to support its claim or defense.

19.03 Article 19(1) requires each party to carry the burden of proving the facts on which it relies in support of its claim or defence. While ‘[a]s a general rule, a party to an international arbitration has the burden of proving the facts necessary to establish its claim or defence’,¹ there is little guidance in international arbitral practice for determining what standard of proof actually applies (for example, the ‘balance of the probabilities’, ‘clear and convincing evidence’, or even ‘beyond reasonable doubt’). Indeed, ‘[i]nternational arbitration conventions, national arbitration laws, compromis, arbitration rules and even the decisions of arbitral tribunals are almost uniformly silent on the subject of the standard of proof’.²

19.04 Perhaps because it has become a general rule of international arbitral practice that each party bears the burden of proof for proving its own claim, Article 19(1) is not reflected in other institutional arbitration rules in that it expressly states a general rule that already widely known and accepted in arbitral practice. The genesis of Article 19(1) is, presumably, the near-identical language found in the 1976 UNCITRAL Rules, stating that ‘[e]ach party shall have the burden of proving the facts relied on to support his claim or defence’.³

19.05 This language embodies the general principle [that] was expressed by the Tribunal in Reza Said Malek: “it is the Claimant who carries the initial burden of proving the facts upon which he relies. There is a point, however, at which the Claimant may

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³ 1976 UNCITRAL Rules, Art 24(1); now replicated in 2010 UNCITRAL Rules, Art 27(1).
be considered to have made a sufficient showing to shift the burden of proof to the Respondent”.

Thus, each party, beginning with the claimant, must discharge its burden of proof by presenting evidence to the tribunal in support of its claims.

Despite Article 19(1)’s unique nature as an express institutional rule specifically devoted to the burden of proof, it is nevertheless a procedural rule, and thus is incorporated by reference into the parties’ arbitration agreement. Article 19(1), however, does not detail the relevant standard of proof that applies to a specific claim or defence. Indeed, the substantive laws of many civil law jurisdictions contain specific and sometimes elaborate rules about the standard of proof to be applied to a particular claim or defence. The issue is further complicated because, under some laws, the burden of proof and how it is reversed in certain circumstances are not purely procedural issues, but a matter of substantive law, so that substantive and procedural issues can overlap in international arbitrations. Tribunals are therefore well advised, despite the clear language of Article 19(1), to examine carefully the impact of the applicable substantive law on both the standard and the burden of proof for the claims and defences in question.

Under some international (and national) frameworks, such as the Iran-US Claims Tribunal, allegations such as fraud, bribery, corruption, and the like require a higher threshold of proof. For example, the Iran-US Claims Tribunal has held that ‘if reasonable doubts remain, such an allegation [of bribery] cannot be deemed to be established’. In another Iran-US Claims Tribunal decision, the tribunal held that allegations of forgery ‘must be proven with a higher degree of probability . . . the proper standard of proof [being] “clear and convincing evidence”’. Therefore, the relationship between Article 19(1) and the underlying procedural rules of the seat and the substantive law is open to interpretation and varies from case to case.

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5 Often, arbitrators simply ‘evaluate’ or ‘weigh’ the evidence in terms of its credibility, noting why they did, or did not believe, a particular witness etc. See ICDR Case 1990 WL 10559702 (ICDR).

6 As noted ibid, however:

> Burden of proof rules are frequently intertwined with substantive legal rules, and it would often distort such rules to separate them. At the same time, some burden of proof rules are the result of procedural matters (such as the availability or unavailability of discovery); it is important in these instances to take this into account in allocating the burden of proof.

7 GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 1,858 (‘Allocating the burden of proof arguably presents choice-of-law questions. In particular, tribunals must decide whether to apply the law of the arbitral seat (on the theory that the burden of proof is “procedural”), the law governing the underlying substantive issues, or some international standard’).


Nevertheless, parties conducting arbitrations pursuant to the ICDR Rules should bear in mind the distinction between the burden of proof, on the one hand, and substantive and procedural standards of proof, on the other.

**B. Exchange of information and document production (Article 19(2) and (3))**

**Article 19(2)**

*The tribunal may order a party to deliver to the tribunal and to the other parties a summary of the documents and other evidence which that party intends to present in support of its claim, counterclaim or defense.*

**Article 19(3)**

*At any time during the proceedings, the tribunal may order parties to produce other documents, exhibits or other evidence it deems necessary or appropriate.*

19.08 As discussed in the context of Article 16, the tribunal may, in its discretion, direct the order of proof. Article 19(2) and (3) reinforces in express terms that the tribunal may request that the parties offer specific evidence and/or to order the production of documents by way of disclosure. The tribunal is entitled to order the production of evidence either upon a party’s request or of its own volition if it is deemed appropriate in the circumstances of the case. The tribunal will, in all instances, be guided by the relevance of the evidence for the issues at bar.

19.09 In that regard, the ICDR has recently introduced Guidelines for Arbitrators Concerning Exchanges of Information, aimed at ensuring that document production processes adopted in arbitration do not detract from the arbitrator’s duty to ensure that arbitration remains ‘a simpler, less expensive, and more expeditious process’ than litigation in state courts. Recognizing that each party must have a fair opportunity to present its case, the Guidelines direct the tribunal to ‘manage the exchange of information among the parties in advance of the hearings with a

10 According to the ICDR Guidelines for Arbitrators Concerning Exchanges of Information (‘ICDR Guidelines’), ‘[t]he parties may provide the tribunal with their views on the appropriate level of information exchange for each case, but the tribunal retains final authority to apply the above standard’: ICDR Guidelines, s 1.b., available online at <http://www.adr.org/si.asp?id=5288>

11 The Introduction to the ICDR Guidelines states that ‘[u]nless the parties agree otherwise in writing, these guidelines will become effective in all international cases administered by the ICDR commenced after May 31, 2008, and may be adopted at the discretion of the tribunal in pending cases’. See generally J Beechey, ‘The ICDR Guidelines for Information Exchanges in International Arbitration: An Important Addition to the Arbitral Toolkit’, Disp Res J 84 (2008).

12 The Introduction to the ICDR Guidelines specifically states that ‘[t]he purpose of these guidelines is to make it clear to arbitrators that they have the authority, the responsibility and, in certain jurisdictions, the mandatory duty to manage arbitration proceedings so as to achieve the goal of providing a simpler, less expensive, and more expeditious process’.

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II. Textual commentary

view to maintaining efficiency and economy’. Under the Guidelines, each party is required to produce all documents on which it intends to rely prior to the hearing. The tribunal is authorized to order the production of documents in the possession of the other party if these documents are described with specificity, and shown to be relevant and material to the outcome of the case.

On the somewhat controversial subject of the production of ‘electronic documents’, the Guidelines do not treat such electronic documents any differently from traditional sources, and thus apply the same concepts of specificity, relevance, and materiality. The Guidelines merely state in addition that ‘requests for documents maintained in electronic form should be narrowly focused and structured to make searching for them as economical as possible’. The documents can be produced in paper form, or in any other form that is most convenient and cost-effective in the circumstances. The Guidelines avoid terminology such as ‘disclosure’ or ‘discovery’, and instead emphasize that US court procedures are, in principle, not appropriate for obtaining information in international arbitration.

The Guidelines also recognize that defences of confidentiality and privilege may be raised against a request for document production. Recognizing the reality in international arbitration that parties and their counsel may be subject to different ethical or professional rules with respect to the documents concerned, the Guidelines direct the tribunal ‘to the extent possible apply the same rule to both sides, giving preference to the rule that provides the highest level of protection’. This approach of a ‘most favourable regime’ appears quite sensible in international cases involving different legal traditions.

13 Ibid, s 1.a.
16 Some authors stress that the reference to electronic ‘documents’ limits the tribunal's authority to order the production of other electronic data, such as metadata or recovered deleted data. See Gusy and Illmer, op cit. In practice, the Guidelines should not be read to impose an inflexible standard, referring generally to the exchange of information. A party may therefore be able to request the production of electronic data more generally if it can identify that data with specificity, show that its production would be relevant and material to the outcome of the case, and show that the production is justifiable in light of the overarching goals of expediency and cost-efficiency.
17 Electronic documents can be produced in paper form, or in any other form that allows for the most convenient and cost-effective production in the circumstances.
18 ICDR Guidelines, s 4.
20 Ibid, s 7.
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I. Introduction

Article 20 sets out basic procedural guidelines for the arbitral hearing, addressing such issues as general logistics, and notice and hearing requirements, and also vests
broad discretion in the tribunal on evidentiary issues. Detailed procedural directions are left to the tribunal. This is commonly accomplished in a procedural order, often after a pre-hearing conference to fine-tune hearing logistics, agree to a detailed timetable, and address anticipated evidence disputes. Despite the fact that contemporary practice puts great weight on having a comprehensive written procedure, most arbitrations that proceed to an award on the merits also include a hearing.¹

20.02 While the tribunal typically enjoys a broad discretion in laying the ‘ground rules’ for the hearing, it will also be influenced by several other factors. First, consistent with contemporary international arbitration practice, the tribunal may well decide to adopt outright, or at a minimum be guided by, international standard rules on evidential or procedural matters, such as the 2010 IBA Rules on the Taking of Evidence in International Arbitration² or the UNCITRAL Notes on Organizing Arbitral Proceedings.³ Further, the arbitral procedure may be influenced by any provisions relating to hearings adopted as part of the arbitration clause or submission to arbitration. The tribunal may also have recourse to the applicable laws or ‘practice’ of the seat of arbitration. Last, but not least, a tribunal will take note of the provisions relating to hearings that are contained in the applicable arbitration rules.

20.03 The scope and language of Article 20 closely match that of the analogous Article 25 of the 1976 UNCITRAL Rules. The UNCITRAL Rules introduced revisions to simplify the rules relating to hearings.⁴ Similarly, ICC Rules, Article 21, is less detailed and not nearly as prescriptive as its ICDR counterpart. No specific deadlines or logistics are laid out and the tribunal is given a general power to be in ‘full charge of the hearings’. Article 19 of the LCIA Rules includes a basic list of broad principles for hearing organization, but grants the tribunal a general power of ‘fullest authority’ to address logistics. A panel operating under the ICDR Rules can rely on the similarly broad mandate in Article 16 to ‘conduct the arbitration in whatever manner it considers appropriate’, with the safeguard that the parties are to


² IBA Rules on the Taking of Evidence in International Arbitration (adopted 1 June 1999, revised 29 May 2010).

³ UNCITRAL Notes on Organizing Arbitral Proceedings (finalized 14 June 1996).

⁴ See 2010 UNCITRAL Rules, Art 28. See also UNCITRAL, Report of Working Group II (UN Doc No A/CN.9/669, 9 March 2009) paras 55–56 (rules governing the organization of hearings were ‘too detailed’ and should be replaced by a more ‘generic provision’).
be ‘treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case’.\(^5\) Importantly in the context of hearings, the tribunal, in exercising its Article 16 discretion, is directed to ‘conduct the proceedings with a view to expediting the resolution of the dispute’, which may include such hearing-related issues as bifurcating proceedings between liability and damages, excluding evidence, or addressing issues that may be dispositive.\(^6\) While tribunals are vested with a great deal of discretion in such situations, they are typically very mindful of the cornerstones of equality of treatment, the right to be heard, and the opportunity to be given a fair opportunity to present one’s case.

## II. Textual commentary

### A. Logistics for hearing (Article 20(1))

**Article 20(1)**

*The tribunal shall give the parties at least 30 days advance notice of the date, time and place of the initial oral hearing. The tribunal shall give reasonable notice of subsequent hearings.*

The general reference in Article 20(1) to giving at least 30 days’ advance notice of an ‘initial oral hearing’ is curious. The reference to an ‘initial’ hearing does not appear in the rules of the other major institutions, nor in the AAA Commercial Rules. It presumably applies to any sort of hearing, whether on the merits or otherwise. It also presumably applies to any ‘oral hearing’, whether in person, telephonic or by video-conference. The 30-day time period is also atypically prescriptive compared to most other rules that refer simply to giving ‘reasonable notice’.\(^7\) The AAA Commercial Rules, in contrast, are more detailed.\(^8\) In practice, hearings will most often be set in consultation with the parties and with plenty of lead time. Of course, if agreement on timing cannot be reached with all parties, the decision will ultimately be made by the tribunal.

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\(^5\) See discussion of Art 16(1) at paras 16.10–16.13 above.

\(^6\) See discussion of Art 16(3) at paras 16.14–16.16 above. See also discussion of Art 13(2) (‘tribunal may hold conferences or hear witnesses or inspect property or documents at any place it deems appropriate’) at paras 13.14–13.17 above.

\(^7\) See eg ICC Rules, Art 21(1); LCIA Rules, Art 19.2.

\(^8\) See AAA Commercial Rules, s R-22:

The arbitrator shall set the date, time, and place for such hearing. The parties shall respond to requests for hearing dates in a timely manner, be cooperative in scheduling the earliest practicable date, and adhere to the established hearing schedule. The AAA shall send a notice of hearing to the parties at least 10 days in advance of the hearing date, unless otherwise agreed by the parties.
In contrast with other institutional rules and national laws, Article 20(1) does not explicitly require that there be an oral hearing on the merits or that a party can insist on such a hearing.\(^9\) Article 20(2) of the ICC Rules, in contrast, provides that the tribunal ‘shall hear the parties together in person if any of them so requests’.\(^{10}\) In any event, international commercial arbitration practice suggests that it is typical in most cases for at least some form of hearing to be held.\(^{11}\) There may also be applicable national laws that, absent agreement otherwise, require a hearing if one party insists thereon.\(^{12}\)

### B. Witness testimony (Article 20(2)−(5))

**Article 20(2)**

At least 15 days before the hearings, each party shall give the tribunal and the other parties the names and addresses of any witnesses it intends to present, the subject of their testimony and the languages in which such witnesses will give their testimony.

**Article 20(3)**

At the request of the tribunal or pursuant to mutual agreement of the parties, the administrator shall make arrangements for the interpretation of oral testimony or for a record of the hearing.

**Article 20(4)**

Hearings are private unless the parties agree otherwise or the law provides to the contrary. The tribunal may require any witness or witnesses to retire during the testimony of other witnesses. The tribunal may determine the manner in which witnesses are examined.

**Article 20(5)**

Evidence of witnesses may also be presented in the form of written statements signed by them.

Paragraphs (2)−(5) provide a skeleton set of rules applying to the presentation of oral testimony through witnesses. While helpful in providing a default set of basic procedures, parties will typically have adopted a more detailed timetable and possibly agreed that the tribunal will be guided by one or more of the sets of rules for

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9 See also ICDR Rules, Art 16(1) (each party has the right to be heard and to be given a fair opportunity to present its case).

10 See also the similar provision in LCIA Rules, Art 19.1; SCC Rules, Art 27(1); SIAC Rules, Art 21.1.


12 See UNCITRAL Model Law, Art 24(1); cf English Arbitration Act 1996, s 34(2)(h) (arbitral tribunal may choose not to hear evidence if it deems it unnecessary).
II. Textual commentary

taking evidence—especially the 2010 IBA Rules on the Taking of Evidence in Arbitration.\textsuperscript{13}

Article 20(2), like the preceding paragraph, provides a default rule in this case for providing a list of witnesses, contact details and the languages in which they will be testifying. This follows the text of Article 25(2) of the 1976 UNCITRAL Rules. In the 2010 revision of the UNCITRAL Rules,\textsuperscript{14} this was deleted as being ‘too detailed’ and replaced with a ‘more generic provision’ about giving timely notice of the hearing.\textsuperscript{15} It was pointed out that, in practice, such detailed procedural rules could be adopted based on international standards such as the UNCITRAL Notes on Organizing Arbitral Proceedings.\textsuperscript{16} The purpose of early notice of witnesses is to encourage a more efficient examination of the witnesses and prevent ‘surprise’. Of course, evidence will typically also be provided by witness statements well in advance of the hearing.

Article 20(3) anticipates that oral evidence in a language other than that of the arbitration, shall be ‘interpreted’ if necessary.\textsuperscript{17} Further, regardless of language used, the paragraph empowers the tribunal to order that a transcript be produced of the hearing. Commentators on the analogous Article 25(3) of the 1976 UNCITRAL Rules have noted that the reference is only to a ‘record’ of the hearing, which need not extend to a verbatim transcript. However, it is now common practice to produce a real-time transcript, usually with the assistance of a stenographer or ‘court reporter’. The provision assigns the responsibility for making these arrangements to the ICDR case administrator, although this task may also follow the tribunal or the parties. Article 25(3) of the 1976 UNCITRAL Rules was deleted in the 2010 amendments.\textsuperscript{18}

Article 20(4) makes clear that, unless otherwise agreed by the parties or provided by law, the hearing is to be ‘private’—that is, access is restricted to only those authorized by the tribunal. This is not to be confused with the Article 34 provision relating to confidentiality.\textsuperscript{19} The analogous Article 25(4) of the 1976 UNCITRAL Rules (and Article 28(3) of the 2010 Rules) refers to hearings being held ‘in camera’, which ‘is clearly intended to exclude members of the public, ie non-party third persons, from the hearing’.\textsuperscript{20} The ICDR provision goes on to make clear that the tribunal may order that any witnesses be excluded from the hearing room pending

\textsuperscript{13} See 2010 IBA Rules, Art 4 (witnesses of fact).
\textsuperscript{14} See 2010 UNCITRAL Rules, Art 28(1).
\textsuperscript{15} UN Doc A/CN.9/669, paras 55 and 56.
\textsuperscript{16} See ibid, para 56.
\textsuperscript{17} The analogous Art 25(3) of the 1976 UNCITRAL Rules refers to ‘translation’.
\textsuperscript{18} See UN Doc A/CN.9/669, paras 55 and 56.
\textsuperscript{19} See ICDR Rules, Art 34 (discussed in Chapter 34 below).
his or her testimony. This appropriately leaves the tribunal with sufficient flexibility
to determine appropriate rules for the particular setting, particularly considering
the expectations of the parties and the law of the seat. In practice, parties are likely
also to take guidance from the 1999 IBA Rules or otherwise.

20.10 Article 20(4) also contains a catch-all grant of authority to the tribunal to ‘deter-
mine the manner in which witnesses are examined’. Commentators on the similar
wording in the 1976 UNCITRAL Rules point to two distinct elements of this
 provision. First, it requires attention to the degree of ‘formality’ of obtaining wit-
ness testimony—that is, the oath or declaration to be used. Second, more broadly,
it encompasses the tribunal’s writ to fashion an examination procedure appropriate
to the circumstances. Much has been written on the different cultural approaches
to witness examination. It suffices to say here that the ICDR Rules leave such
determinations to the tribunal.

20.11 Consistent with common practice, as evidenced in the IBA Rules, Article 20(5)
provides that evidence may also be presented in the form of a signed witness state-
ment as a substitute for live direct testimony.

C. Evidence and privilege issues (Article 20(6))

**Article 20(6)**

The tribunal shall determine the admissibility, relevance, materiality and weight of
the evidence offered by any party. The tribunal shall take into account applicable principles
of legal privilege, such as those involving the confidentiality of communications between a
lawyer and client.

20.12 The first sentence of Article 20(6) empowers the tribunal to rule on evidentiary
questions. This language mirrors that of Article 25(6) of the 1976 UNCITRAL
Rules and Article 27(4) of the 2010 UNCITRAL Rules. Such a broad power appears
in other institutional rules.

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21 On sequestration of witnesses, see generally GB Born, *International Commercial Arbitration*
22 See 1999 IBA Rules, Art 3(12).
23 See Caron, Caplan, and Pellonpää, op cit, 617–18.
24 See eg R Bishop (ed) *The Art of Advocacy in International Arbitration* (Juris Publishing,
25 See 2010 IBA Rules, Arts 4 and 8(4). For a rare instance of a case in which a witness was subse-
quently not made available for examination at the hearing, see ICDR Case No 030-04, 2004 WL
5750007 (ICDR) (tribunal denied a motion to strike the written testimony, finding instead that it
would take into account the non-appearance in deciding what weight to give to the testimony, and
leaving open the possibility of drawing adverse inferences).
26 See eg SCC Rules, Art 26 (‘The admissibility, relevance, materiality and weight of evidence shall
be for the Arbitral Tribunal to determine’).
II. Textual commentary

Uniquely, Article 20(6) also explicitly mandates that the tribunal is to take into account applicable principles of legal privilege when making such determinations.27 The explicit reference to privilege mirrors that found in other rules associated with the AAA.28 In addition, unless otherwise agreed, the ICDR Guidelines for Arbitrators Concerning Exchanges of Information apply to all arbitrations since 31 May 2008. Guideline 7 provides that:29

The tribunal should respect applicable rules of privilege or professional ethics and other legal impediments. When the parties, their counsel or their documents would be subject under applicable law to different rules, the tribunal should to the extent possible apply the same rules to both sides, giving preference to the rule that provides the highest level of protection.

The default rule of providing, to the extent possible, equal treatment of both parties and a preference for the highest level of protection is consistent with the international practice recommended by leading arbitrators.30

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28 See eg AAA Commercial Rules, s R-31(c).
29 See also discussion of the Guidelines above at paras 1.48–1.50.
I. Introduction

While it is unsurprising that an arbitral tribunal is empowered to order interim measures (sometimes referred to as ‘provisional measures’), the scope and procedural structure of that power remains a topic of considerable debate.  

1 See eg the debate engendered in the attempts to amend Art 17 of the UNCITRAL Model Law. See UNCITRAL, Report of Working Group II (UN Doc No A/CN.9/641, 25 September 2007) paras 46–60. For a general discussion of interim measures available under various institutional rules,
the ICDR Rules steers a middle course, empowering the tribunal to order whatever interim measures ‘it deems necessary’, including, but not limited to, injunctive relief and measures necessary for the protection of property. The measures may, for example, be intended to preserve evidence for use in the case, prevent property from being interfered with, or, more generally, to preserve the status quo pending determination of the dispute. In addition to empowering the tribunal to take such measures, Article 21(3) also makes clear that a request to a judicial authority for interim measures is not inconsistent with the arbitration agreement. This Article should not be confused with Article 37, which provides for ‘emergency measures of protection’. This latter rule is intended to provide an extrajudicial avenue for interim measures where the tribunal has not yet been appointed.

21.02 As discussed below, Article 21 is broadly similar to its equivalent provisions in Articles 23, 25, and 26 of the ICC, LCIA, and 1976 UNCITRAL Rules, respectively, each of which grants fairly broad powers to the tribunal to order interim measures of protection. The 2010 UNCITRAL Rules revised Article 26 to better conform to the UNCITRAL Model Law. The ICDR provision takes a less prescriptive approach than, for example, the list of interim measures laid out in Article 25 of the LCIA Rules. While the power to make such orders has always been part of the ICDR Rules, there was no such power in the AAA Commercial Rules until they were amended by the introduction of section R-34 in 2000.

21.03 In considering the application of Article 21, one should refer to the arbitration legislation at the arbitral seat, as well as where any resulting interim measure may be enforced. In this respect, Article 17 of the UNCITRAL Model Law (adopted in revised form in 2006) represents a recent restatement of the contemporary position on availability of interim relief in international arbitration. Briefly, it provides that the court and arbitral tribunal have concurrent jurisdiction to order interim measures, that a tribunal’s orders granting interim relief are enforceable, and even provides an optional mechanism for a tribunal to order *ex parte* ‘preliminary orders’.


2 See eg Nordell Int Resources, Ltd v Triton Indonesia, Inc, No 92-55058, 1993 WL 280169 (9th Cir 1993) (citing s R-34 of the AAA Commercial Rules, permitting 'such orders as may be necessary to safeguard the property which is the subject matter of the arbitration without prejudice to the rights of the parties or to the final determination of the dispute', as empowering the tribunal to make an interim order requiring the parties to continue to perform the agreement pending conclusion of the arbitration).

3 See discussion of Art 37 in Chapter 37 below.

4 See UNCITRAL Model Law, Arts 17J, 17H, and 17B, respectively. For general discussion of the revisions, see LE Foster and N Elsberg, ‘Two New Initiatives for Provisional Remedies in International
The 2006 UNCITRAL Model Law revisions have inspired a number of legislative amendments and also several reforms of major institutional rules. To date, however, the ICDR has resisted the temptation to join this reformist trend.

II. Textual commentary

A. Power to order interim measures (Article 21(1))

**Article 21(1)**

*At the request of any party, the tribunal may take whatever interim measures it deems necessary, including injunctive relief and measures for the protection or conservation of property.*

The model for Article 21 is Article 26 of the 1976 UNCITRAL Rules. As in Article 26, the tribunal enjoys a very broad discretion to ‘take whatever interim measures it deems necessary’. However, Article 26 contains some potential limitations on the tribunal’s powers—most importantly, in that the interim measures must apply to the ‘subject matter of the dispute’. To overcome this, Article 21(1) of the ICDR Rules was amended with effect from September 2000 to permit orders for the protection or conservation of any ‘property’. While most property at issue may be associated with the subject matter of the dispute, the rule is not so narrowly proscribed. Thus commentators suggest, for example, that the amended Article 21(1) empowers the tribunal to order security for costs not limited to the costs associated with the measures being sought.

Article 21(1) still retains the requirement that any such interim measures be ‘necessary’ rather than merely ‘appropriate’, as provided in the equivalent Article 23(1) of the ICC Rules. As to what is ‘necessary’, it could be said that one should refer back


8 See ICC Rules, Art 23(1).
to the tribunal’s implied duty to render an effective award and thus the arbitrators may take such preliminary measures as may be ‘necessary’ to ensure that the award is not rendered meaningless. However, such a restrictive interpretation is not apparent on the face of the language. On the contrary, analogous provisions have been found to give arbitrators ‘substantial power to fashion remedies that they believe will do justice between the parties’. The analogous provision in the AAA Commercial Rules empowering arbitral tribunals to issue interim measures of protection also uses the ‘as it deems necessary’ standard. Courts asked to review such orders have upheld a vast array of types of order and left issues of ‘necessity’ to the arbitrators’ discretion.


10 The trend away from limiting a tribunal’s powers to situations of ‘necessity’ and covering only the ‘subject matter of the dispute’ can also be seen in the 2006 amendments to Art 17 of the UNCITRAL Model Law. See LE Foster and N Elsberg, ‘Two New Initiatives for Provisional Remedies in International Arbitration: Article 17 of the UNCITRAL Model Law on International Commercial Arbitration and Article 37 of the AAA/ICDR International Dispute Resolution Procedures’, 3(5) Transnl Disp Mgt 4 (2006).


13 See eg SM Widman, ‘When It’s Over Before It’s Completed: The Finality of Interim Awards’, 24 Alternatives to the High Cost of Litigation 97 (2006). See also Sperry Intl Trade, Inc v Government of Israel, 689 F2d 301, 306 (2d Cir 1982) (enforcing an interim award issued under the pre-amendment ICDR International Rules providing that disputed monies be paid into an escrow fund pending an award on the merits).

14 See eg Konkar Maritime Enterprises v Compagnie Belge d’Aff retement, 668 FSupp 267, 272 (SDNY 1987) (confirming that an order to establish an escrow account was enforceable); Publicis Communication, et al v True North Communication, Inc 206 F3d 725, 731 (7th Cir 2000) (in an

Chapter 21: Article 21—Interim Measures of Protection

B. Form of interim measures and security (Article 21(2))

Article 21(2)

Such interim measures may take the form of an interim award, and the tribunal may require security for the costs of such measures.

21.06 Article 21(2) indicates that the measures may be in the form of an interim award so as to encourage enforcement in those jurisdictions in which a mere ‘order’ may not be enforceable under the New York Convention or local law. A similar issue arises in those jurisdictions, such as in the US, in which an award must be ‘final’ in the sense that it either disposes of a separate claim or has actual effects on property rights. US courts faced with an interim award of the sort contemplated by Article 21 have held that it has the requisite finality and is thus enforceable under the New York Convention.
The tribunal may also order security for costs related to the measures. As is often the
practice in litigation, an applicant may be ordered to post a bond, give a letter of
credit, or provide some other security. The form and amount is left to the discretion
of the tribunal. This form of provisional measure is most common in England and
other Commonwealth jurisdictions in which security for costs is common in court

\section*{C. Application to court not incompatible (Article 21(3))}

\textbf{Article 21(3)}

\textit{A request for interim measures addressed by a party to a judicial authority shall not
be deemed incompatible with the agreement to arbitrate or a waiver of the right to
arbitrate.}

The ability for parties to request interim measures from competent courts without
waiving their rights to arbitrate is also enshrined in the UNCITRAL Model Law\footnote{See
\textit{UNCITRAL Model Law, Art 9.}} and in the arbitration laws of many jurisdictions.\footnote{See generally the arbitration laws of Australia, Bahrain, Belarus, Bermuda, Bulgaria, Canada, Chile, Cyprus, Egypt, France, Greece, Guatemala, Hungary, India, Iran, Ireland, Japan, Kenya, Lithuania, Macau, Madagascar, Malta, Mexico, New Zealand, Nigeria, Oman, Peru, Russian Federation, Scotland, Singapore, Sri Lanka, Tunisia, Ukraine, and Zimbabwe.} Because this is a fairly recent
development in some jurisdictions,\footnote{See \textit{in New York, Civil Practice Law and Rules, s 7502(c) (a 2005 amendment to the rules of civil procedure authorizing New York state courts to grant provisional remedies in aid of arbitration).}} Article 21 may be important evidence to
convince a court that interim relief from courts is not inconsistent with the parties’
arbitration agreement.\footnote{See \textit{Puerto Rico Hospital Supply, Inc v Boston Scientific Corp}, Civ 05-1523, 2005 WL 1431822 *3 (D Puerto Rico, 17 June 2005) (referring to ICC Rules, Art 23, as evidence that the court had jurisdiction over a request for a preliminary injunction to preserve the status quo). However, even where resort to court is not ‘incompatible’ with the arbitration agreement, a court may decline to give relief and refer the matter to the arbitrators. See \textit{eg DHL Information Services (American), Inc v Infinite Software Corp}, 502 F Supp 2d 1082 (DC Cal 2007) (referring to similar language in AAA Commercial Rules, s R-34(c), as permitting the court to order interim relief, but holding that it would be inappropriate to do other than refer the matter to the tribunal).} Notably, the language in Article 21(3) does not contain
any limitations on \textit{when} recourse to a court for interim relief may be considered.
This is in contrast to the ICC and LCIA Rules, which refer to the parties’ power to
apply to the courts before the tribunal is constituted, but limit application to
the courts thereafter to ‘appropriate’ or ‘exceptional’ circumstances, respectively.\footnote{See ICC Rules, Art 23(2), and LCIA Rules, Art 25.3, respectively.}
Article 37(8) of the ICDR Rules contains the analogue provision in cases of requests for emergency relief.21

D. Costs associated with application for interim measures (Article 21(4))

**ARTICLE 21(4)**

The tribunal may in its discretion apportion costs associated with applications for interim relief in any interim award or in the final award.

21.09 The tribunal’s power to apportion costs associated with an application for interim relief can be understood as a specific application of the general power to award costs found in Article 31 of the ICDR Rules,22 which also enumerates a broad definition of what constitutes costs. In this respect, Article 31(e) specifically applies to costs ‘in connection with an application for interim or emergency relief pursuant to Article 21’. With respect to an application under Article 37 for ‘emergency relief’, the ‘emergency arbitrator’ is directed to make an ‘initial apportionment’ that is ‘subject to the power of the tribunal’ to make a final determination.23

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21 See discussion of Art 37(8) at paras 37.25–37.26 below.
22 See paras 31.01–31.08 below.
23 See para 37.24 below (discussing Art 37(9)).
ARTICLE 22—EXPERTS

I. Introduction

II. Textual commentary

A. Appointment of the expert (Article 22(1))

B. Provision of information to the expert (Article 22(2))

C. Opportunity to comment on and question the expert report (Article 22(3) and (4))

Article 22

a) The tribunal may appoint one or more independent experts to report to it, in writing, on specific issues designated by the tribunal and communicated to the parties.

b) The parties shall provide such an expert with any relevant information or produce for inspection any relevant documents or goods that the expert may require. Any dispute between a party and the expert as to the relevance of the requested information or goods shall be referred to the tribunal for decision.

c) Upon receipt of an expert’s report, the tribunal shall send a copy of the report to all parties and shall give the parties an opportunity to express, in writing, their opinion on the report. A party may examine any document on which the expert has relied in such a report.

d) At the request of any party, the tribunal shall give the parties an opportunity to question the expert at a hearing. At this hearing, parties may present expert witnesses to testify on the points at issue.
I. Introduction

22.01 Article 22 addresses tribunal-appointed, as opposed to party-appointed, experts. Although tribunal-appointed experts are more common in the civil law tradition, the practice is increasingly widely employed in general international arbitration. The text of Article 22 is closely modelled on the equivalent provision in the 1976 UNCITRAL Rules, although that provision has subsequently been amended. It is also broadly similar to the analogous Articles of the ICC and LCIA Rules. While it provides the framework for empowering the tribunal to appoint such experts and some basic rules, it leaves to the tribunal’s discretion other practical issues, such as the method of selecting the expert, qualifications required of the expert, arrangements for payment of the expert’s fees and expenses, and negotiation of the expert’s terms of engagement. In this respect, a tribunal may well turn to internationally accepted procedural guidelines on using tribunal-appointed experts.

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2 See generally Born, op cit, 1,860–62.


4 See 1976 UNCITRAL Rules, Art 27.


7 See LCIA Rules, Art 24, with respect to payment of fees.

8 See 2010 UNCITRAL Rules, Art 29(1), and 1976 UNCITRAL Rules, Art 27(1) (‘A copy of the expert’s terms of reference, established by the arbitral tribunal, shall be communicated to the parties’).

II. Textual commentary

A. Appointment of the expert (Article 22(1))

**Article 22(1)**

*The tribunal may appoint one or more independent experts to report to it, in writing, on specific issues designated by the tribunal and communicated to the parties.*

Article 22(1) grants the tribunal a broad power, either on application or *sua sponte*, to appoint one or more experts that are independent of the parties. Unlike in the ICC Rules, there is no explicit obligation to consult with the parties on the appointment, although this would clearly be prudent. The provision also vests in the tribunal the exclusive power to designate the issues on which the expert will opine. The issues must, however, be communicated to the parties (by way of a terms of reference or otherwise). The provision also requires that any expert report must be delivered in writing.¹¹

Unlike recent amendments to the 1999 IBA Rules and the 1976 UNCITRAL Rules, Article 22 does not specifically require the tribunal-appointed expert to provide a statement of impartiality and independence, nor does it provide an explicit mechanism for challenging or objecting to the appointment of an expert. However, such procedural safeguards are now commonplace in international arbitration practice and likely to be used by an ICDR tribunal. The less prescriptive approach of Article 22 lends itself to adopting well-accepted procedural rules such as Article 6 of the 2010 IBA Rules.

B. Provision of information to the expert (Article 22(2))

**Article 22(2)**

*The parties shall provide such an expert with any relevant information or produce for inspection any relevant documents or goods that the expert may require. Any dispute*

11 Compare LCIA Rules, Art 21.2, permitting the expert to deliver an oral report.
12 As to ‘impartiality and independence’ in the context of arbitrators, see discussion of Art 7 above at para 7.05 ff.
14 See GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 1,862 (‘It is beyond debate that an expert appointed by the arbitral tribunal must be independent and impartial, in a manner analogous to the arbitrators’).
between a party and the expert as to the relevance of the requested information or goods shall be referred to the tribunal for decision.

22.04 A tribunal-appointed expert may well request information or assistance from the parties. Article 22(2) states that the parties must provide the expert with any relevant information, documents, or goods that the expert may require. Such requests may typically be made through the tribunal. The tribunal is to decide any dispute regarding the relevance of such material. The language of paragraph (2) is very similar to that of the 1976 UNCITRAL Rules, which remain substantively unchanged. In the absence of more specific rules, in determining whether requested information is relevant, the tribunal is likely to be guided by the same criteria applied to any disclosure request.

C. Opportunity to comment on and question the expert report (Article 22(3) and (4))

Article 22(3)

Upon receipt of an expert’s report, the tribunal shall send a copy of the report to all parties and shall give the parties an opportunity to express, in writing, their opinion on the report. A party may examine any document on which the expert has relied in such a report.

Article 22(4)

At the request of any party, the tribunal shall give the parties an opportunity to question the expert at a hearing. At this hearing, parties may present expert witnesses to testify on the points at issue.

22.05 In accordance with the duties of equality and opportunity to present one’s case enshrined in Article 16, Article 22(3) provides that the expert report is to be shared with all parties and that the parties are to have an opportunity to express ‘in writing’ their opinions on the report. This is most likely to be done by way of party-appointed expert witnesses. Article 22(3) also states that a party may ‘examine any document on which the expert has relied in such a report’. The tribunal may need to make specific orders regarding confidentiality of information exchanged as part of this process.

22.06 Article 22(4) provides that, if requested, any party shall have an opportunity to question the expert at a hearing and, in so doing, parties may present their own expert witnesses to testify ‘on the points at issue’. In practice, the tribunal may also

15 See 1976 UNCITRAL Rules, Art 27(2); 2010 UNCITRAL Rules, Art 29(3).
16 This is explicitly provided for in the revised 2010 IBA Rules. See 2010 IBA Rules, Art 6(3).
17 See also 2010 IBA Rules, Art 6(5) (‘The parties may examine any information, Documents, goods, samples, property, machinery, systems, processes or site for inspection that the Tribunal-Appointed Expert has examined and any correspondence between the Arbitral Tribunal and the Tribunal-Appointed Expert’).
adopt any of the forms of ‘witness caucusing’ or ‘witness conferencing’, in which tribunal-appointed and/or party-appointed experts confer to seek to narrow the issues in dispute.  

These paragraphs mirror the language in the 1976 UNCITRAL Rules, which remain substantively unchanged in the 2010 revision. The parties may wish to adopt the 2010 IBA Rules provision that sets out a checklist of matters that shall be included in the expert’s report, including: the name and address of the expert; a description of the expert’s background and qualifications; a statement of the facts upon which the report is based; a statement of the methods, evidence, and information used to reach his or her conclusions; and an affirmation of the expert’s ‘genuine belief in the opinions expressed’ in the report.

19 See 2010 IBA Rules, Art 6(4).
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I. Introduction

It is not uncommon for one of the parties to a dispute to seek to derail the arbitral process by refusing to cooperate.\(^1\) Article 23 addresses the situation in which one party to a proceeding ‘defaults’, whether by failing to file a timely statement of defence, appear at a hearing, produce evidence, or otherwise contravene an order of the tribunal. Unsurprisingly, such a default occurs only where the errant party has

been duly notified of the steps required and where the party fails to show ‘sufficient cause’ to excuse its failure. In keeping with international arbitration practice, in such circumstances, the tribunal may choose to proceed with the arbitration regardless of such failure. In contrast to litigation in many jurisdictions, this approach is preferred to issuing any sort of ‘summary judgment’ or ‘default judgment’. In other words, the claimant must still make out his or her case, and the arbitrators must still review the legal and evidential record before making a final determination.³

With the exception discussed below, Article 23(1) closely follows the language in Article 28 of the 1976 UNCITRAL Rules. Of course, even in the absence of Article 23, a tribunal has inherent powers to carry out its adjudicatory function without falling prey to one party’s attempts to ‘stonewall’ the proceeding. The practical importance of these powers is recognized in the UNCITRAL Model Law,⁴ in the arbitration laws of several jurisdictions,⁵ and in most institutional rules.⁶

II. Textual commentary

A. Failure to file a statement of defence or appear at hearing (Article 23(1) and (2))

Article 23(1)

If a party fails to file a statement of defense within the time established by the tribunal without showing sufficient cause for such failure, as determined by the tribunal, the tribunal may proceed with the arbitration.

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² See ICDR Rules, Art 18 (regarding ‘Notices’) (discussed above at para 18.01 ff).
⁴ See UNCITRAL Model Law, Art 25, and Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration, as Amended in 2006, para 38:

Provisions that empower the arbitral tribunal to carry out its task even if one of the parties does not participate are of considerable practical importance. As experience shows, it is not uncommon for one of the parties to have little interest in cooperating or expediting matters. Such provisions therefore provide international commercial arbitration its necessary effectiveness, within limits of fundamental requirements of procedural justice.

⁵ See eg English Arbitration Act, s 41(4); Netherlands Code of Civil Procedure, Art 1040.
⁶ See eg ICC Rules, Arts 6 and 21; LCIA Rules, Art 15.8; SIAC Rules, Art 21(3).
II. Textual commentary

Article 23(2)

If a party, duly notified under these rules, fails to appear at a hearing without showing sufficient cause for such failure, as determined by the tribunal, the tribunal may proceed with the arbitration.

Article 23(1) provides that where a party fails to file a statement of defence, the tribunal ‘may proceed with the arbitration’. In other words, while the tribunal retains a broad discretion, the preference is to proceed with the arbitration rather than to resort to the sort of expedited default judgment that might be available in some courts. Were the position otherwise, it might be inconsistent with the arbitrators’ Article 16(1) duties to ensure that the parties are treated with equality, that each party has the right to be heard, and that each is given a fair opportunity to present its case. Where the respondent fails to file a statement of defence, he or she will generally not be precluded from responding to the claimant’s allegations at a later stage. However, the respondent does so at the risk that he or she may be held to have waived certain arguments.

While Article 23(1) largely follows the text of Article 28 of the 1976 UNCITRAL Rules, it omits explicit instructions on how to deal with a defaulting claimant. Article 28(1), in contrast, provides that where a claimant fails to communicate its claim without showing sufficient cause for such failure, the arbitral tribunal shall terminate the proceeding. The reason for this omission might be because Article 2(3) of the ICDR Rules requires the initiating notice of arbitration to include a ‘statement of claim’. However, a claimant (or counter-claimant) might also default in other ways. In the absence in Article 23(1) of any explicit language addressing a defaulting claimant, one can conclude that remedies are left to the tribunal’s discretion. Those remedies include exercising the Article 29(2) power to terminate the proceeding.

7 See D Caron, L Caplan, and M Pellonpää, The UNCITRAL Arbitration Rules: A Commentary (Oxford University Press, Oxford, 2006) 714 (discussing analogous 1976 UNCITRAL Rules, Art 28). With respect to the analogous default provision in the AAA Commercial Rules, see Choice Hotels Int'l, Inc v SM Property Management, LLC, 519 F3d 200 (4th Cir 2008) (upholding vacatur of a default arbitral award on the basis that the contract’s notice provision had not been fulfilled); cf Gingis Int'l, Inc v Bormet, 58 F3d 328 (7th Cir 1995) (upholding a default award where the challenging party had been duly notified in accordance with AAA Commercial Rules requirements).

8 E Gaillard and J Savage (eds) Fouchard, Gaillard, Goldman on International Commercial Arbitration (Kluwer Law International, The Hague, 1999) 1363 (‘There is no obligation on the arbitrators to simply accept the arguments of the party which is present or represented, nor indeed to increase the burden of proof on that party so as to compensate for the other’s failure to participate, provided the other party has been properly invited to attend’).

9 For a discussion of waiver under the ICDR Rules, see Chapter 25 below.

10 However, Art 2(3) is only a filing requirement. According to ICDR senior management, ‘most, if not all, notices are accompanied by a more detailed statement of claim’ (interview of ICDR senior management).

11 See discussion of Art 29(2) at paras 29.08–29.10 below.
Similarly to paragraph (1), Article 23(2) addresses the situation in which the defaulting party fails to appear at a hearing. Again, the tribunal is afforded broad discretion on how to interpret a non-appearance and what sanctions to employ. As explained, this does not discharge the claimant from its duty to establish that its claims are well-founded in fact and law.

B. Failure to produce evidence or take any other step (Article 23(3))

Article 23(3)

*If a party, duly invited to produce evidence or take any other steps in the proceedings, fails to do so within the time established by the tribunal without showing sufficient cause for such failure, as determined by the tribunal, the tribunal may make the award on the evidence before it.*

Article 23(3) provides that where the default is a failure to ‘produce evidence or take any other steps in the proceedings’ within the time established, the tribunal ‘may make the award on the evidence before it’. Again, the purpose of the provision is to ensure that the arbitration is not stymied by a party’s lack of cooperation. The tribunal maintains a broad discretion as to how to deal with such a failure. This includes the possibility of sanctioning the offending party by drawing adverse inferences against it with respect to the evidence not provided.

For enforcement purposes, and subject to any relevant laws in the enforcing jurisdiction, an award made following default proceedings is to be treated no differently from one made following proceedings in which all parties fully participated. US courts have explicitly adopted this approach in cases involving the ICDR Rules. Thus, in one case, a federal court rejected an argument that ’ex parte arbitral proceedings off ended [the respondent’s] due process rights’. The court referred to Article 23 of the ICDR Rules and noted that ‘those rules permit proceeding on a default basis if “a party, duly notified under these Rules, fails to appear at

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12 For a tribunal’s extensive discussion of a party’s failure to appear at a hearing and the decision to proceed with the hearing pursuant to Art 23(2), see ICDR Case No 251-04, 2005 WL 6346380 (ICDR) (including a discussion of the lengths to which the tribunal went to allow the defaulting party an opportunity to participate in some form).

13 See generally JK Sharpe, ‘Drawing Adverse Inferences from the Non-production of Evidence’, 22(4) Arb Intl 549–71 (2006). For an example of an award in which a tribunal relied on its Art 23(3) powers where a party repeatedly failed to produce documents and comply with orders, see ICDR Case No 526-04, 2006 WL 6354057 (ICDR) (tribunal also drew adverse inferences against the offending party in reliance on IBA Rules, Art 9).


II. Textual commentary

Further, the court noted that the incorporation of the ICDR Rules meant that the arbitration clause was ‘self-executing’, meaning that the arbitration could proceed without the claimant having to obtain a court order to compel arbitration. Thus, the court refused to ‘penalize [the claimant] for [the respondent’s] deliberate decision to boycott the arbitration’.

17 Ibid; see also Oh Young Indus Co Ltd v E and J Textile Group, Inc, 2005 WL 2470824 (Cal App 2 Dist 2005).
ARTICLE 24—CLOSURE OF HEARING

I. Introduction

This provision grants the tribunal broad powers to conclude the hearing and the discretion, before an award is made, to reopen a hearing. The text of Article 24 closely follows that of Article 29 of the 1976 UNCITRAL Rules, which, apart from one minor wording amendment, remains unchanged in the 2010 UNCITRAL Rules. Article 24 of the ICDR Rules is intended to bring to a close the hearing phase of the arbitration and to clear the way for the arbitrators to proceed to issue their award. It may also serve to preclude any frivolous requests for additional hearings.

II. Textual commentary

1. After asking the parties if they have any further testimony or evidentiary submissions and upon receiving negative replies or if satisfied that the record is complete, the tribunal may declare the hearings closed.
2. The tribunal in its discretion, on its own motion or upon application of a party, may reopen the hearings at any time before the award is made.

2 See also ICDR Rules, Art 29, discussed in Chapter 29 below (addressing termination of the proceeding).
Chapter 24: Article 24—Closure of Hearing

II. Textual commentary

24.02 The purpose of Article 24(1) is to provide a mechanism for closing the hearing stage of the arbitration. The provision closely follows 1976 UNCITRAL Rules, Article 29(1), although the ICDR version makes clear that the tribunal must solicit the parties’ views on whether there are any additional ‘testimony or evidentiary submissions’ to be supplied. This is likely to be done in any event. Another difference is the reference in the ICDR Rules to the tribunal being satisfied that the ‘record is complete’—a term widely used in common law jurisdictions to describe the evidentiary record.

One ambiguity in Article 24 is whether the close of the ‘hearing’ is intended to cover only the oral hearing or also any additional post-hearing submissions and/or evidence tendered. The analogous provision in the ICC Rules clearly refers to ‘closing of the proceedings’ and is intended to encompass any post-hearing briefing or evidence. The same is true in Article 34 of the SCC Rules (‘Close of Proceedings’). However, the language in Article 24 of the ICDR Rules, on its face, suggests that it is limited to only the evidential record. Such a narrow reading is supported by commentary on the 1976 UNCITRAL Rules, in which it is stated that it ‘brings finality to the hearing proceedings only and has no other legal effect outside this area’, such that post-hearing submissions may be ordered after closure of the hearing.

Having said this, section R-35 of the AAA Commercial Rules (also called ‘Closure of Hearing’) makes clear that the close of the ‘hearing’ extends beyond the oral hearing itself to include any post-hearing briefs, or additional documents or evidence ordered by the tribunal.

In the only published ICDR award to refer to Article 24, the tribunal found that the ‘hearing is deemed to be closed as of the time the record is complete’, and that this was measured from when post-hearing submissions had been filed.

24.03 In the AAA Commercial Rules, the close of the hearing triggers the time limit within which the arbitrators must render their award. Pursuant to the ICC Rules,

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4 See ICC Rules, Art 22; see also WL Craig, W Park, and J Paulsson, International Chamber of Commerce Arbitration (3rd edn, Oceana Publications, New York, 2000) (distinguishing between ‘closing of the hearings’ and ‘closing of the proceedings’).

5 See Caron, Caplan and Pellonpää, op cit, 650–51.

6 AAA Commercial Rules, s R-35 (‘. . . if satisfied that the record is complete, the arbitrator shall declare the hearing closed. If briefs are to be filed, the hearing shall be declared closed as of the final day set by the arbitrator for the receipt of briefs. If documents are to be filed . . . the later date shall be the closing date of the hearing’).

7 See ICDR Case No 030-04, 2004 WL 5750007 (ICDR), 11.

8 See AAA Commercial Rules, ss R-35 (‘Closing of Hearing’) and R-41 (‘Time of Award’), providing that, unless otherwise agreed, the award must be made within 30 days from the date of closing the hearing.
II. Textual commentary

upon closure of the hearing, the tribunal is obligated to advise the ICC Secretariat of an approximate date by which the award will be rendered. The ICDR Rules do not contain any such default deadline and thus the ‘closure of the hearing’ is important only in closing the record and in signalling that the tribunal is about to move into deliberations.

Article 24(2) gives the tribunal the discretion, of its own motion or upon application of one of the parties, to reopen the hearings at any time before the award is made. Unlike Article 29(2) of the 1976 UNCITRAL Rules, reopening is available even in the absence of ‘exceptional circumstances’. In any event, it is likely to be applied only rarely. Appropriate circumstances might arise, for example, where the tribunal’s deliberations have thrown up an issue not adequately covered in the hearing to date, where previously unavailable evidence has come to light, or where a post-hearing development has arisen that affects the issues in dispute. A tribunal might reopen the hearing out of concern to uphold its Article 16(1) duty to ensure that each party is given a fair opportunity to present its case.

For obvious reasons, reopening the hearing must occur prior to the award relating to the hearing. Note that the ICDR Rules do not formally state that, upon release of the final award (and subsequent to the passing of any period for interpretation or correction under Article 30), the arbitrators’ mandate expires—that is, that they are ‘functus officio’. However, subject to any applicable national laws on the topic, it is standard practice for this to be the case.

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9 Compare ICC Rules, Art 22(2).
10 See Caron, Caplan and Pellonpää, op cit, 652 (noting that exceptional circumstances might include: (1) in the course of deliberations, the arbitrators realize that a particular point of law or fact has been insufficiently developed; or (2) new material evidence has been discovered that requires clarification through an additional hearing).
11 See discussion of Art 30 and the principle of functus officio in para 30.03 below.
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Article 25—Waiver of Rules

I. Introduction

It is not uncommon for a party to raise objections to the arbitration based on non-compliance—sometimes of the most ‘technical’ kind—with the relevant institutional rules. The non-compliance might arise from the parties’ own acts or in relation to an order of the tribunal. When such an objection is raised promptly, it can be considered and, if appropriate, remedial action can be taken. But when not raised promptly, such an objection can derail an arbitral proceeding and/or create potential grounds on which to challenge the award. Therefore, unsurprisingly, the principle has developed that a party must make any such objection promptly or risk being deemed to have waived its right to object.

This principle is embodied in Article 25 of the ICDR Rules, which requires that where a party knows of any non-compliance with the ICDR Rules, but instead proceeds with the arbitration without promptly objecting in writing, it will be deemed to have waived the right to object. This general principle is also commonly

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1 The parties are free to modify the ICDR Rules, but this must be recorded in writing pursuant to Art 1(1). See discussion at paras 1.91–1.92 above.
Chapter 25: Article 25—Waiver of Rules

identified in international arbitration practice and procedure,\(^2\) and in some national laws.\(^3\) It is also echoed in the ICDR Rules in the specific context of challenges to arbitrators\(^4\) and objections to jurisdiction.\(^5\)

**25.03** Article 25 is almost identical to Article 30 of the 1976 UNCITRAL Rules, but the latter provision was substantially redrafted in the 2010 UNCITRAL Rules. As discussed below, the analogous provisions in other institutional rules are similar, but with a potentially broader ambit.

## II. Textual commentary

**25.04** Article 25 is limited to non-compliance with any ‘provision of the rules or requirement under the rules’.\(^6\) It is not entirely clear what the difference is between a ‘provision’ and a ‘requirement’, but the same terminology is used in Article 30 of the 1976 UNCITRAL Rules and in section R-37 of the AAA Commercial Rules. By comparison, ICC Rules, Article 33, explicitly extends the non-compliance to other instances, including failure to comply with directions given by the tribunal or requirements under the arbitration agreement. LCIA Rules, Article 32, also refers to non-compliance with any provision of the arbitration agreement. This apparent anomaly was addressed in the 2010 UNCITRAL Rules, in which new Article 32 thereof refers to ‘any non-compliance with these Rules or with any requirement of the arbitration agreement’.\(^7\) Of course, the limitations on the scope in Article 25 do not mean that a party may not be deemed to have waived a right to object under the relevant applicable law or in reliance on general international arbitration practice.

**25.05** A prerequisite for waiver under Article 25 is that the waiving party must first ‘know’ of the non-compliance. In discussing the same language in the 1976 UNCITRAL Rules, commentators noted that this must be a reference to ‘actual knowledge’, and

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\(^3\) See in particular UNCITRAL Model Law, Art 4 (containing language very similar to Art 25 of the ICDR Rules). See also Avraham v Shigur Express Ltd, 1991 US Dist LEXIS 12267 (SDNY 1991) (‘A party with an objection to an arbitration panel has an affirmative obligation to raise that objection with the arbitrators or else that objection shall be waived’); see generally GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 2,593–94.

\(^4\) See discussion of waiver in the context of Art 8 at paras 8.09–8.13 above.

\(^5\) See discussion of waiver in the context of Art 15 at paras 15.25–15.26 above.

\(^6\) In earlier versions of the ICDR Rules there were inconsistencies in using the capitalized ‘Rules’ as opposed to lower case. However, there is no doubt that the intention is to refer to non-compliance with the ICDR International Rules.

that it is ‘difficult in practice to prove actual knowledge of a failure and that in some jurisdictions actual knowledge [is] interpreted restrictively’. The working group charged with revising the 1976 UNCITRAL Rules found broad support for adopting language that included constructive knowledge, but there was a lack of accord on how to do that. In the end, Article 30 was revised to create a new Article 32 that avoids stating a knowledge requirement and shifts the burden to the objecting party to show that ‘under the circumstances, its failure to object was justified’.

Article 25 of the ICDR Rules clearly places the onus on a party to object to any non-compliance without delay. But in order to constitute a waiver, the party still must, first, ‘proceed with the arbitration’, which presumably means move to the next stage despite its knowledge of the non-compliance. Second, it must fail to object ‘promptly’, which will be a highly fact-intensive inquiry. Finally, unlike its UNCITRAL Rules counterpart, the objecting party must state its objection ‘in writing’ in order to prevent waiver.

As a practical matter, the willingness of a tribunal, court or other decision-maker to find that a party has waived its right to object is going to be very fact-specific. Despite the lack of an explicit direction in Article 25, the decision-maker is likely to look at all of the circumstances to decide whether waiver is justified. Further, the willingness to hold that a party has waived its rights may diminish depending on the seriousness of the non-compliance and the nature of the procedural right at issue. While the ICDR Rules do not identify specific rules that are non-derogable, arbitration commentators have pointed to procedural rights in analogous rules that may be so fundamental that they cannot be waived. Commentators on the 1976 UNCITRAL Rules, relying on the travaux préparatoires, also caution against finding waiver in situations other than ‘minor violations’ of the rules.

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9 Ibid, para 49. See also UNCITRAL, Report of Working Group II on the Work of its 52nd Session: Settlement of Commercial Disputes—Revision of the UNCITRAL Arbitration Rules, UN Doc A/CN.9/WG.II/WP.157/Add.1 (10 December 2009), para 43. The full text of Art 32 of the 2010 UNCITRAL Rules reads: ‘A failure by any party to object promptly to any non-compliance with these Rules or with any requirement of the arbitration agreement shall be deemed to be a waiver of the right of such party to make such an objection, unless such party can show that, under the circumstances, its failure to object was justified.’
10 Note that the analogous Art 4 of the UNCITRAL Model Law was amended to refer to ‘without undue delay’ rather than a stricter ‘promptly’ standard.
12 See eg ibid, n 5. See also G Born, International Commercial Arbitration (Kluwer Law International, The Hague, 2009) 1,775–76 (discussing objections to agreements involving corruption, grossly abusive procedural arrangements, protections aimed at protecting third parties, or public values as not subject to waiver).
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ARTICLE 26—AWARDS, DECISIONS, AND RULINGS

I. Introduction

In any arbitration involving more than a sole arbitrator, there is always the possibility that a unanimous decision will be unobtainable. Article 26(1) attempts to address this situation by permitting any ‘award, decision or ruling’ to be made by a majority of arbitrators, regardless of whether the presiding arbitrator is part of that majority. This vexed question has given rise to competing solutions in the different institutional rules, but the ICDR approach is firmly grounded in the analogous Article 31(1) of the 1976 UNCITRAL Rules. Article 26(2) empowers the tribunal to take the common approach of delegating to the presiding arbitrator the authority to make ‘decisions or rulings on questions of procedure’, subject to revision by the full tribunal. While the majority of commercial arbitrations result in unanimous awards, these rules provide an important default provision in the event of disagreement. By keeping the power with the majority to make a binding ruling,
Article 26 also dilutes the power of the presiding arbitrator and encourages compromise. While separate, dissenting, and concurring opinions, however, are uncommon in international commercial arbitration,¹ they are not unknown in ICDR arbitration.²

II. Textual commentary

A. Awards to be made by majority and failure to sign (Article 26(1))

**Article 26(1)**

*When there is more than one arbitrator, any award, decision or ruling of the arbitral tribunal shall be made by a majority of the arbitrators. If any arbitrator fails to sign the award, it shall be accompanied by a statement of the reason for the absence of such signature.*

Article 26(1) establishes that, in any arbitration with other than a sole arbitrator,³ ‘any award, decision or ruling’ shall be made by a majority of the tribunal. There is no requirement that the majority includes the presiding arbitrator, nor is the chairperson specifically empowered to make a decision alone if no majority can be achieved. This is in contrast to the rules of almost every other international arbitration institution, all of which provide that an award can be made by the majority, but that in the absence of a majority award, the chair can make an award alone.⁴ This so-called ‘presiding arbitrator’ approach gives the chairperson an extra degree of leverage in deliberations. In contrast, the approach adopted in the ICDR and UNCITRAL Rules encourages compromise so that at least a majority can be formed. Commentators have noted that it protects the parties against ‘extreme

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² See eg ICDR 3-2004, 2004 WL 3250896 (ICDR) (arbitrator dissented as to the apportionment of costs only). ICDR senior management confirms that there are other instances of such awards, but statistics are not available (interview with ICDR senior management, October 2010).

³ See ICDR Rules, Art 5, regarding the number of arbitrators (discussed in Chapter 5 above).

⁴ Compare ICC Rules, Art 25(1) (requiring that ‘if there be no majority, the Award shall be made by the chairman of the Arbitral Tribunal alone’). See also LCIA Rules, Art 26; SIAC Rules, Art 27(4); SCC Rules, Art 35; WIPO Rules, Art 61; VIAC Rules, Art 26(2); Swiss Rules, Art 31; CIETAC Rules, Art 43 (all adopting some form of the so-called ‘presiding arbitrator’ approach).
II. Textual commentary

views’ of the presiding arbitrator; further, a majority decision is ‘arguably more legitimate and thus more authoritative’ than one made unilaterally by the chair.\(^5\)

Article 26 closely follows the language of Article 31 of the 1976 UNCITRAL Rules. But the majority approach was hotly debated during the revisions to the 1976 UNCITRAL Rules. During the debate, it was noted that, despite the fact that so many other rules adopted the presiding arbitrator principle, ‘the majority rule was a tried and tested feature of [the UNCITRAL Rules], which had been generally received well in practice’.\(^6\) It was further observed that the ICSID and ICDR Rules maintained the majority approach, and that the AAA had rejected a proposal to modify the majority requirement in the ICDR Rules.\(^7\) After much deliberation, Article 33(1) of the 2010 UNCITRAL Rules retained the majority requirement with no substantive changes.\(^8\)

It is to be noted that the majority requirement in Article 26(1) applies not only to a final award, but also to ‘any award, decision or ruling’ of the tribunal. Article 31(1) of the 1976 UNCITRAL Rules similarly refers to ‘any award or other decision’ and commentators have noted that the rule applies to all matters relating to the tribunal’s official functions.\(^9\) Practically speaking, this is subject to the common situation in which procedural matters are handled by the chair, as anticipated in Article 26(2) and discussed below.

The second sentence of Article 26(1) provides that ‘if any arbitrator fails to sign the award’, it ‘shall be accompanied by a statement of the reason for the absence of such signature’. It is common practice for all members of the tribunal to sign the award.\(^10\) Somewhat curiously, the drafters of the ICDR Rules do not state this affirmatively; instead, Article 26(1) addresses what happens when an arbitrator ‘fails to’ sign. The language chosen mirrors that of Article 32(4) of the 1976 UNCITRAL Rules, although in that case the provision is tied to an explicit duty on all arbitrators to sign

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\(^7\) See ibid (noting that ‘the majority rule was not obsolete and that, in a recent review of the International Arbitration Rules of the American Arbitration Association … a proposal to modify the majority requirement had been rejected’).

\(^8\) See 2010 UNCITRAL Rules, Art 33(1) (‘When there is more than one arbitrator, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators’). Article 33(1) was changed to make clear that the rule applies not only ‘when there are three arbitrators’, but also ‘when there is more than one arbitrator’—ie adopting the same language as in Art 26 of the ICDR Rules.


the award.\textsuperscript{11} As discussed by the leading commentators, the 1976 provision was apparently controversial, with many negotiators insisting that even an arbitrator who disagrees with the majority decision should still sign the award.\textsuperscript{12} This also raised the issue of whether dissenting opinions should be permitted and whether they formed part of the award.\textsuperscript{13} The resulting compromise is that Article 32(4) is focused only on a situation in which for whatever reason—including incapacity and intransigence—an arbitrator fails to sign an award. The other arbitrators who do sign the award have the duty to provide the ‘statement of reasons’ for the lack of a signature. In doing so, they should formulate a statement that explains in sufficient detail why the signature is missing such that it will answer questions that might be asked by a reviewing court about the extent to which the other arbitrator participated in the arbitral process.\textsuperscript{14} The statement thus becomes a part of the award.\textsuperscript{15}

### 26.06

Given the similarity in language, it follows that Article 26(1) of the ICDR Rules has the same rationale. Of course, national laws at the place of any attempt to set aside the award or to challenge enforcement may impact on the form of the award and the usefulness of the ‘statement’ provided. In most legal systems, all of the arbitrators are required to sign the award.\textsuperscript{16} But in many of them, where necessary, the laws permit signatures by the majority\textsuperscript{17} and/or a statement as to why a signature is missing.\textsuperscript{18} Any such form requirements might be treated as mandatory rules that prevail over the applicable institutional rule.\textsuperscript{19} Accordingly, prudent arbitrators in such a situation will carefully consider whether Article 26 is of itself sufficient.

\begin{itemize}
  \item \textsuperscript{11} See 1976 UNCITRAL Rules, Art 32(4) (‘An award shall be signed by the arbitrators and it shall contain the date on which and the place where the award was made. Where there are three arbitrators and one of them fails to sign, the award shall state the reason for absence of the decision’).
  \item \textsuperscript{12} See Caron, Caplan, and Pellonpää, op cit, 804–11.
  \item \textsuperscript{13} The status of dissenting opinions is not addressed within the 1976 UNCITRAL Rules and, perhaps for this reason, does not appear in the ICDR Rules.
  \item \textsuperscript{14} See generally Caron, Caplan, and Pellonpää, op cit, 809–11.
  \item \textsuperscript{15} Article 32(4) of the 1976 UNCITRAL Rules was not substantively amended in the new Art 34(4) of the 2010 revision.
  \item \textsuperscript{17} Generally speaking, the US does not require a signature from all members of the tribunal. Perhaps for this reason, the AAA Commercial Rules do not require such a statement, but only that the award is ‘signed by a majority of the arbitrators’. See also \textit{Just Pants v Wagner}, 247 IllApp3d 166, 173 (Ill App 1 Dist 1993) (‘[U]nsigned awards rendered pursuant to Federal law are still intended to be final resolutions of disputes on the merits and, once rendered, will have a res judicata effect on the parties and the issues addressed in the arbitration’).
  \item \textsuperscript{18} See Born, op cit, 2,447, and jurisdictions noted in n 127 therein.
  \item \textsuperscript{19} See ibid, 2,446–47.
\end{itemize}
II. Textual commentary

B. Presiding arbitrator may make procedural rulings (Article 26(2))

Article 26(2)

When the parties or the tribunal so authorize, the presiding arbitrator may make decisions or rulings on questions of procedure, subject to revision by the tribunal.

As discussed, the arbitral tribunal enjoys a broad discretion to determine issues of procedure. Article 26(2) is intended to assist in the expeditious exercise of that discretion by permitting the parties or the tribunal to empower the presiding arbitrator to make procedural decisions, but always subject to revision by the tribunal. Such consolidation of power in the chair fast-tracks the decision-making process, makes it easier to arrange procedural conference calls, and generally allows the arbitration to run more smoothly than if all members of the panel had to be present.

The wording of Article 26(2) closely follows that of the 1976 UNCITRAL Rules, Article 31(2), which remains largely unchanged as Article 33(2) in the 2010 UNCITRAL Rules. The only apparent difference between the ICDR and UNCITRAL formulations is that the UNCITRAL Rule applies where ‘there is no majority or when the arbitral tribunal so authorizes’. The ICDR provision also applies where the parties authorize such concentration of authority, but the practical effect of this is limited, because a chair is unlikely to take such a step without authority from the rest of the panel.

It is open to debate what constitutes ‘questions of procedure’. With respect to the analogous 1976 UNCITRAL Rules, Article 31(2), a leading commentator says that the test:

as a practical matter should involve consideration of whether the decision could have a measurable impact on the rights of one or both of the parties … [a]n identifiable significant impact should give an arbitral tribunal pause to treat a decision as purely procedural.

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20 See discussion in the context of Art 16 above at paras 16.02–16.09.
21 A similar provision is in LCIA Rules, Art 14(3) (‘In the case of a three-member Arbitral Tribunal the chairman may, with the prior consent of the other two arbitrators, make procedural rulings alone’). See also SIAC Rules, Art 16.5 (‘A presiding arbitrator may make procedural rulings alone, subject to revision by the Tribunal’).
22 Given the power in Art 26(1) for a majority decision on any ruling, it appears that this could theoretically also apply where there is no unanimity on the issue of delegation of such powers to the presiding arbitrator.
Another commentator cautions that the:

authority is narrow, extending only to purely procedural matters, typically understood to constitute matters of time limits, scheduling and the like (and not more significant ‘procedural’ issues such as disclosure, admissibility of material evidence, or similar matters of possible impact on the substance of the dispute).  

In practice, this may also depend on the dynamics of the tribunal and the arbitrators’ availability. Further, a presiding arbitrator is unlikely to deny a request by a co-arbitrator or counsel for a specific matter to be determined by the full tribunal. Of course, ultimately, any such decision is ‘subject to revision by the tribunal’, but it would be a rare case in which a tribunal reversed an earlier decision taken by the chair under delegated authority.

ARTICLE 27—FORM AND EFFECT OF THE AWARD

I. Introduction

II. Textual commentary

A. Award is final and binding (Article 27(1))

B. Award must be reasoned (Article 27(2))

C. Award must state date and place made and be communicated to parties (Article 27(3) and (5))

D. Award is confidential, but redacted award may be published (Article 27(4) and (8))

E. Award may be registered (Article 27(6))

F. Tribunal may make interim awards (Article 27(7))

Article 27

1. Awards shall be made in writing, promptly by the tribunal, and shall be final and binding on the parties. The parties undertake to carry out any such award without delay.

2. The tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons need be given.

3. The award shall contain the date and the place where the award was made, which shall be the place designated pursuant to Article 13.

4. An award may be made public only with the consent of all parties or as required by law.

5. Copies of the award shall be communicated to the parties by the administrator.

6. If the arbitration law of the country where the award is made requires the award to be filed or registered, the tribunal shall comply with such requirement.

7. In addition to making a final award, the tribunal may make interim, interlocutory or partial orders and awards.

8. Unless otherwise agreed by the parties, the administrator may publish or otherwise make publicly available selected awards, decisions and rulings that have been edited to conceal the names of the parties and other identifying details or that have been made publicly available in the course of enforcement or otherwise.
I. Introduction

Article 27—Form and Effect of the Award

27.01 Modelled on Article 32 of the 1976 UNCITRAL Rules, Article 27 of the ICDR Rules prescribes the basic requirements for the form, and the effect, of any ICDR arbitral award. The Article does not provide a comprehensive list of requirements for a valid award; rather, it prescribes certain general minimum standards, while also giving some deference to the potential application of the parties’ agreement and the specific demands of the law at the place of arbitration or where enforcement is sought. A similar approach is taken in other institutional rules. Particularly close attention should be paid to any form requirements under the potentially applicable national laws.

27.02 An award rendered under the ICDR Rules also is distinguishable from those made in arbitrations under the auspices of institutions such as the ICC and SIAC, for which the ICC Court of Arbitration or the SIAC Registrar, respectively, will review the award and may suggest modifications or draw the tribunal’s attention to matters of substance. Other institutions, such as the LCIA, while not providing in their Rules for formal review of an award, may permit the tribunal, of its own volition, to seek an informal review of matters of form or procedure. The ICDR Rules themselves do not envisage any role for the ICDR in reviewing awards rendered in ICDR arbitrations. However, as described above, the ICDR’s practice is to have the administrator scrutinize a draft award to correct any clerical, typographical, or computation errors, and to ensure that all claims submitted to the tribunal have been addressed. But such assistance is voluntary and the comments are not binding in any way on the tribunal.

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1 See eg LCIA Rules, Art 26; SCC Rules, Art 36. See also AAA Commercial Rules, s R-42 (’Form of Award’) and R-43 (’Scope of Award’).
2 See ICC Rules, Art 27.
3 See 2010 SIAC Rules, Art 28.2.
6 See discussion at para 1.113 above.
II. Textual commentary

A. Award is final and binding (Article 27(1))

**Article 27(1)**

Awards shall be made in writing, promptly by the tribunal, and shall be final and binding on the parties. The parties undertake to carry out any such award without delay.

Article 27(1) requires that the award be ‘in writing’, following international arbitration practice and the requirements of many jurisdictions interpreting Articles III and IV of the New York Convention.\(^7\)

The statement that an ICDR award is ‘final and binding’ corresponds with the established arbitral practice that such an award is conclusive of the issues determined, may not be appealed or challenged (except on whatever grounds may be provided for in the relevant jurisdiction), and creates obligations on the parties that are potentially enforceable as a matter of law.\(^8\) This may also be seen as the source of a duty on the tribunal to do all that it can to ensure that the award is valid and enforceable.\(^9\) In addition to being ‘final and binding’ the parties also undertake to ‘carry out any such award without delay’. Depending on the relevant applicable law, this obligation might also constitute a waiver of the parties’ rights to challenge the award or a waiver of sovereign immunity from enforcement.\(^10\) However, the language of Article 27(1) is not, on its face, as explicit in that respect as that which is found in other analogous rules.\(^11\) Note also that the AAA Commercial Rules do

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\(^10\) See eg Creighton v Qatar, Cour de Cassation, Appeal No A98019.068 (hearing on 6 July 2000), reproduced in English in (2000) 15 (10) Mealeys International Arbitration Reporter A1 (holding that a state waives its immunity from enforcement when agreeing to carry out the award without delay, and that the arbitration award was ‘enforceable’ as stated in Art 24 of the (then in force) ICC Rules of Arbitration under the heading ‘Finality and enforceability of award’). However, such an argument is unlikely to be accepted as a waiver of the recognized grounds for challenging an award under the New York Convention or applicable national laws.

\(^11\) Compare LCIA Rules, Art 26.9:

All awards shall be final and binding on the parties. By agreeing to arbitration under these Rules, the parties undertake to carry out any award immediately and without any delay . . .
Chapter 27: Article 27—Form and Effect of the Award

not contain language about the award being ‘final and binding’ or that the parties will ‘carry out any such award without delay’. Perhaps for this reason, US lawyers often include such an obligation in the arbitration clause itself.\(^\text{12}\)

Article 27(1) has departed from the analogous language in the UNCITRAL Rules\(^\text{13}\) by requiring that the arbitrators render their award ‘promptly’, although the ICDR Rules offer no guidance on what constitutes ‘promptly’.\(^\text{14}\) This is a less specific requirement than the time limit provided in the ICC Rules (although such time limit is frequently extended).\(^\text{15}\) The AAA Commercial Rules provide that ‘the award shall be made promptly . . . and, unless otherwise agreed by the parties or specified by law, no later than 30 days from the date of closing the hearing’.\(^\text{16}\) Absent party agreement, such deadline cannot be extended.\(^\text{17}\) Some jurisdictions may, of course, also have arbitration laws that require an award to be rendered within a certain time period or even provide judicial recourse in the event that an arbitrator fails to render an award within a reasonable time.\(^\text{18}\) From the ICDR’s experience, such inviolable fixed deadlines may not be appropriate in every case and any missed deadline could be used by a disappointed party to challenge the award.\(^\text{19}\) The ICDR instead relies on Article 27(1)’s admonition to render the award ‘promptly’ and uses its case managers to monitor the tribunal’s progress in drafting the award.

and the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other judicial authority, insofar as such waiver may be validly made.

See also ICC Rules, Art 28(6) (‘By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made’).

\(^\text{12}\) See P Friedland, Arbitration Clauses for International Contracts (Juris Publishing, Huntington, NY, 2007) 104–05; see also Wartsila Finland OY v Duke Capital LLC, 518 F3d 287 (5th Cir 2008) (affirming district court’s ruling denying stay of enforcement on grounds that parties agreed arbitration would be ‘final and binding’).

\(^\text{13}\) See 1976 UNCITRAL Rules, Pt IV (‘The Award’) (unchanged in 2010) (not providing any deadline for issuing the award).

\(^\text{14}\) See Introduction, para 1.58 ff (average duration of ICDR arbitration proceedings and citing 35–45 days as an average time from close of the proceedings to issue of an award).

\(^\text{15}\) See ICC Rules, Art 24(1) (providing that, unless extended, the final award must be rendered within six months of the operative date of the terms of reference); WL Craig, WW Park, and J Paulsson, International Chamber of Commerce Arbitration (3rd edn, Oceana Publications, New York, 2000) 143. See also 2010 SIAC Rules, Art 28.2 (providing that the tribunal shall submit the draft award to the registrar within 45 days from the date on which the proceedings are declared closed).

\(^\text{16}\) See AAA Commercial Rules, s R-41.

\(^\text{17}\) See ibid, s R-38.


\(^\text{19}\) See eg Lagstein v Certain Underwriters at Lloyd’s, London, 607 F3d 634 (9th Cir 2010) (holding that arbitrators had power to determine interpretation of AAA Commercial Rules on whether time for making an award had to be extended where additional hearing was to be held on quantification of punitive damages).
II. Textual commentary

B. Award must be reasoned (Article 27(2))

**Article 27(2)**

The tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons need be given.

Article 27(2) requires the tribunal to ‘state the reasons upon which the award is based’ unless the parties have agreed otherwise. The language is almost identical to 1976 UNCITRAL Rules, Article 32(3). This provision represents an important departure from the AAA Commercial Rules in that it recognizes the international practice of expecting a ‘reasoned’ award. US domestic arbitral practice has, at least historically, been less consistent in expecting that an award will be reasoned. However, the requirement to provide reasons in an award has become standard in contemporary international arbitration practice.

C. Award must state date and place made and be communicated to parties (Article 27(3) and (5))

**Article 27(3)**

The award shall contain the date and the place where the award was made, which shall be the place designated pursuant to Article 13.

**Article 27(5)**

Copies of the award shall be communicated to the parties by the administrator.

Article 27(3) requires that the award state the date on which, and place where, the award was made. Unlike other institutional rules, this requirement is not tied to an explicit obligation on the arbitrators to sign the award, although where an arbitrator does not sign the award, the signing arbitrators must give a statement of

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20 See also LCIA Rules, Art 26.1; cf ICC Rules, Art 25(2) (requiring that the award state the reasons upon which it is based, which seems a logical necessity in order to pass the scrutiny of the ICC Court).

21 See AAA Commercial Arbitration Rules, R-42(b) (‘The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate’).

22 See H Smit, ‘International and Domestic Arbitration Procedure: The Need for a Rule Providing a Limited Opportunity for Arbitral Reconsideration of Reasoned Awards’, 15 Am Rev Intl Arb 9, 16 (2004). See also Gerstle v Merry X and Co, Cour de Cassation, 22 November 1966 (confirming that an AAA arbitral panel’s failure to provide a reasoned award was not per se contrary to French international public policy).

reasons for the absence of such signature.  The omission of an explicit duty might be intended to overcome an argument that the award must be signed at the place of arbitration. Article 27(3) specifically states that the place where the award is made shall be the place designated pursuant to Article 13—that is, the seat of the arbitration—although this might have been made clearer by stating that the place where the award is made shall be deemed to be the seat.

Article 27(5) requires that copies of the award shall be communicated to the parties by the ICDR (rather than the tribunal). Unlike with some other institutions, release of the award to the parties is not dependent on all arbitration costs first having been paid. Receipt of the award triggers the 30-day period for seeking an interpretation, correction, or additional award pursuant to Article 30. The date of the award or the date of receipt of the award may also trigger certain deadlines for setting aside or enforcement as provided for in the applicable local laws.

D. Award is confidential, but redacted award may be published (Article 27(4) and (8))

Article 27(4)

An award may be made public only with the consent of all parties or as required by law.

Article 27(8)

Unless otherwise agreed by the parties, the administrator may publish or otherwise make publicly available selected awards, decisions and rulings that have been edited to conceal the names of the parties and other identifying details or that have been made publicly available in the course of enforcement or otherwise.

Article 27(4) confirms, but provides common limitations on, the presumption that an award shall remain confidential—that is, that awards may be made public with the consent of all parties or as required by law. This provision addresses only the confidentiality of the award and not other aspects of confidentiality of the proceeding. The inclusion of the ‘as required by law’ caveat envisages situations in

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24 See Art 26(1), discussed above at paras 26.02–26.06 above.
25 See Hiscox v Outhwaite [1991] 3 All ER 641 (holding that, despite the seat being London, an award signed by the chairperson of the tribunal in Paris would be considered French).
26 See ICC Rules, Art 25(3).
27 Comment made by ICDR senior management; cf LCIA Rules, Art 26.5.
28 See eg Oberwager v McKechnie Ltd, Civ No 06-2685, 2007 US Dist LEXIS 90869, *16–*24 (ED Penn, 10 December 2007) (reviewing ICDR Rules, Art 27, in deciding that the statute of limitations under the FAA for filing a challenge to an award ran from the date of the ‘Final Award’ as opposed to the arbitrator’s subsequent decision under ICDR Rules, Art 30, denying a request for interpretation).
29 See Art 34 regarding confidentiality. That provision also places a duty on the ‘members of the tribunal and the administrator [to] keep confidential all matters relating to the arbitration or the
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which a party may need to make an award public, for example, in the course of collateral litigation (such as setting aside or enforcement proceedings) or due to disclosure obligations incumbent on publicly traded companies.

Article 27(4) and (8) analogous to 2010 UNCITRAL Rules, Article 34(5). Both provide that an award may be made public only upon consent of the parties, or where disclosure is required by a legal duty, or to pursue a legal right. Disclosure in this last instance is a provision added in the 2010 revisions to the UNCITRAL Rules. LCIA Rules, Article 30.3, provides that an award will be published only upon consent of the parties and the tribunal. ICC Rules, Article 1(5) and (6), provide that researchers may publish awards only upon consent of the Secretary General of the Court. There is no analogous provision in the SIAC Rules.

On a related issue, Article 27(8) provides that the ICDR may ‘publish or otherwise make publicly available selected awards, decisions and rulings that have been edited to conceal the names of the parties and other identifying details’. This power exists unless the parties agree otherwise.30 This default rule mirrors ICC Rules, Article 28(2). As with other institutions, the AAA/ICDR has commenced a project to publish selected awards and decisions in order to help all users of AAA/ICDR arbitration to understand the various sets of rules and arbitral practice under such rules.31 The awards are redacted to protect confidentiality. A few of these published awards are currently available on the Westlaw database, although the AAA/ICDR is undertaking a project to expand this resource.

E. Award may be registered (Article 27(6))

Article 27(6)

If the arbitration law of the country where the award is made requires the award to be filed or registered, the tribunal shall comply with such requirement.

While increasingly uncommon, some jurisdictions require that the award be deposited with, typically, a court in order to be recognized as a binding award.32 If the arbitration law of the seat so requires, Article 27(6) obliges the tribunal to file or register the award. This duty, mirroring Article 32(7) of the 1976 UNCITRAL Rules, is arguably already encompassed within the tribunal’s directive to ensure that the award is final and binding for purposes of Article 27(1). The 2010 UNCITRAL

30 To opt out of this requires agreement of the parties; cf eg ICSID Arbitration Rules, Rule 48(4).
31 See discussion above at Introduction, para 1.65 above.
revisions deleted Article 32(7) in the replacement provision in Article 34. The drafters explained that Article 32(7) was ‘unnecessary’, because it merely provided that the tribunal should comply with the registration requirements contained in the relevant national law.33

27.13 Article 27 does not contain the language found in the AAA Commercial Rules, confirming that the parties ‘are deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof’.34 This is a hangover from a line of US cases that required the parties’ consent before an award could be recognized as a judgment. Although now distinguished for cases arising in the context of ‘international awards’ for the purposes of Chapters II and III of the US Federal Arbitration Act, one still often sees such language incorporated into arbitration clauses drafted by US lawyers.35

F. Tribunal may make interim awards (Article 27(7))

**Article 27(7)**

*In addition to making a final award, the tribunal may make interim, interlocutory or partial orders and awards.*

27.14 Article 27(7) empowers the tribunal to make not only a ‘final award’, but also any ‘interim, interlocutory or partial orders and awards’. Notably, the rule includes ‘orders’ and not only ‘awards’.36 There is no agreement on the exact distinctions between these potentially different types of award and order. Even in debating the drafting of the 1976 UNCITRAL Rules, the terms were used interchangeably in Committee discussions and:

the flexible nomenclature envisioned by the drafters was meant to promote efficiency, effectiveness and expediency in the tribunal’s decision-making process by avoiding overly technical and unnecessarily time-consuming disputes about the appellation of a particular decision.37

The 2010 revisions to the UNCITRAL Rules in new Article 34(1) replaced ‘interim, interlocutory or partial awards’ with the more generic ‘separate awards on different issues at different times’. The drafters of the revision considered it unnecessary to list the types of award, and modelled the new Article 34(1) on LCIA Rules,

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34 See AAA Commercial Rules, s R-48(c).


36 Compare 1976 UNCITRAL Rules, Art 32(1). Of course, for reasons of enforcement or otherwise, arbitrators may prefer to issue an ‘award’ rather than an ‘order’.

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Article 26.7. Whether an interim, partial, or interlocutory award is treated any differently from a final award is a matter likely to be determined by the law of the enforcing court. The nature and enforceability of awards other than ‘final awards’ on the merits are further discussed in relation to Article 21 (‘Interim Measures of Protection’) and Article 37 (‘Emergency Measures of Protection’).

39 See eg CH Yu, ‘Final, Interim, Interlocutory or Partial Award: Misnomers Apt to Mislead’, 13 Sing Acad LJ 467 (2001) (discussing Tang Boon Jek Jeffrey v Tan Poh Leng Stanley [2001] 3 SLR 237). See also Metallgesellschaft AG v M/V Capitan Constante, 790 F2d 280 (2d Cir 1986) (holding that an award that finally and definitively disposes of a separate independent claim may be confirmed even though it does not dispose of all of the claims that were submitted to arbitration); Sperry Int Trade, Inc v Israel, 532 FSupp 901, 909–910 (DCNY 1982) (interpreting the AAA Commercial Rules).
40 See discussion in Chapter 21.
41 See discussion in Chapter 37.
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ARTICLE 28—APPLICABLE LAWS AND REMEDIES

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Article 28

1. The tribunal shall apply the substantive law(s) or rules of law designated by the parties as applicable to the dispute. Failing such a designation by the parties, the tribunal shall apply such law(s) or rules of law as it determines to be appropriate.

2. In arbitrations involving the application of contracts, the tribunal shall decide in accordance with the terms of the contract and shall take into account usages of the trade applicable to the contract.

3. The tribunal shall not decide as amiable compositeur or ex aequo et bono unless the parties have expressly authorized it to do so.

4. A monetary award shall be in the currency or currencies of the contract unless the tribunal considers another currency more appropriate, and the tribunal may award such pre-award and post-award interest, simple or compound, as it considers appropriate, taking into consideration the contract and applicable law.

5. Unless the parties agree otherwise, the parties expressly waive and forego any right to punitive, exemplary or similar damages unless a statute requires that compensatory damages be increased in a specified manner. This provision shall not apply to any award of arbitration costs to a party to compensate for dilatory or bad faith conduct in the arbitration.
Chapter 28: Article 28—Applicable Laws and Remedies

I. Introduction

This provision is an amalgam of various rules addressing the issue of laws applicable to the arbitration and certain matters relating to the remedies available to the tribunal. Its touchstone is ‘party autonomy’—that is, respecting the choice of the parties, as expressed in the arbitration agreement or in positions taken before the tribunal. Absent party agreement, the arbitrators enjoy a broad discretion. Nevertheless, practically speaking, the parties’ freedom and the tribunal’s discretion may be restricted by mandatory rules of law at the place of arbitration or of enforcement. This limitation is also reflected in Article 1(2), which provides that any applicable mandatory law takes precedence over the powers recognized in Article 28.¹

On the whole, the ICDR provision does not depart significantly from the analogous rules of other institutions. Perhaps more noteworthy is the way in which the drafters appear to have taken a ‘smorgasbord’ approach of picking and choosing from various sets of rules. Interestingly, the issue of applicable law is not covered at all in the AAA Commercial Rules and that of remedies is dealt with only summarily.² Article 28(5) of the ICDR Rules, limiting the scope for application of punitive damages, appears to be drafted specifically to reassure the international audience that, despite the ICDR’s US heritage, such damages—frequently associated (rightly or wrongly) with US litigation—will be very rare in international arbitration.

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A. Parties’ choice of law to be given effect (Article 28(1))

The tribunal shall apply the substantive law(s) or rules of law designated by the parties as applicable to the dispute. Failing such a designation by the parties, the tribunal shall apply such law(s) or rules of law as it determines to be appropriate.

Article 28(1) provides that, in determining the dispute, the tribunal shall apply the ‘substantive law(s) or rules of law’ designated by the parties. Only absent such a designation (or where there is an applicable mandatory rule of law) should the

¹ See discussion of Art 1(2) at paras 1.93–1.97 above.
² See AAA Commercial Rules, s R-43(a) (‘The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract’).
tribunal apply the law(s) that ‘it determines to be appropriate’. The language appears to be a combination of 1976 UNCITRAL Rules, Article 33(1), and ICC Rules, Article 17(1). Article 28(1) differs from the UNCITRAL equivalent by referring not only to ‘substantive law(s)’, but also to the applicability of ‘rules of law’, the latter presumably being broader. While in most cases the parties will choose a single national law as the law governing the merits, this need not be the case. The designated ‘rules of law’ may encompass, for example, *lex mercatoria*, the UNIDROIT Principles of International Commercial Contracts, or the Vienna Convention on the Sale of Goods. The extension to ‘rules of law’ has its genesis in the 1985 UNCITRAL Model Law; it was also adopted in the 2010 revisions to the UNCITRAL Rules and appears in other rules.

As with the ICC Rules, the ICDR Rules do not specify what criteria the tribunal should apply to decide what law is ‘appropriate’ should it be required to make a determination. In the 1976 UNCITRAL Rules, Article 33(1) specifically refers to applying a conflict-of-laws analysis. However, an ICDR panel need not be so constrained and may, for example, choose to employ the *voie directe* method that allows selection of the most appropriate substantive law without expressly using conflicts rules. In the revised 2010 UNCITRAL Rules, Article 35(1) replaces

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3 See 1976 UNCITRAL Rules, Art 33(1) (‘The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable’).

4 See ICC Rules, Art 17(1) (‘The parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute. In the absence of any such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate’).


6 Note also that, by referring to applying the ‘substantive law(s)’, the text envisages the possibility of more than one law being applicable.


8 See UNCITRAL Model Law, Art 28(1) (‘The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute’).


10 See eg LCIA Rules, Art 22.3; SIAC Rules, Art 27.1.

11 See ICC Rules, Art 17(1).

12 See also UNCITRAL Model Law, Art 28(2).

Chapter 28: Article 28—Applicable Laws and Remedies

reference to ‘conflict of law rules’ with the more general ‘[the] arbitral tribunal shall apply the law which it determines to be appropriate’. This revision was apparently made to provide the tribunal with broader discretion and was modelled on Article 17 of the ICC Rules.\(^\text{14}\) Article 28 does not provide a specific procedural mechanism for how and when the arbitral tribunal should address any question of what law applies to the substance of the arbitration—but if disputed, it should be identified as an issue in dispute early on in the proceeding and is precisely the kind of ‘preliminary issue’ that can be dealt with in a partial award so that the parties know where they stand.\(^\text{15}\)

\(28.05\) It is worth noting that the parties’ and the tribunals’ freedom to select the substantive law may be restricted by any applicable mandatory rules in the law of the seat or of that of the place of enforcement.\(^\text{16}\) For example, consistent with the precedent set by the European Court of Justice (ECJ) in \textit{Eco Swiss},\(^\text{17}\) the Paris Court of Appeal held in \textit{Thales} that domestic courts could vacate awards enforcing agreements that are in violation of European competition law, which was deemed mandatory.\(^\text{18}\) Similarly, the US Supreme Court has noted that ‘in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party’s right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy’.\(^\text{19}\) Absent disregard of mandatory rules, courts do not generally second-guess arbitrators’ determinations of the applicable law where the rules expressly give that power to the arbitrators.\(^\text{20}\)


\(^{15}\) See para 27.14 above (discussing partial awards).

\(^{16}\) See eg Art 7(1) of the Rome Convention on the Law Applicable to Contract of 19 June 1980 (providing that ‘effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract’). In the US, see s 187(2) of the Restatement (Second) Conflict of Laws, providing that:

\begin{quote}
The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless . . . (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under [the general choice of law] rule of §188, would be the state of the applicable law in the absence of an effective choice-of-law by the parties.
\end{quote}

\(^{17}\) \textit{Eco Swiss China Time Ltd v Benetton Intl NV}, C-126/97 (1999).


\(^{19}\) \textit{Mitsubishi Motors Corp v Solder Chrysler-Plymouth, Inc}, 473 US 614, 637 (1985).

II. Textual commentary

B. Tribunal to apply contract terms and usages of the trade (Article 28(2))

Article 28(2)

In arbitrations involving the application of contracts, the tribunal shall decide in accordance with the terms of the contract and shall take into account usages of the trade applicable to the contract.

Article 28(2) makes clear that the terms of the contract are to take precedence in any contract dispute. The language is very similar to that of 1976 UNCITRAL Rules, Article 33(3), the only point of difference being that the ICDR drafters limit the rule to arbitrations ‘involving the application of contracts’ and not to ‘all cases’—but this seems unlikely to have any real consequences.21 ICC Rules, Article 17(2), contains the more ambiguous directive to ‘take account’ of the contract.22 More recent rules, such as those of SIAC, have opted for the more directive language in the UNCITRAL and ICDR Rules.23

What the real impact is of deciding the dispute ‘in accordance with the terms of the contract’ remains debated. In practice, unsurprisingly, most international commercial arbitrations are determined on the basis of the terms of the contract. But does the language in Article 28(2) restrict the arbitrators’ powers to refer to evidence outside the contract, to award equitable relief not contemplated by the contract, or even to ‘rebalance’ a contract? Indeed, the arbitrators’ power to fill gaps and revise contracts has been described as one of ‘the most controversial issues of arbitral doctrine of the past three decades’.24 Ultimately, it is left to the tribunal to decide the range of its powers. In doing so, arbitrators should look to the terms of the parties’ agreement,25 as well as any of the applicable national laws.26 Article 28 does not contain the unique restrictions on ‘correcting’ a contract found in Article 22.1(g) of the LCIA Rules, although even that provision is criticized as

21 2010 UNCITRAL Rules, Art 35(3), added ‘if any’ following ‘terms of the contract’. The drafters explain that the addition was meant to clarify applicability of the UNCITRAL Rules in a situation in which a contract was not necessarily the basis of the dispute: see UNCITRAL, Report of Working Group II, UN Doc No A/CN.9/684 (10 November 2009), para 98. In contrast to the UNCITRAL Rules, the ICDR Rules have not, to date, been used in an investment treaty arbitration.


23 See SIAC Rules, Art 27.3 (‘In all cases, the Tribunal shall decide in accordance with the terms of the contract, if any . . . ’).


26 Berger, op cit, 6–7.
suredly not proscribing the tribunal’s power to amend, rectify, or ‘rebalance’ a contract if permitted under the relevant applicable law.27

28.08 In addition, Article 28(2) provides that the tribunal ‘shall take into account usages of the trade’, but only to the extent ‘applicable to the contract’. Commentators note that this formulation suggests that, in applying the law, trade usages ‘have only a supplementary role’ to the extent that they do not conflict with the clear terms of the contract.28 Note also that the ICDR formulation is potentially narrower than the UNCITRAL version, in as much as it applies only to trade usage applicable to the ‘contract’ and not to the ‘transaction’. While some rules, like the LCIA Rules, do not specifically refer to applying trade usages, such usages may still be relevant if recognized under the relevant applicable law.29

C. Tribunal may act as an amiable compositeur (Article 28(3))

Article 28(3)

The tribunal shall not decide as amiable compositeur or ex aequo et bono unless the parties have expressly authorized it to do so.

28.09 Article 28(3) permits the tribunal to decide the dispute as an amiable compositeur or ex aequo et bono, but only if the parties have ‘expressly authorized it to do so’.30 This reaffirms the primacy of the assumption that the tribunal will apply a substantive law or rules of law unless the parties have expressly—in their arbitration agreement, a separate submission agreement, or before the tribunal—permitted a departure to consider notions of fairness and equity. Article 28(3) omits the explicit requirement found in 1976 UNCITRAL Rules, Article 33(2), that the ‘law applicable to the arbitral procedure’ must permit such a departure. The 2010 revised UNCITRAL Rules removed this caveat.31 However, this remains a valid consideration regardless.32 While those states that have enacted arbitration legislation based on the UNCITRAL Model Law should recognize the arbitrators’ power to make such awards,33 counsel should carefully research the potentially

27 See P Turner and R Mohtashami, A Guide to the LCIA Arbitration Rules (Oxford University Press, Oxford, 2009) paras 6–39–6–43. See also SIAC Rules, Art 24.a (similar to LCIA Rules, Art 22.1(g)).
28 See Caron, Caplan, and Pellonpää, op cit, 138. See also PMI Trading Ltd v Farstad Oil Inc, No 00CIV.7120 (RLC), 2001 WL 38282 (SDNY, 16 January 2001) (arbitrators did not act in manifest disregard of the law when they failed to apply trades usages inconsistent with the parties’ contract.)
29 See Turner and Mohtashami, op cit, para 6–62.
30 For a discussion of powers to act as an amiable compositeur or ex aequo et bono, see generally GB Born, International Commercial Arbitration (Kluwer Law International, The Hague, 2009) 2,238–43; Gaillard and Savage (eds), op cit, 1,500–08.
31 See 2010 UNCITRAL Rules, Art 35(2).
32 See discussion of ICDR Rules, Art 1(2), at para 1.93 ff above.
33 See UNCITRAL Model Law, Art 28(3).
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relevant jurisdictions.\textsuperscript{34} Generally speaking, in the US, no such restrictions apply.\textsuperscript{35} Reflecting the fact that such arbitrations ‘in equity’ are rare in the US, the AAA Commercial Rules do not contain any explicit provision on this topic.

D. Currency, interest, punitive damages

(Article 28(4) and (5))

Article 28(4)

A monetary award shall be in the currency or currencies of the contract unless the tribunal considers another currency more appropriate, and the tribunal may award such pre-award and post-award interest, simple or compound, as it considers appropriate, taking into consideration the contract and applicable law.

Article 28(5)

Unless the parties agree otherwise, the parties expressly waive and forego any right to punitive, exemplary or similar damages unless a statute requires that compensatory damages be increased in a specified manner. This provision shall not apply to any award of arbitration costs to a party to compensate for dilatory or bad faith conduct in the arbitration.

Article 28(4) and (5) addresses the remedies that a tribunal is empowered to order. However, the specific paragraphs are limited only to issues of currency, interest, and punitive damages. There is no broad statement like that found in the AAA Commercial Rules, which empowers the tribunal to ‘grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of the contract’.\textsuperscript{36} However, this does not mean that the arbitrators enjoy anything other than a very broad discretion to award the remedies that they see fit. While careful research should be made of the potentially applicable laws, in most jurisdictions, tribunals can order remedies very similar to, or even broader than, those available to a judge.\textsuperscript{37}

The ICDR Rules certainly do not provide an impediment.

\textsuperscript{34} Born, op cit, 2,239–40 (stating that Bulgaria’s and the Russian Federation’s Law on Commercial International Arbitration does not provide that arbitrators may act \textit{ex aequo et bono}).

\textsuperscript{35} Moncharsh v Heily and Blase, 3 Cal 4th 1, 832 P 2d 899, 904 (Cal 1992).

\textsuperscript{36} See AAA Commercial Rules, s R-43(a). See New Zealand Arbitration Act 1996, s 12 (‘An arbitration agreement, unless otherwise agreed by the parties, is deemed to provide that an arbitration tribunal—(a) [m]ay award any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in that court’); Singapore International Arbitration Act (Ch 143A) (revd edn, 2002), s 12(5) (‘Without prejudice to the application of Article 28 of the Model Law, an arbitral tribunal, in deciding the dispute that is the subject of the arbitral proceedings—(a) may award any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in that court’).

Chapter 28: Article 28—Applicable Laws and Remedies

28.11 Article 28(1) provides that any monetary award will be in the same currency as the contract at issue unless the tribunal considers another currency ‘more appropriate’. Further, the tribunal is free to award ‘such pre-award and post-award interest, simple or compound, as it considers appropriate, taking into consideration the contract and applicable law’. In other words, the tribunal is given a very broad discretion.\(^38\) Similar language was inserted into Article 26.6 of the LCIA Rules in 1985, even making clear that the tribunal is not bound by the legal rate of interest that would be imposed by any state court. Commentators on the LCIA provision note that the broad discretion to award even compound interest and post-award interest reflects the greater autonomy given to arbitrators following the enactment of the English Arbitration Act 1996.\(^39\) Unlike the LCIA Provision, Article 28(4) of the ICDR Rules explicitly states that while the tribunal is to award the interest that it ‘considers appropriate’, it must ‘take[e] into consideration the contract and applicable law’.

28.12 Article 28(5) seeks to avoid a potential—although, in practice, rare—problem: the possibility of punitive damages being awarded and the fact that such an award may be unenforceable as contrary to public policy in some jurisdictions. The rules provide that the parties ‘expressly waive and forego the right to punitive, exemplary or similar damages unless a statute requires that compensatory damages be increased in a specified manner’. While not unique to the US, such damages are commonly perceived as a characteristic of US litigation, and thus this provision might serve to distance the ICDR Rules from their association with the AAA and US practice.\(^40\) Notably, the rule carves out from the prohibition statutory directions to award increased compensatory damages, such as treble damages proscribed by statute.\(^41\) This is despite the fact that judgments containing such statutory treble damages are themselves also often the subject of foreign ‘blocking’ statutes or other restrictions on enforcement.\(^42\) Notably, the AAA Commercial Rules do not contain a

\(^{38}\) On interest in arbitration generally, see Born, op cit, 5,202–10; Redfern and Hunter, op cit, paras 9-74–9-86.


\(^{41}\) See eg Investment Partners, LP v Glamour Shots Licensing, Inc, 298 F3d 314, 318 (5th Cir 2002) (upholding enforcement of an award where antitrust treble damages were awarded, because these were not inconsistent with a contractual prohibition on ‘punitive damages’).

\(^{42}\) For example, the Bundesgerichtshof (the German Federal Court of Justice), Germany’s highest court, has refused to enforce the punitive damages component of a Californian state court judgment: see BGH IXth Civil Senate, 4 June 1992, Docket No IX ZR 149/91, [1992] Wertpapiermitteilungen 1451. See more generally Gotanda [2007], op cit, 517; JY Gotanda, ‘Punitive Damages: A Comparative Analysis’, 42 Col J Transnl L 391 [2004]; J Berch, ‘The Need for Enforcement of US Punitive
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restriction on punitive or exemplary damages. It might surprise some US arbitration users that by adopting arbitration under the ICDR Rules (or AAA arbitration in an international dispute), they are in fact waiving such non-statutory rights to punitive/exemplary damages unless explicitly agreed otherwise. Some US courts have, however, found punitive damages waivers unconscionable and thus unenforceable.  

The restriction on punitive or exemplary damages does not apply to an award of costs intended to ‘compensate for dilatory or bad faith conduct in the arbitration’. The rationale for this is obviously to preserve the tribunal’s power to use such sanctions as a way of exerting control over the proceeding. A recent US case construed Article 28(5) and held that the Article does not empower the tribunal to sanction non-party parties to the arbitration.  

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43 See *IJL Dominicana SA v It’s Just Lunch Intl, LLC*, No CV 08-5417-VAP (OPx), 2009 WL 305187 (CD Cal, 6 February 2009) (finding, in an action to compel arbitration, that punitive damages and class action waivers contained in a franchise agreement providing for arbitration under the ICDR Rules were unconscionable; the court compelled arbitration, but refused to enforce the offensive waivers). Although the court neither specifically addressed, nor explicitly severed, the applicable Art 28(5) of the rules, its ruling likely implicitly had this effect.


ARTICLE 29—SETTLEMENT OR OTHER REASONS FOR TERMINATION

I. Introduction

Of course, not all arbitrations proceed to a hearing on the merits and final award. Article 29 of the ICDR Rules addresses within its two paragraphs at least three situations in which the arbitration may be terminated other than by provision of a final award: termination upon settlement; termination upon settlement, but where the parties request that a ‘consent award’ be issued; and termination because the continuation of the proceeding has become unnecessary or impossible for any reason. The first scenario is probably the most typical, but in all three, the tribunal is likely to terminate the proceeding subject to payment of any outstanding fees or costs. Article 29 is closely modelled on the equivalent provision in the UNCITRAL...
Chapter 29: Article 29—Settlement or Other Reasons for Termination

Rules and the other institutional rules differ in only minor respects. The AAA Commercial Rules contain an equivalent provision addressing consent awards, as well as a power to suspend or terminate a proceeding, but only for default on payment of fees.

29.02 As discussed further below, if a tribunal has been appointed, the decision on whether or not to terminate rests with the arbitrators. This is so even when the grounds for termination arise out of non-payment of fees. Note that, according to ICDR practice, once an arbitrator has been appointed, no refund of filing fees is available, even if the arbitration is terminated pursuant to Article 29.

II. Textual commentary

A. Termination upon settlement (Article 29(1))

Article 29(1)

If the parties settle the dispute before an award is made, the tribunal shall terminate the arbitration and, if requested by all parties, may record the settlement in the form of an award on agreed terms. The tribunal is not obliged to give reasons for such an award.

29.03 Article 29(1) provides that the tribunal shall terminate the arbitration if the parties settle the dispute before an award is made. If the parties so request, the tribunal may record the settlement in the form of an award on agreed terms. While commentators have pointed out that the equivalent Article 26 of the ICC Rules is more explicit in stating that the tribunal must agree to make such a consent award, the best interpretation of Article 29(1) is that the tribunal also has discretion to decide whether or not to agree to issue such an award. In practice, it is unlikely that

1 See 1976 UNCITRAL Rules, Art 34; 2010 UNCITRAL Rules, Art 36.
3 See AAA Commercial Rules, s R-44 (‘Award upon Settlement’).
4 See AAA Commercial Rules, s R-54 (‘Suspension for Non-payment’).
5 See discussion of Art 33(3) (addressing suspension or termination for non-payment of deposit of costs) at paras 33.06 ff below.
6 Based on a discussion with ICDR senior management (October 2010).
7 See P Turner and R Mohtashami, A Guide to the LCIA Arbitration Rules (Oxford University Press, Oxford, 2009) para 7-30 (referring to a ‘potential ambiguity’ in Art 26.8 of the LCIA Rules, but concluding that the tribunal has discretion).
a tribunal would refuse to do so—particularly where, as is made explicit in other rules, the award is specifically described as being a consent award.

The key advantage of a ‘consent award’ is that, in most jurisdictions, this will be treated as any other arbitration award and will be enforceable as such. Having the tribunal involved may also present a useful opportunity to review and offer suggestions on the terms of the settlement, although care must be taken in making such a disclosure if the settlement is not yet final and binding. More likely, the tribunal may have useful suggestions on the form and content of the consent award that may assist in avoiding enforcement complications. Of course, as with any award, even a consent award is subject to challenge on the usual grounds available under the New York Convention or the law of the seat or place of enforcement.

Given the unique nature of an ‘award on agreed terms’, Article 29(1) makes clear that the tribunal need not give reasons for such an award. This mirrors language in Article 34(1) of the 1976 UNCITRAL Rules (Article 36(1) of the 2010 UNCITRAL Rules), as well as in Article 26.8 of the LCIA Rules. Otherwise, the consent award should be subject to the same requirements of form and have the same effect as any other award under the Rules. Article 29(1) does not contain the same language as that in Article 34(3) of the 1976 UNCITRAL Rules cross-referring to Article 32 (form of effect of the award), but it is implicit that other equivalent provisions of the ICDR Rules should apply, in particular, but not exclusively, Article 27.

The equivalent section R-44 (‘Award upon Settlement’) of the AAA Commercial Rules makes explicit that ‘a consent award must include an allocation of arbitration costs, including administrative fees and expenses as well as arbitrator fees and..."
expenses’. No such provision exists in Article 29 of the ICDR Rules, but any settlement agreement is likely to address these issues, and where the tribunal is being asked for a consent award, it will obviously be in a good position to ensure that they are fully addressed.

29.07 Note that the ICDR Rules do not provide any mechanism for ‘suspending’ the arbitration to allow implementation of settlement, where withdrawal of the claims is conditional on certain terms being performed. Settlement on such terms is not uncommon. Nevertheless, the tribunal may be willing to remain constituted and to order an ‘adjournment’ of the proceedings (or to keep the proceedings ‘in abeyance’) for some period of time, probably with regular reporting periods to check on implementation of the settlement. As a practical matter, arbitrators are likely to be reticent to agree to such a plan for other than a fairly short period of time.

B. Termination where continuation unnecessary or impossible (Article 29(2))

Article 29(2)

If the continuation of the proceedings becomes unnecessary or impossible for any other reason, the tribunal shall inform the parties of its intention to terminate the proceedings. The tribunal shall thereafter issue an order terminating the arbitration, unless a party raises justifiable grounds for objection.

29.08 Article 29(2) addresses the situation in which the continuation of the arbitration becomes ‘unnecessary or impossible for any other reason’. This catch-all provision provides a mechanism for the tribunal to terminate a proceeding prior to the final award in all situations other than an agreed ‘settlement’ of the sort contemplated in Article 29(1). Perhaps the most common reason for termination would be where a claimant unilaterally withdraws its claims for whatever reason.14 Other reasons might include where the claimant fails to prosecute its case,15 where the costs of the arbitration are not being paid, or where the subject matter of the arbitration becomes moot.

29.09 Once the tribunal has concluded that there is a prima facie case that justifies termination, it must inform the parties of its intention to terminate the proceeding. Unless a party raises ‘justifiable grounds for objection’, it may thereafter issue an order.

15 In this respect, see discussion on Art 23 (‘Default’) at para 23.04 above. (Article 23 did not incorporate the equivalent UNCITRAL Rules provision on a defaulting claimant. Accordingly, a tribunal wishing to terminate in this scenario is left with resort to Art 29(2).)
II. Textual commentary

terminating the arbitration.\textsuperscript{16} This language mirrors that of Article 34(2) of the 1976 UNCITRAL Rules. The drafting history of Article 34(2) makes clear that this is not intended to be a ‘veto power’ for any party.\textsuperscript{17} Moreover, the 2010 revisions to Article 34(2) further strengthened the tribunal’s autonomy by deleting the language referring to ‘justifiable grounds for objection’ and providing that the tribunal has the power to order termination ‘unless there are remaining matters that may need to be decided and the arbitral tribunal considers it appropriate to do so’.\textsuperscript{18} As suggested by this new text, whether under the ICDR or UNCITRAL Rules, termination may not be appropriate if there are still unresolved issues regarding costs, counterclaims, or other matters. As part of this exchange with the tribunal, there may well be discussion of whether or not the termination is intended to be ‘with prejudice’ to the claimant’s right to re-file the claim later.\textsuperscript{19} It is important that these issues are aired at this stage, because once the termination becomes effective, depending on applicable laws, the tribunal will likely be \textit{functus officio}.\textsuperscript{20}

Neither the ICC Rules nor the LCIA Rules have a similarly explicit default rule on termination, except in relation to failure to pay the advance on costs. Under ICC Rules, Article 22(1), after each party has had a reasonable opportunity to present its case, the tribunal has the power to declare the proceedings closed. Thereafter, no further evidence or argument may be introduced unless requested by the tribunal. However, a tribunal’s inherent powers to manage the proceeding must extend to the power to terminate the arbitration in appropriate situations.

\textsuperscript{16} The ICDR Rules do not give any guidance on what might constitute ‘justifiable grounds’. But see discussion of Art 34(2) in Caron, Caplan, and Pellonpää, op cit, 864–66.
\textsuperscript{17} See ibid, 864 (noting that the earlier drafts referred to termination ‘unless a party objects’).
\textsuperscript{20} See discussion in P Turner and R Mohtashami, \textit{A Guide to the LCIA Rules} (Oxford University Press, Oxford, 2009) para 7–31 (arguing that where the arbitration is terminated under Art 26.8, the tribunal does not become \textit{functus officio} until such time as the costs have been paid).
ARTICLE 30—INTERPRETATION OR CORRECTION OF THE AWARD

I. Introduction

As with most other arbitral rules, the ICDR Rules provide a limited opportunity for interpretation or correction of an award and for an additional award to be made on claims presented, but not included within the award. Article 30 provides a strict deadline for any such application and for the tribunal’s response. The rationale behind such a limited review and on such a strict timeline is the concern not to interfere with the parties’ agreement for a fast and final resolution of their dispute. For this reason, arbitrators, courts, and commentators are quick to emphasize the very limited scope of an application under Article 30 or its analogous provisions in other rules. Given the likelihood, however, of at least one party feeling aggrieved by

II. Textual commentary

A. Request to interpret, correct, or make an additional award

1. Interpretation
2. Correction
3. Additional award

B. Tribunal may grant request where justified

1. Interpretation
2. Correction
3. Additional award

I. Article 30

1. Within 30 days after the receipt of an award, any party, with notice to the other parties, may request the tribunal to interpret the award or correct any clerical, typographical or computation errors or make an additional award as to claims presented but omitted from the award.

2. If the tribunal considers such a request justified, after considering the contentions of the parties, it shall comply with such a request within 30 days after the request.

III. Conclusion

In conclusion, Article 30 provides a limited opportunity for interpretation or correction of an award and for an additional award to be made on claims presented, but not included within the award. The strict deadline for any such application and for the tribunal’s response is to ensure that the parties’ agreement is not interfered with and that a fast and final resolution of their dispute is achieved. Given the limited scope of an application under Article 30 or its analogous provisions in other rules, arbitrators, courts, and commentators are quick to emphasize the very limited scope of an application under Article 30 or its analogous provisions in other rules. Given the likelihood, however, of at least one party feeling aggrieved by
the tribunal’s decision, Article 30 can also be subject to creative attempts to ‘reargue’ a particular legal, evidential or procedural point.¹

### 30.02 Article 30 condenses into one Article the powers to interpret, correct, and make an additional award laid out in Articles 35, 36, and 37, respectively, of the 1976 UNCITRAL Rules (Articles 37, 38, and 39 of the 2010 UNCITRAL Rules). Perhaps the most striking characteristic of the Article is that it covers these three remedies in very short form. As discussed below, the substantive differences between the UNCITRAL provisions and the ICDR Rules are not significant. The AAA Commercial Rules counterpart is considerably less broad than Article 30, but more explicit in providing for a limited power to ‘correct any clerical, typographical, or computational errors . . . [but not] to redetermine the merits of any claim’.²

### 30.03 The application of Article 30 may also be impacted by national laws containing an independent source of power for the tribunal to modify an arbitral award, although this is typically subject to the parties’ agreement.³ Such legislation may also define the point of time in which an arbitrator’s power to act may expire (when the arbitrator becomes ‘functus officio’)⁴ and how that relates to the post-award review contemplated by mechanisms such as Article 30.⁵ The ICDR Rules do not specifically address when the tribunal becomes functus officio. This uncertainty gave rise to

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² See AAA Commercial Rules, s R-46:

Within 20 days after the transmittal of an award, any party, upon notice to the other parties, may request the arbitrator, through the AAA, to correct any clerical, typographical, or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided. The other parties shall be given 10 days to respond to the request. The arbitrator shall dispose of the request within 20 days after transmittal by the AAA to the arbitrator of the request and any response thereto.

³ See eg UNCITRAL Model Law, Art 33:

Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties: (a) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature; (b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

⁴ See Born, op cit, 2,513–20 (discussing the functus officio doctrine).

⁵ See eg UNCITRAL Model Law, Art 32(3) (‘The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of articles 33 and 34(4)’).
I. Introduction

a US federal appellate court opining on the proper scope of the doctrine and Article 30.

In T Co Metals, LLC v Dempsey Pipe and Supply, Inc, the US Court of Appeals for the Second Circuit closely analysed Article 30. Before the Court was whether the district court erred in setting aside an amended award made pursuant to Article 30 and confirming the original award in its place. In the arbitration itself, both parties moved the arbitrator to correct his award. The arbitrator granted partial relief on the basis that his application of certain invoices in evidence to the damages calculation had been in error, even though the errors were not evident on the face of the award. The arbitrator accordingly ‘corrected’ the award by recalculating the damages and issuing an order amending his original award.

Upon a challenge to the award, the first-instance court vacated the amended award and confirmed the original award, because the arbitrator had ‘exceeded his authority’ by making ‘corrections’ beyond the scope permitted by Article 30 of the ICDR Rules. The trial court held that the arbitrator’s approach violated the *functus officio* doctrine.

This trial court decision was reversed on appeal, essentially on the ground that the *functus officio* doctrine applies only ‘absent an agreement by the parties to the contrary’. By submitting their dispute to the ICDR, the Court found that the parties had submitted themselves to its rules, including Article 30. The Court held that the correction powers of Article 30 are a source of authority independent from the arbitrator’s inherent authority to correct mistakes. Further, the Court concluded that the parties intended to submit the question of the scope of the tribunal’s Article 30 powers to the arbitrator rather than the courts. As such, the Court held that, even if it were to view the arbitrator’s construction of Article 30 as erroneous, which it did not, it would still lack authority to vacate the amended award. The Court reversed the lower court’s decision, with instructions to vacate the original award and confirm the amended award.

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6 592 F3d 329 (2d Cir 2010).
7 See T Co Metals LLC v Dempsey Pipe and Supply, Inc, No 07-Civ-7747, slip op (SDNY, 8 July 2008).
8 Ibid, 7.
10 Ibid, 343.
11 Ibid, 344. The court also observed (ibid) that Art 36, which provides that ‘[t]he tribunal shall interpret and apply these Rules insofar as they relate to its powers and duties’, provided an independent basis to conclude the parties intended to submit the question of Art 30’s interpretation to the tribunal and not to the courts.
12 Ibid.
Chapter 30: Article 30—Interpretation or Correction of the Award

The T Co decision has been the subject of some controversy, particularly concerning the appellate court’s willingness to ‘permit tribunals to give themselves the power to reconsider decisions [made] in final awards’. But regardless of the court’s pronouncements on Article 30, the case provides a rare example of an influential appellate court analysing the ICDR Rules and concluding that the parties’ adoption thereof authorizes the tribunal to interpret its own powers with only very limited opportunity for court review.

II. Textual commentary

A. Request to interpret, correct, or make an additional award (Article 30(1))

Within 30 days after the receipt of an award, any party, with notice to the other parties, may request the tribunal to interpret the award or correct any clerical, typographical or computation errors or make an additional award as to claims presented but omitted from the award.

Any Article 30 application must be lodged with the tribunal ‘within 30 days after receipt of the award’. Article 30 does not contain any limitation on what sort of ‘award’ may be the subject of an application. Further, at least on its face, Article 30 does not contain any explicit power for the tribunal to interpret, modify, or supplement of its own volition, although it might be argued that the tribunal enjoys such an inherent power to make corrections.


14 Kirby, ibid, at 519.

15 See further at para 36.05 below (discussing T Co in the context of Art 31).

16 As noted, filing an application under Art 30 might not toll the statutory limitation period in some jurisdictions for challenging an award. See discussion at para 27.08 above (discussing Oberwager v McKechnie Ltd, Civ No 06-2685, 2007 US Dist LEXIS 90869, *16–*24 (ED Penn, 10 December 2007)).

17 See eg GB Born, International Commercial Arbitration (Kluwer Law International, The Hague, 2009) 2,531 (‘the authority to correct obvious errors is consistent with the expectations of rational commercial parties acting in good faith, and can properly be seen as inherent in the arbitrators’ adjudicative mandate . . . ’). This power is given explicitly to the tribunal in Art 36 of the 1976 UNCITRAL Rules, although only with respect to correction.
Article 30(1) encapsulates within it three quite distinct remedies that the tribunal may give when faced with an application.

1. Interpretation

Commentators on analogous rules have stated that the interpretation process does not permit re-argument of a conclusion, nor may new arguments or evidence be raised; rather, it is to provide ‘clarification of the award by resolving any ambiguity and vagueness in its terms’. In other words, ‘an interpretation or clarification of an award does not alter the previous award’s statements or calculations, but instead more clearly explains what such statements were intended to mean, without altering them’. Article 30 follows essentially the same approach as in Article 35 of the 1976 UNCITRAL Rules (which remains substantively unchanged in Article 37 of the 2010 UNCITRAL Rules). By comparison the LCIA Rules, for example, do not permit such interpretation at all.

2. Correction

The tribunal’s authorization to ‘correct any clerical, typographical or computation errors’ is modelled on the language in the ICC, LCIA, and UNCITRAL Rules. The types of error encompassed are well covered in the literature. Article 30 does not contain the more open-ended language permitting correction of ‘any errors of a similar nature’; neither does it contain the language in the UNCITRAL provision making clear that the correction must be ‘in the award’. On its face, unlike the other rules, Article 30 further does not grant the tribunal any discretion to make a correction of its own initiative. As discussed above, in the T Co case,

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21 Compare 1976 UNCITRAL Rules, Art 36(1). See also Art 38(2) of the 2010 UNCITRAL Rules (broadening the correction power even more to include ‘any error or omission of a similar nature’). See also UNCITRAL, Report of Working Group II on the Work of its 51st Session, UN Doc A/CN.9/684 (10 November 2009) 109 (clarifying that the term ‘omission’ refers only to defects in form and not on the substance).
22 See 1976 UNCITRAL Rules, Art 36(1).
23 Compare 1976 UNCITRAL Rules, Art 36(1); ICC Rules, Art 29(1); LCIA Rules, Art 27.2.
24 On the issue of whether a tribunal enjoys inherent powers to correct an award, see also CM di Ciò, ‘Dealing with Mistakes Contained in Arbitral Awards’, 12 Am Rev Int Arb 121 [2001]; cf Danella Constr Corp v MCI Telecoms Corp, No Civ A91-1053, 1992 WL 82316 (ED Pa, 14 April
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a reviewing court confirmed that the arbitrator’s determination of the scope of his or her Article 30 power to correct would be afforded ‘significant deference’.25

3. Additional award

30.12 The power to make an additional award addressing claims or counterclaims presented in the proceeding, but omitted from the award, is also found in 1976 UNCITRAL Rules, Article 37 (and retained in 2010 UNCITRAL Rules, Article 39), and LCIA Rules, Article 27.3, but is not in the ICC Rules. The 1976 UNCITRAL Rules required the tribunal to grant such relief only if the omission could be ‘rectified without any further hearings or evidence’, although this language was omitted from the 2010 revised Rules. The 2010 UNCITRAL Rules also make clear that the ‘additional award’ procedures may be used following a termination order under the equivalent of ICDR Rules, Article 29(2).26

B. Tribunal may grant request where justified (Article 30(2))

Article 30(2)

If the tribunal considers such a request justified, after considering the contentions of the parties, it shall comply with such a request within 30 days after the request.

30.13 Article 30(2) sets the very ambitious timetable that the tribunal is to make a determination ‘within 30 days after the request’. In contrast, the 1976 and 2010 UNCITRAL Rules provide a deadline of 45 days after receipt of a request for interpretation, 30 days for correction, and 60 days for an additional award. Article 29(2) of the ICC Rules anticipates giving the non-moving party a ‘short’ time in which to respond (‘normally not exceeding 30 days’) and provides that the draft decision must be submitted to the ICC Court not later than 30 days following expiration of the time limit for comments from the other party, or within such other period as the ICC Court may decide.27

30.14 Article 30 does not explicitly state that any interpretation or correction is to form part of the award.28 Noting this, a US court has held that a request for interpretation or correction does not toll the statutory time periods within which a party

1992) (FAA does not provide a basis for an arbitrator to reconsider his or her award); revd Danella Constr Corp v MCI Telecoms Corp, 993 F2d 876 (3d Cir 1993) (Table).

25 T Co Metals, LLC v Dempsey Pipe and Supply, Inc, 592 F3d 329, 345 (2d Cir 2010). But see also Kirby, op cit, at 524–5 (criticizing the arbitrator’s correction as being beyond the scope of Art 30).

26 See discussion of Art 29(2) at paras 29.08–29.10 above.

27 See also LCIA Rules, Art 27.1 (providing for the tribunal’s decision within 30 days of receipt of the request).

28 Compare 1976 UNCITRAL Rules, Arts 35 and 37; LCIA Rules, Arts 27.1 and 27.3; ICC Rules, Art 29(3).
must challenge the award. In the T Co case discussed above, the arbitrator rendered his decision as an order amending the original award and then issued an ‘amended award’. While not explicitly stated in the ICDR Rules, any resulting interpretation, correction, or additional award is to be treated as an ‘award’ for purposes of Article 27 (‘Form and Effect of the Award’).

Unlike the UNCITRAL Rules, the ICDR Rules do not specify that the arbitrators may not charge fees for work undertaken on such a request for interpretation or correction, or for an additional award.

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29 See Oberwager v McKechnie Ltd, Civ No 06-2685, 2007 US Dist LEXIS 90869, *16–*24 (ED Penn, 10 December 2007) (finding a decision denying a request under Art 30 not to be part of the final award and thus the party’s challenge to the award was untimely).


31 Compare 1976 UNCITRAL Rules, Art 40(4) (now Art 40(3) of the 2010 UNCITRAL Rules).
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ARTICLE 31—COSTS

I. Introduction

Users of international arbitration know all too well that it can be a costly process. There is no shortage of commentaries decrying the ‘cost conundrum’ afflicting arbitration practice. Article 31, which empowers the tribunal to fix the ‘costs of the arbitration’ in its award, must therefore be seen as a potentially significant part of the solution. Article 31(1) empowers the tribunal to fix the ‘costs of arbitration’ in its award. The tribunal may apportion such costs among the parties if it determines that such apportionment is reasonable, taking into account the circumstances of the case. Such costs may include:

a) the fees and expenses of the arbitrators;
b) the costs of assistance required by the tribunal, including its experts;
c) the fees and expenses of the administrator;
d) the reasonable costs for legal representation of a successful party; and

e) any such costs incurred in connection with an application for interim or emergency relief pursuant to Article 21.

arbitration' and to apportion those costs between the parties, is therefore highly relevant. As with most sets of arbitration rules, Article 31 identifies what kinds of costs may be recoverable, but leaves the tribunal a broad discretion to decide what costs are ‘reasonable’ and how recovery of those costs should be apportioned between the parties. Of course, the parties’ agreement, the applicable national laws, and the legal cultures of the respective parties and the tribunal may also play a role in this determination.²

### 31.02 Article 31 has its roots in the 1976 UNCITRAL Rules. Most of the text can be traced to Article 38 of those rules, with some additional language drawn from Article 40.³ On the whole, Article 31 takes a less prescriptive approach to identifying the types of costs than is found in those Rules or, for example, in the LCIA Rules.⁴ The AAA Commercial Rules take an even more ‘bare bones’ approach to defining the scope of the tribunal’s power to award costs.⁵ In considering Article 31, it is also important to bear in mind that US domestic litigation practice provides very few opportunities for any cost-shifting with respect to a party’s ‘attorney fees’ or otherwise.⁶ This so-called ‘American Rule’, at least to some extent, remains the practice in domestic arbitration. Therefore the AAA’s adoption in the ICDR Rules of the UNCITRAL-sanctioned approach of making a broad award of the ‘costs of arbitration’ signals a clear break from domestic practice to embrace international norms.

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³ Except as discussed below, these provisions remain largely unchanged in the 2010 UNCITRAL Rules as Arts 40 and 42, respectively.

⁴ See LCIA Rules, Art 28.

⁵ See AAA Commercial Rules, s R-43(c).

⁶ See generally Born, op cit, 2,491–94.
II. Textual commentary

A. Tribunal’s power to fix the costs of arbitration

Article 31 requires that the tribunal ‘shall fix the costs of arbitration in its award’. This is expressed in mandatory terms, because it is necessary that, at a minimum, the tribunal fix the terms for distribution of the deposit on costs, which will have been collected under Article 33 to cover arbitrator fees and administrative costs. As discussed further below, unlike some rules, Article 31 uses the term ‘costs of the arbitration’ to include not only arbitrator fees and administrative costs, but also costs incurred by the parties in putting on their cases. Article 31 refers to the tribunal fixing such costs ‘in its award’. However, there is no reason why an order as to costs cannot be made in more than one award over the course of the proceeding. It is also common for an award on the merits to be followed by a separate final award as to costs. An award of costs may also be made where the arbitration is terminated pursuant to Article 29.

As already noted, the arbitrators’ power to award costs, and the exercise of their discretion in relation thereto, may also be impacted by applicable arbitration laws. In this respect, difficult choice-of-law issues may arise. However, in most cases, one would assume that the power to award costs will be governed by the procedural law of the arbitration. The substantive standards for determining the costs award might also be drawn from the procedural law, could be governed by the law applicable to the contract (especially to the extent the contract makes specific provisions on costs), or might in fact be premised on international standards applicable to international arbitration. As one commentator notes, an international approach is justified because ‘domestic rules regarding legal costs are designed with domestic litigation systems and legal professions in mind’. The ICDR Rules’ costs provisions are different from those found in any of the AAA’s other, domestic-focused, sets of arbitration rules. As such, while national laws and legal cultures cannot be

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7 Compare LCIA Rules, Art 28.1 (excluding from the term ‘costs of the arbitration’ the ‘legal or other costs incurred by the parties themselves’ and leaving that to be addressed separately in Art 28.3).
8 See 2010 UNCITRAL Rules, Art 40(1) (amending the old Art 38 to refer to fixing the costs of the arbitration ‘in the final award and, if it deems it appropriate, in any other award’). See UNCITRAL, Note by the Secretariat, UN Doc No A/CN.9/W.G.II/WP.157/Add.2 (10 December 2009), para 18.
9 While not explicitly stated in the ICDR Rules, this must be so in order to settle any outstanding issues regarding liability for costs and expenses. It is explicitly stated to be the case in Art 40(3) of the 1976 UNCITRAL Rules (this is incorporated into the general power to award costs in any award or other decision under Art 40(1) of the 2010 UNCITRAL Rules).
10 See Born, op cit, 2,495. For a discussion of choice-of-law issues generally in the context of costs, see ibid, 2,494–95.
Chapter 31: Article 31—Costs

ignored, the ICDR provisions should be understood as falling within this uniquely international context.

31.05 Nevertheless, it is interesting briefly to review domestic practice the analogous AAA Commercial Rules, section R-40(c). That provision simply states that the arbitrator will assess the ‘fees, expenses, and compensation’, and may apportion them among the parties ‘in such amounts as the arbitrator determines is appropriate’. This broad discretion granted to the tribunal specifically includes the power to award attorneys’ fees in certain circumstances (discussed below). Awards of costs made in reliance on the AAA Commercial Rules have generally been respected by the courts in enforcement actions in the US.\(^\text{11}\)

31.06 Similar deference to arbitrators is shown by courts asked to review costs awards made under the ICDR Rules. A US federal court recently upheld all but one portion of an award of costs in an arbitration under the ICDR Rules.\(^\text{12}\) The court noted that the arbitration clause in question incorporated ‘the rules and practices of the [AAA]’ and was determined in accordance with the ICDR Rules.\(^\text{13}\) The court cited the broad language of Article 31 and the arbitrator’s reliance thereon in deciding to make an award of attorneys’ fees, expenses, and arbitration costs, despite the fact that the parties’ agreement stated that ‘the costs of such arbitration shall be borne equally by the parties’.\(^\text{14}\) The tribunal enforced the award, because the ‘arbitrator’s authority to award attorneys’ fees, expenses, and costs depended upon his interpretation of the contract and there is no question that his right to interpret the contract is rationally inferable from the wording of the parties’ Agreement and its arbitration clause’.\(^\text{15}\)

B. Tribunal may apportion costs

31.07 Article 31 provides that the tribunal ‘may apportion such costs among the parties if it determines that such apportionment is reasonable, taking into account the

\(^\text{11}\) See *Chase v Cohen*, 519 FSupp2d 267, 270 (D Conn 2007). But cf *Bacardi Corp v Congreso de Uniones Industriales de Puerto Rico*, 692 F2d 210 (1st Cir 1982) (vacating award of attorney’s fees); *Sammi Line Co v Altamar Nav SA*, 605 FSupp 72 (SDNY 1985) (relying on ‘traditional American rule’ to conclude that agreement not addressing power to award attorneys’ fees did not permit such award); *Transvenezuelan Shipping Co v Czarnikow-Rionda Co*, 1981 US Dist LEXIS 10059 (SDNY 1981) (vacating award of attorneys’ fees as exceeding arbitrators’ authority where parties’ agreement provided for discretion to apportion ‘expenses and costs of the arbitration’, but was silent as to attorneys’ fees).

\(^\text{12}\) See *Millmaker v Bruso and Sovereign Oil and Gas Company II, LLC*, Civ No H-07-3837, 2008 WL 4560624 (SD Texas, 9 October 2008) (vacating portion related to costs against a non-party).

\(^\text{13}\) Ibid, *3* (and see also n 3 concerning the ICDR).

\(^\text{14}\) Ibid, *4–5* (concluding that this meant that costs were to be borne equally only during the course of the arbitration).

\(^\text{15}\) Ibid, *6.*
II. Textual commentary

circumstances of the case’. This language appears to be drawn from Article 40(1) of the 1976 UNCITRAL Rules, but with an important difference: the broad discretion granted to the tribunal under Article 31 is not coupled with any explicit expectation that the unsuccessful party shall bear the costs of the arbitration. Even though an ICDR tribunal may therefore not feel constrained to apply the ‘loser pays’ approach, it is likely to consider this as an important factor in determining the apportionment of costs. The reference to ‘taking into account the circumstances of the case’, which also appears in the 1976 and 2010 UNCITRAL Rules, has been interpreted to refer to the relative success or failure of each of the parties, the conduct of the parties during the arbitration, and the nature of the parties (such as whether an individual, corporation, or sovereign entity). However, in reality, this will be a very fact-specific determination and the tribunal can take into account whatever other ‘circumstances of the case’ it determines relevant. The fact that the ‘apportionment’ is to be ‘reasonable’ also permits the tribunal to consider whether the amount of costs claimed is reasonable and to adjust it accordingly.

C. Components of the costs of arbitration

As to what constitutes ‘costs’, Article 31 states that the ‘costs may include’ the items enumerated. Particularly given that the list of costs found in the UNCITRAL Rules provision is explicitly exhaustive, it is reasonable to conclude that, in choosing different language, the AAA was seeking to give ICDR arbitrators full discretion in identifying applicable costs. Determining what are ‘costs’ for purposes of Article 31 is also important because it will impact the deposit on costs required under Article 33.

16 1976 UNCITRAL Rules, Art 40(1) (‘Except as provided in paragraph 2 [relating to legal fees], the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case’). This language remains in the revised Art 42 of the 2010 UNCITRAL Rules, except that the exclusion for legal fees has been removed.

17 See LCIA Rules, Art 28.4 (unless otherwise agreed, the award of costs ‘should reflect the parties’ relative success and failure in the award or arbitration’ unless the tribunal considers such approach inappropriate).


20 See discussion of Art 33 in Chapter 33 below.
Chapter 31: Article 31—Costs

Unsurprisingly, the Article 31 list includes: in paragraph (a), the fees and expenses of the arbitrators (which will have been determined in accordance with Article 32);\(^{21}\) in paragraph (b), the costs of assistance required by the tribunal (such as tribunal-appointed experts);\(^{22}\) and in paragraph (c), the ICDR administrative fees and expenses (determined according to the Schedule to the Rules).\(^{23}\) While none of these costs are explicitly premised by the word ‘reasonable’, the language at the beginning of the Article and general arbitral practice demand that the tribunal consider whether the costs claimed are reasonable in the circumstances.

Article 31(d) permits recovery of ‘the reasonable costs for legal representation of a successful party’. Whether and to what extent so-called ‘attorney fees’ should be recoverable as part of an award of costs in an arbitration is hotly debated.\(^{24}\) The ICDR provision has certain textual limitations that bear mention.

(1) On its face and consistent with the ‘prevailing party’ approach, only a successful party may seek an award of its legal costs. This presumably also applies where a party is successful as to certain aspects of its claims or defences, and therefore evidence may be required of how much of its total legal costs were spent on those arguments.

(2) The tribunal’s duty to award ‘reasonable’ apportionment of costs is repeated in stating that it is only ‘reasonable costs’ that will be considered for an award. This implies some kind of quantitative and qualitative review that, in practice, is unlikely to happen in other than broad-brush terms.\(^{25}\)

(3) Curiously, the provision refers only to the costs for ‘legal representation’ and, arguably, does not include other third-party costs incurred by the parties, such as party-appointed expert witness fees and expenses. In contrast, the 1976 UNCITRAL provision refers to costs for ‘legal representation and assistance’ and also mentions ‘the travel and other expenses of witnesses’;\(^{26}\) the LCIA Rules

\(^{21}\) Discussed in Chapter 32 below.

\(^{22}\) Discussed in Chapter 22 above.

\(^{23}\) Discussed at para 2.40 ff above. Note that the Schedule refers only to administrative fees, but that the ICDR will, on a case-by-case basis, also seek recovery of hearing room fees for ICDR/AAA facilities, certification fees, and other extraordinary expenses (interview with ICDR senior management, October 2010).


\(^{25}\) Note that the drafters of the UNCITRAL Rules had considered and rejected, as unduly interfering with the parties’ rights to choose their counsel, an additional limitation that the legal assistance for which recovery is sought was ‘necessary under the circumstances of the case’. See D Caron, L Caplan, and M Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary* (Oxford University Press, Oxford, 2006) 931–32.

\(^{26}\) See 1976 UNCITRAL Rules, Art 38(e) and (d), respectively. The 2010 Rules have adopted, in Art 40(2)(e), the phrase ‘legal and other costs’. See UNCITRAL, *Note by the Secretariat*, UN Doc No A/CN.9/W.G.II/WP.157/Add.2 (10 December 2009), para 18 (explaining change).
II. Textual commentary

refer to ‘legal or other costs incurred by a party’. However, this seems nonsensical, and given the non-exclusive nature of the list of costs in Article 31, the better interpretation is that non-legal costs associated with a party’s representation and prosecution of its case can be considered as part of a claim for costs under Article 31.

As noted, the inclusion of paragraph (d) in Article 31 marks a break with the traditional ‘American Rule’ of each side bearing its own legal fees. It is interesting to note the narrower provision in the AAA Commercial Rules, section R-40(c), which states that attorney’s fees may be awarded if they are requested by all parties, or are authorized by applicable law, or are authorized by the arbitration agreement. Thus, for example, a US court upheld an award of attorney’s fees because both parties requested recovery of such fees as required by section R-40(c). Another court upheld an award of attorney’s fees even though all parties did not request them, but on the grounds that the applicable law—California state law—authorized such an award of costs.

Paragraph (e) of Article 31’s list refers to costs ‘incurred in connection with any application for interim or emergency relief pursuant to Article 21’. Since Article 21(3) expressly mentions applications for interim relief to judicial authorities, this language needs to be read as encompassing not only costs associated with seeking interim relief from the tribunal, but also any such application to the courts.

Finally, it is worth noting that the non-exclusive nature of the list of costs and the wide discretion given on apportionment may give ICDR arbitrators latitude for including within the ‘costs of arbitration’ costs that are used as a ‘sanction’ for procedural misconduct or taking positions that caused unnecessary cost and delay. However, as noted in a recent case concerning an award under the ICDR Rules, while the arbitrator may order ‘costs paid as a sanction for dilatory or bad faith conduct’, it could not order such costs against a non-party.

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27 See LCIA Rules, Art 28.3.
28 This is also in accordance with common arbitral practice. See G Petrochilos, Procedural Law in International Arbitration (Oxford University Press, Oxford, 2004) 222 (‘It is for the tribunal to apportion the costs of the proceedings, in a reasonable manner and taking account of all the legal and other costs’).
29 See RP Industries, Inc v S and M Equip Co, Inc, 896 So2d 460, 467 ( Ala 2004) (holding also that the parties had therefore waived the right to object to the power to award attorney fees).
31 See also ICDR Rules, Art 37(9) (costs associated with an application for emergency relief are to be initially apportioned by the emergency arbitrator or special master, but are subject to final determination by the tribunal). See discussion at para 37.24 below.
33 See Millmaker v Bruso and Sovereign Oil and Gas Co II, LLC, Civ No H-07-3837, 2008 WL 4560624 (SD Texas, 9 October 2008) (vacating award as to that portion of the award of costs entered against the President and CEO of the defendant party), *3–*4.
D. Logistics for making award of the costs of arbitration

Article 31 does not address any of the practical logistics of how a party proves its claim for costs, whether costs should be part of the final award or made in a supplemental award, and how to handle disbursement of any amounts paid on deposit. These matters are left to the arbitral tribunal. An ICDR award of costs will not be subject to the same level of institutional scrutiny as would be the case under the ICC Rules, however it is reviewed by the case administrator. Article 31 must also be considered in the context of the immediately following Article 32 (‘Compensation of Arbitrators’) and Article 33 (‘Deposit of Costs’).


35 See paras 1.98 ff and 27.02 above (discussing the role of the ICDR administrator).
ARTICLE 32—COMPENSATION OF ARBITRATORS

I. Introduction

Article 32 represents a different approach from that adopted, for example, in the ICC Rules, in which arbitrator fees are determined by the ICC Court, based on a scale of costs established by reference to the amount in dispute.¹ The LCIA Rules also provide a fixed range of fees, although the tribunal retains discretion to establish its own fees based on various factors and subject to review by the LCIA.² Under the ICDR Rules, however, there is no fee schedule of any sort; instead, the case administrator at the ICDR takes the lead in ensuring that fee rates are agreed between all tribunal members and the parties. Similarly, although not formally

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¹ See ICC Rules, Appx III (‘Arbitration Costs and Fees’), Art 4. See also SCC Rules, Appx III (‘Schedule of Costs’), Art 2; SIAC Rules, Art 30.1, and Schedule of Fees (both adopting an ad valorem approach to arbitrator compensation).
required under the rules, throughout the arbitration and in the final costs of arbitration, the administrator reviews the reasonableness of the arbitrators’ fees and expenses.³

32.02 Article 32 bears little resemblance to its equivalent in the AAA Commercial Rules, section R-51. The latter is headed ‘Neutral Arbitrator’s Compensation’ and appears to envisage the AAA administrator getting involved in compensation issues only where a ‘neutral’ arbitrator is appointed.⁴ Where there is a neutral arbitrator, compensation is to be made through the AAA and not directly with the parties. The rule does not lay out any factors relevant to establishing the rate of compensation, but simply provides that his or her ‘stated rate of compensation’ shall apply. In contrast, the ICDR Rules envisage a more hands-on role to be played by the institution.

II. Textual commentary

32.03 Article 32 sets out various factors to be taken into account in establishing the arbitrators’ compensation, empowers the administrator to ensure that the arbitrators’ rates are agreed as soon as practicable after the arbitration has commenced, and, if there is no agreement, allows the administrator to impose a fee agreement. The structure and some of the text appears to be drawn from Article 39 of the 1976 UNCITRAL Rules (Article 41 of the 2010 UNCITRAL Rules), but it is also sufficiently different to warrant a closer examination.

32.04 The text refers to arbitrators being compensated ‘based upon their amount of service’. While the wording is curious, this presumably refers to the fact that the arbitrators’ fees will be based on actual time worked, rather than on an ad valorem basis.⁵ As to the factors to be taken into account in setting the compensation—the stated rate of compensation, and the size and complexity of the case—these are hardly surprising and are typical of other institutions.

32.05 Article 32 makes clear that it is the job of the ICDR administrator to arrange an appropriate rate in consultation with the parties and all arbitrators. This discussion


⁴ See AAA Commercial Rules, s R-17 (defining neutral and non-neutral arbitrators).

can take place in various different ways. For example, if the parties agree to selection by the list method, they may also specify candidates within a certain fee range and this wish will be respected. In the absence of agreement, the administrator can impose an applicable rate. Rates are normally on a per hour basis, although there have been instances of agreements to flat fees, and are disclosed to the parties ‘as soon as practicable after the commencement of the arbitration’, but, in any event, prior to the time of the appointment of the tribunal. The ICDR requires that all other terms related to arbitrator compensation, such as a cancellation fee, are also disclosed at this point. The ICDR generally will not interfere where a party-appointed arbitrator’s fees seem excessive; the ICDR’s practice is, however, to encourage arbitrator compensation to be equal among the different tribunal members (although it may be that the chairperson of the tribunal is entitled to a higher fee than the co-arbitrators). Accordingly, the administrator may discuss a fee discrepancy amongst the parties’ counsel or the arbitrators. Where negotiation with the arbitrators over fees is required, this will be done by the administrator so as to immunize the parties and their counsel from direct bargaining with the arbitrators.

The arbitrators render invoices for compensation to the ICDR and the case administrator is responsible for collecting funds from the parties and ensuring that sufficient funds are available to meet invoices on an ongoing basis. The ICDR also performs a role in monitoring the reasonableness of the invoices submitted for compensation, as well as in ensuring that an arbitrator provides adequate explanation for particular tasks performed. If a party questions an arbitrator’s fee, the ICDR will undertake a confidential review and may request further information of the arbitrator. If requested, an arbitrator’s invoice may be provided to the parties. However, the ICDR Rules do not contain the sort of independent ‘review mechanism’ found in some national laws or as recently adopted in the 2010 UNCITRAL Rules.

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6 When an arbitrator is added to the ICDR panel of arbitrators, he or she is asked to identify a standard rate. The ICDR will not interfere with setting this rate. But senior management advises that arbitrators tend to be flexible and will reduce rates if they deem them to be restricting their appointments (interview with ICDR senior management, October 2010).

7 Compare 2010 UNCITRAL Rules, Art 41(3) (providing a strict timeline for the tribunal to inform the parties after its constitution of ‘how it proposes to determine its fees and expenses, including any rates it intends to apply’). After the tribunal is already constituted, it is strategically difficult for a party to challenge the arbitrators’ proposed remuneration.

8 See generally Gaillard and Savage (eds), op cit, 1,158 ff. See also eg SCC Rules, Appx III (‘Schedule of Costs’), Art 2(2) (providing a default rule that the co-arbitrators shall each receive 60 per cent of the fee payable to the chairperson).

9 Interview with ICDR senior management (October 2010).

10 See discussion of ‘deposits’ under Art 33 in Chapter 33 below.

11 See eg the English Arbitration Act 1996, s 64(2) (permitting a party to apply to the court to determine what are reasonable fees and expenses).

12 See 2010 UNCITRAL Rules, Art 41(4)(b)–(d) (allowing a party to refer the tribunal’s determination of its fees and expenses to the appointing authority—or, in the absence of an appointing authority, the PCA—to review whether the determination is consistent with the tribunal’s proposal or is otherwise ‘manifestly excessive’). Of course, because of the ICDR’s role in managing the proceeding, there may be no need for such a review mechanism.
ARTICLE 33—DEPOSIT OF COSTS

I. Introduction

Article 33 sets out the basic rules for when deposits are to be paid as an advance on the costs of the arbitration, the consequences for non-payment, and the administrator’s duty to account to the parties for how the deposits have been used. The advance on costs is strategically important because, unlike in litigation, it requires the parties to ‘front’ potentially significant sums in order to continue to have the

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Chapter 33: Article 33—Deposit of Costs

33.02 There is nothing unusual in the content of Article 33. It is very similar to 1976 UNCITRAL Rules, Article 41 (which remains substantively unchanged as Article 43 of the 2010 UNCITRAL Rules). It does, however, differ from rules such as those of the ICC, in which the advance on costs is calculated pursuant to a schedule of costs and associated formula. The AAA Commercial Rules provide that, unless otherwise ordered, the cost of arbitral expenses shall be borne equally by the parties. In this respect, the AAA may require the parties to deposit in advance of any hearings such sums of money as it deems necessary to cover the expense of the arbitration, including the arbitrator’s fee. As discussed above, release of an ICDR award to the parties is not conditioned on payment of any outstanding deposits.

II. Textual commentary

A. Deposits as an advance on costs (Article 33(1) and (2))

Article 33(1)

When a party files claims, the administrator may request the filing party to deposit appropriate amounts as an advance for the costs referred to in Article 31, paragraphs (a), (b) and (c).

Article 33(2)

During the course of the arbitral proceedings, the tribunal may request supplementary deposits from the parties.

33.03 Article 33(1) makes clear that the advance on costs is to be calculated based on the fees and expenses of the arbitrators, the costs of assistance required by the tribunal,

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3 See AAA Commercial Rules, s R-50.

4 See ibid, s R-52.

5 See discussion in the context of Art 27 at para 27.08 above.

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II. Textual commentary

and the fees and expenses of the administrator. Unlike some other institutions, the ICDR does not apply a specific formula to calculate the advance on costs; instead, the administrator, in close consultation with the tribunal, makes regular ongoing assessments of what the actual anticipated costs of arbitration will be.

As a practical matter, the administrator will require an up-front payment at the outset of the arbitration. This is typically calculated on the basis of requiring sufficient funds to cover eight hours of preparation time per arbitrator in advance of the procedural hearing. However, thereafter, the supplemental payments demanded are based on the anticipated likely actual costs of the arbitration. These are likely to be demanded in advance of critical points in the arbitration, such as the merits hearing. Note that, unlike in ICC arbitration, full payment of the deposit is not a prerequisite to the file being transmitted to the tribunal.

While the ‘filing party’ must make the initial deposit, thereafter all parties will be expected to contribute. Article 41(1) of the 1976 UNCITRAL Rules (Article 43(1) of the 2010 version) explicitly states that, on establishment of the tribunal, each party may be requested to deposit an equal amount. Nothing is explicitly stated in the ICDR Rules, but the default approach is to require that the advance on costs be evenly shared amongst each of the ‘representatives’, pending some different allocation by the tribunal. Unlike some other institutions, the ICDR will not apportion the advance based on size of claim or some other metric. The ICDR also will not accept a guarantee or some other non-cash equivalent for the advance.

B. Default on payment (Article 33(3))

Article 33(3)

If the deposits requested are not paid in full within 30 days after the receipt of the request, the administrator shall so inform the parties, in order that one or the other of them may make the required payment. If such payments are not made, the tribunal may order the suspension or termination of the proceedings.

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6 Compare Art 41 of the UNCITRAL Rules, which does not include administrative costs. Of course, this is because the arbitration may be ad hoc. Article 41 contains separate provisions for addressing any fees to be paid by an appointing authority.

7 Comment made by ICDR senior management (October 2010).

8 Compare ICC Rules, Appx III (‘Arbitration Costs and Fees’), Art 1(3).

9 See also ICC Rules, Art 30(3) (providing for equal payment of the advance unless the ICC Court has established separate advances to cover claims and counterclaims).


11 Discussion with ICDR senior management (October 2010).
Consistent with international arbitration practice, if a party fails to pay its portion of the deposit, the administrator must inform the other party or parties and invite one or another of them to make the payment in order for the arbitration to proceed. If the payment is not made, the tribunal will be informed and is then empowered to suspend or terminate the proceeding. If no arbitrator has yet been appointed, the ICDR may suspend the arbitration for a defined period. If the payment is made by the non-defaulting party, the arbitration can proceed. The rationale for permitting the non-defaulting party to cover the outstanding portion of the deposit is that it has an interest in proceeding to a final award. The party that has covered the defaulter may then wait to seek reimbursement as part of the final award or, in some circumstances, might be entitled to an immediate partial award for recovery of the sums paid. However, this is not specifically addressed in the ICDR Rules.

What is clear is that the tribunal is not permitted to treat the defaulting party’s failure to pay the deposit as a general default that would allow the tribunal to proceed to the merits without hearing the defaulting party. An award under the AAA’s Construction Arbitration Rules was vacated by a New York state court because the tribunal ordered that a party was precluded from presenting its case after that party failed to pay its share of costs. In the underlying arbitration, the respondent failed to pay its share of costs due to financial hardship and was repeatedly warned by the tribunal that non-payment could result in termination of the proceedings. Petitioner moved that the hearing be continued ‘without’ the respondent and the tribunal agreed ordering that respondent could attend, but could neither participate, nor introduce evidence, during the final two days. On cross-petitions to confirm or vacate the resulting arbitration award made in petitioner’s favour, the trial court held that the panel’s preclusion order violated respondent’s: (i) statutory rights under New York’s Civil Practice Law and Rules; (ii) due process; and (iii) the AAA’s own Rules. The trial court therefore vacated

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12 The ICDR will not disclose to the arbitrators the identity of the defaulting party (ibid).
13 See discussion of ‘termination’ in the context of Art 29 in Chapter 29 above. If the arbitration is ‘suspended’, all administrative activities are placed on hold and all deadlines are tolled pending payment. If payment has not been made by the deadline ordered, the tribunal (or the administrator, if there is not yet a tribunal) may extend the suspension or terminate the proceeding. Discussion with ICDR Senior management (October 2010).
14 See AAA Commercial Rules, R-54 (‘If such payments are not made, the arbitrator may order the suspension or termination of the proceedings. If no arbitrator has yet been appointed, the AAA may suspend the proceedings’).
15 Compare 2010 SCC Rules, Art 45(4) (‘If the other party makes the required payment, the Arbitral Tribunal may . . . make a separate award for the reimbursement of the payment’). See also M Secomb, ‘Awards and Orders Dealing with the Advance on Costs in ICC Arbitration: Theoretical Questions and Practical Problems’, 14(1) ICC Intl Arb Bull (2003).
17 In supporting the finding of arbitrator misconduct, the court also vacated because the tribunal had impermissibly become involved directly in the dispute over the unpaid advance rather than leaving it to the AAA case manager who had sought to ‘insulate them from the negotiations’: ibid, -*5–*6.
the arbitration award. The New York Appellate Division subsequently affirmed the trial court’s ruling.  

C. Accounting and return of deposit (Article 33(4))

**Article 33(4)**

*After the award has been made, the administrator shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.*

After the award has been made, Article 33(4) provides that the administrator must provide an accounting of the deposits received and return any unexpended funds in amounts proportional to the parties’ relative contributions. The deposits are not placed in interest-bearing accounts and the depositors have no right to any interest thereon. This duty to provide an accounting also applies where the arbitration is terminated for any other reason prior to an award being rendered.

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18 See **Coty Inc v Anchor Const, Inc**, 7 AD3d 438 (NYAD 1 Dept 2004).
19 Discussion with ICDR senior management (October 2010).
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I. Introduction

The extent to which arbitral proceedings are, or should be, confidential is a topic of recurring debate within the international arbitration community. It is also one of the few areas in which there are notable distinctions between the leading sets of institutional rules. Article 34 of the ICDR Rules—with its focus on imposing a duty of confidentiality on the arbitrators and the institution—represents an innovation by the ICDR that has since been partially adopted by some other

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Chapter 34: Article 34—Confidentiality

Institutions.² By comparison, neither the ICC nor UNCITRAL Rules impose any such restrictions on the arbitrators and nor do they, or the LCIA Rules, apply to the institution.³

34.02 It is also important to note what Article 34 is not. It does not impose a duty on the parties to keep confidential all information disclosed in the course of the proceeding. In that respect, Article 20(4) provides the limited protection that hearings are 'private', meaning that they are not open to the public.⁴ Article 27(4) provides that an award may be 'made public' only with consent of the parties or as required by law.⁵ The ICDR Rules otherwise leave issues of confidentiality to the agreement of the parties, any procedural order entered by the tribunal, and the dictates of applicable arbitration laws.⁶

II. Textual commentary

34.03 The Article 34 duty of confidentiality extends to ‘confidential information disclosed during the proceedings by the parties or by witnesses’. Of course, this begs the question: what is ‘confidential information’ in this context? The remainder of the Article provides a very expansive duty to ‘keep confidential all matters relating

² See 2010 SIAC Rules, Art 35 (‘The parties and the Tribunal shall at all times treat all matters relating to the proceedings and the award as confidential’); SCC Rules, Art 46 (‘Unless otherwise agreed by the parties, the SCC and the Arbitral Tribunal shall maintain the confidentiality of the arbitration and the award’); Swiss Rules of International Arbitration, Art 43(1):

Unless the parties expressly agree in writing to the contrary, the parties undertake as a general principle to keep confidential all awards and orders as well as all materials submitted by another party in the framework of the arbitral proceedings not otherwise in the public domain . . . This undertaking also applies to the arbitrators, the tribunal-appointed experts, the secretary of the arbitral tribunal and the Chambers.

³ While LCIA Rules, Art 30.1, contains an expansive confidentiality clause for the parties, neither the tribunal nor the institution are bound to its scope. The tribunal need keep confidential only their deliberations (LCIA Rules, Art 30.2) and the institution need protect only the award (LCIA Rules, Art 30.2). Neither the UNCITRAL Rules nor the ICC Rules contain an analogous provision.

⁴ See discussion of Art 20(4) at para 20.09 above. See also AAA Commercial Rules, s R-23 (duty to maintain the privacy of the hearing).

⁵ See discussion of Art 27(4) at paras 27.09–27.11 above.


While US courts have found confidentiality provisions in other AAA rules to be enforceable, they have not recognized an implied duty of confidentiality inherent in an agreement to arbitrate. See Parilla v IAP Worldwide Services, VI, Inc, 368 F3d 269 (3d Cir 2004) (holding that the AAA Rules (Employment Disputes) relating to confidentiality were not per se unconscionable under US law); United States of America v Panhandle Eastern Corp, 118 FRD 346, 350 (CD Cal 1988) (noting that the applicant, a party to ICC arbitration, failed ‘to point to any actual agreement of confidentiality, documented or otherwise’).
II. Textual commentary

to the arbitration or the award’. Taking the language at face value, this duty must presumably extend to provision of pleadings and evidence, the hearing, the arbitrators’ deliberations,\(^7\) and the actual content of the award. It arguably also extends to the identities of the parties and the existence of a dispute. One commentator noted that Article 34 is an ‘unusually strict’ rule, preventing disclosure of awards or the identities of the parties.\(^8\)

To provide some international comparison, the 2010 SIAC Rules (extending a duty of confidentiality to the tribunal and the parties) cover ‘all matters relating to the proceedings and the award’. They define ‘matters relating to the proceedings’ as:

proceedings, and the pleadings, evidence and other materials in the arbitration proceedings and all other documents produced by another party in the proceedings or the award arising from the proceedings, but excludes any matter that is otherwise in the public domain.\(^9\)

There are three exceptions to the duty of confidentiality in Article 34.

(1) In keeping with the principle of party autonomy, the parties can agree otherwise.

(2) There is a carve-out for Article 27—presumably a reference to Article 27(8), in which the ICDR reserves the right, unless agreed otherwise, to publish redacted awards.\(^10\)

(3) Finally, the duty may be abrogated ‘as required by applicable law’. Disclosure pursuant to applicable law may encompass, for example, pursuant to a subpoena or as part of public access to judicial records in arbitration-related litigation.\(^11\)

One also assumes that where information becomes available in the public domain, the Article 34 duty no longer applies to the extent of that disclosure.\(^12\)

Of course, there are no sanctions for a breach of any Article 34 duty. However, if an arbitrator were to commit such an act, it would have serious reputational repercussions. Similarly, the ICDR’s success is dependent on protecting confidentiality of information in its control. The broad scope of Article 34 can therefore be understood as one of the ways in which the ICDR encourages parties to use its services.

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\(^7\) LCIA Rules, Art 30.2, explicitly provides that the deliberations are to remain confidential, save to the extent that disclosure of an arbitrator’s refusal to participate is required.


\(^9\) SIAC Rules, Art 35.3.

\(^10\) See discussion of Art 27(8) at para 27.11 above.

\(^11\) See eg SIAC Rules, Art 35.2 (listing permissible disclosure, although not all situations will apply to the arbitrators or the relevant institution). In the context of disclosure by arbitrators, note also that disclosure of some information may occur in being considered for other appointments.

\(^12\) See eg SIAC Rules, Art 35.3 (confidentiality exception ‘excludes any matter that is otherwise in the public domain’); Swiss Rules, Art 43(1) (same). See also Zurich Am Ins Co v Rite Aid Corp, 345 F Supp 2d 497 (ED Pa 2004) (unsealing the record and noting that the confidentiality procedures of the AAA did not ‘trump the clear law and policy standards . . . for maintaining open and accessible records of legal matters for public scrutiny’: ibid, 507).
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ARTICLE 35—EXCLUSION OF LIABILITY

I. Introduction

Article 35 seeks to absolve the tribunal and the ICDR administrator of any liability in connection with the arbitration except for the consequences of intentional wrongdoing. While arbitrator immunity and that of arbitral institutions is typically dealt with in applicable national laws, Article 35 performs the important additional function of providing a contractual basis for granting immunity. The text is similar to the core language in the analogous AAA Commercial Rules, section R-48 (a text that is repeated in the other AAA specialized arbitration rules). Its substance is also broadly similar to that of the other arbitral institutions and the newly revised 2010 UNCITRAL Rules. Article 35 brings the ICDR Rules into conformity with most national arbitration regimes in common law countries, which provide arbitrators with statutory or common law immunities from civil claims against them flowing from their performance of their adjudicative duties.¹

Consistent with most national legal systems and the rules of other institutions, Article 35 grants immunity to both the arbitrators and the administrator for any act or omission in connection with any ICDR arbitration. The reference to the undefined ‘administrator’ is less explicit than the list of office holders, staff, and court members associated with the LCIA and ICC in the equivalent provisions. However, the intent is clearly to cover all ICDR personnel. The ICC rule is also explicit in stating that there shall be no liability ‘to any person’, whereas both the ICDR and LCIA provisions refer to not being liable to any ‘party’, potentially creating an ambiguity about whether the scope of immunity extends only to ‘parties’ to the arbitration proceeding.

In contrast to the exclusion of liability for ‘intentional wrongdoing’, the SCC allows liability for gross negligence. Perhaps more controversially, the ICC’s Article 34 provides an absolute exclusion of liability without carving out deliberate wrongdoing. LCIA Rules, Article 31.1, is on similar terms to the ICDR Rule, excluding ‘conscious and deliberate wrongdoing’. Commentators on Article 31.1 note that the Arbitration Act 1996, which provides the statutory framework for arbitrations with seats in England and Wales, provides a similar broad grant of immunity, but with a carve-out for ‘bad faith’. The 2010 revisions to the UNCITRAL Rules adopted for the first time a provision on arbitrator immunity. It is expressed as being a waiver by the parties of any claims ‘to the fullest extent permitted under the applicable law’, but expressly excludes from coverage any ‘intentional wrongdoing’.

Article 35 is strangely silent on the corollary of immunity from liability: immunity from being named in a suit or called as a witness in any litigation. The standard immunity language in the AAA Commercial Rules provides that ‘neither the AAA nor an arbitrator in a proceeding under these rules is a necessary or proper party in judicial proceedings relating to the arbitration’. The LCIA Rules go even further to state that neither the institution, nor the arbitrators, nor any tribunal-appointed

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2 See LCIA Rules, Art 31.1; ICC Rules, Art 34.
3 SCC Rules, Art 48 (‘Neither the SCC nor the arbitrator(s) are liable to any party for any act or omission in connection with the arbitration unless such act or omission constitutes wilful misconduct or gross negligence’).
4 See WL Craig, WW Park, and J Paulsson, International Chamber of Commerce Arbitration (3rd edn, Oceana Publications, New York, 2000) 181 (noting that the ICC rejected a proposal to exclude deliberate wrongdoing); see also Gaillard and Savage (eds), op cit, 1,142 ff.
7 See AAA Commercial Rules, s R-48(b). Note that the AAA Commercial Rules also explicitly provide that the AAA ‘shall, upon the written request of a party, furnish to the party, at the party's
expert ‘shall be under any legal obligation to make any statement to any person about any matter concerning the arbitration, nor shall any party seek to make any of these persons a witness in any legal or other proceedings arising out of the arbitration’. While not explicitly stated in the ICDR Rules, the AAA has previously taken the position that arbitrators should not be subjected to giving evidence of any sort in post-award litigation.

At the end of the day, the efficacy of Article 35 is largely dependent on what is provided for in applicable national laws. Because of the arbitrators’ adjudicative role, most jurisdictions have laws offering extensive immunity from suit. In the US, while not consistent across all jurisdictions, arbitrators are generally considered to be the functional equivalent of a judge, thus arbitrators’ immunity follows suit. Moreover, US courts have held that judicial immunity extends to arbitrators, the tribunal, and the administrators alike.

Of course, the arbitrators and parties may also enter into specific contractual arrangements concerning immunity, in addition to that provided in the ICDR Rules, to the extent permitted by the applicable law.

expense, certified copies of any paper in the AAA’s possession that may be required in judicial proceedings relating to the arbitration: see s R-47.

8 See LCIA Rules, Art 31.2.
9 See Gearhardt v Cadillac Plastics Group, Inc, 140 FRD 349 (SD Ohio 1992) (refusing to permit an arbitrator to be deposed concerning his preparation of the award and any medical or mental condition that may have affected his conduct in the arbitration, where defendant was challenging the award on the basis that the arbitrator may have been suffering from senile dementia or some other form of neurological disorder). Note that the court also relied on an amicus curiae brief from the AAA advising that the request was ‘unprecedented in the AAA’s 65-year history of administering arbitration proceedings’: ibid, 351.

10 In the US, questions of arbitrator immunity and compellability to give evidence may fall under applicable state or federal law. See eg Revised Uniform Arbitration Act of 2000, s 14(d) (‘arbitrators are also generally accorded immunity of process when subpoenaed or summoned to testify in a judicial proceeding in a case arising from their service as arbitrator’); Sperry Intl Trade, Inc v Gov’t of Israel, 602 FSupp 1440 (SDNY 1985) (‘[A]n arbitrator may not testify as to the meaning or construction of his written award’).
11 See Revised Uniform Arbitration Act of 2000, s 14(a); Austern v Chicago Bd Options Exchange, Inc, 898 F2d 882, 886 (2d Cir 1990); Wasyl, Inc v First Boston Corp, 813 F2d 1579 (9th Cir 1987); Corey v New York Stock Exchange, 691 F2d 1205 (6th Cir 1982); Tamari v Conrad, 552 F2d 778 (7th Cir 1977).
12 See Acuna v Am Arbitration Assn, 180 F Appx 699, 700 (9th Cir 2006) (holding ‘arbitral immunity protects defendants [arbitrator] and the American Arbitration Association (‘AAA’) from liability for the wrongful conduct alleged . . . ‘); United States v City of Hayward, 36 F3d 832, 838 (9th Cir1994) (acknowledging the extension of arbitral immunity to sponsoring boards).
13 See Pacific Insurers Employment Co v Moglia, 365 BR 863 (ND Ill 2007) (holding that arbitrators acting pursuant to the AAA Commercial Rules had the authority to require the parties to sign a ‘hold harmless’ agreement by which the parties undertook not to assert any claims against the arbitrators).
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ARTICLE 36—INTERPRETATION OF RULES

I. Introduction

Article 36 provides a bright-line rule that seeks to clarify when the arbitrators, as opposed to the institution, are responsible for interpreting and applying the ICDR Rules: to the extent that a rule impacts on the tribunal’s powers and duties, then the tribunal is charged with its application; in all other cases, this duty falls on the ICDR. Practically speaking, however, given the ICDR’s extensive experience with applying the rules, arbitrators typically will consult with the institution before making such an interpretation.

II. Textual commentary

The intention behind the division of responsibilities in Article 36 is self-explanatory. Nevertheless, it may not always be so clear what provisions ‘relate
to [the tribunal’s] powers and duties’ and therefore fall to it to be decided. In practice, however, the ICDR is unlikely to interfere with a tribunal’s exercise of its power pursuant to the rules. More importantly, the ICDR staff are available to assist arbitrators with questions that may arise about a particular provision.

36.03 The analogous provision in the AAA Commercial Rules (and in the other AAA Arbitration Rules) provides the same text as in Article 36, but also states that where there is a dispute between arbitrators over ‘the meaning or application of these rules, it shall be decided by a majority vote’. Further, ‘if that is not possible, either an arbitrator or a party may refer the question to the AAA for final decision’.¹

36.04 The AAA rule on interpretation has been considered by US courts mainly in the context of rejecting challenges to awards. Courts have invoked that provision in dismissing arguments that the tribunal misapplied the rules regarding, for example, scheduling of a hearing after an initial award,² submission of supporting documents to correct an inadvertent omission,³ timeliness of an arbitral award,⁴ the tribunal’s decision to hold a hearing following a vacancy,⁵ and suspension of the proceedings following non-payment of costs.⁶

36.05 Article 36 of the ICDR Rules was specifically addressed by a US federal appellate court in the T Co Case.⁷ The court cited to Article 36 in finding that where the parties had agreed to be bound by the ICDR Rules, a reviewing court must accord ‘significant deference to the arbitrator’s interpretation’ of the rules.⁸ Thus, the court refused to second-guess an arbitrator’s interpretation of his powers to correct an award under Article 30 of the ICDR Rules.⁹

36.06 The ICC, SIAC, and other institutions issue ‘Practice Notes’ to ‘supplement, regulate and implement these Rules for the purpose of facilitating the administration of arbitrations governed by these Rules’.¹⁰ The ICDR also issues Practice Notes, but, to date, the only current note is the ICDR Guidelines for Arbitrators Concerning Exchanges of Information.¹¹ Practice advisories about amendments to

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¹ See AAA Commercial Rules, s R-33 (‘Interpretation and Application of Rules’).
² See Lagstein v Certain Underwriters at Lloyd’s, London, 607 F3d 634, 643 (9th Cir 2010).
⁴ See Koch Oil and Transocean Gulf Oil Co, 751 F2d 551, 554 (2d Cir 1985); Matter of Arbitration No AAA13-161-0511-85 Under Grain Arbitration Rules, 867 F2d 130, 134 (2d Cir 1989).
⁶ See Lifescan, Inc v Premier Diabetic Services, Inc, 363 F3d 1010, 1011 (9th Cir 2004).
⁸ Ibid, 345.
⁹ Ibid. See also Contec Corp v Remote Solution, Co Ltd, 398 F3d 205 (2d Cir 2005) (holding that the parties incorporation of the AAA Commercial Rules manifested intent to have tribunal determine its own jurisdiction to bind non-signatory to the arbitration agreement).
¹⁰ SIAC Rules, Art 36.3.
¹¹ See discussion at paras 1.48–1.50 above.
the rules or the filing fees are also regularly published on the AAA website. The ICDR has also recently inaugurated an email newsletter disseminated to practitioners and other users of ICDR arbitration.

The ICDR Rules do not contain a catch-all ‘General Rule’ of the sort found in ICC Rules, Article 35, and LCIA Rules, Article 32, in which the tribunal and the institution are directed that, in all matters not expressly provided for in the rules, they are to act in the ‘spirit of these Rules’ and to make every effort to ensure that the resulting award is enforceable. Nevertheless, the ICDR considers that even though not explicitly stated in the ICDR Rules, such principles are intrinsic to the rules as a whole.

12 See <http://www adr org/sp asp id=28819>  
13 A similar ‘gap-filling provision’ was considered during the debate on revising the UNCITRAL Rules, but ultimately abandoned in the absence of consensus. See UNCITRAL, Report of Working Group II on the Work of its 52nd Session, UN Doc A/ CN.9/688 (19 February 2010), paras 39–44.  
14 Comment made by ICDR senior management.
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ARTICLE 37—EMERGENCY MEASURES OF PROTECTION

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A. Applicability (Article 37(1))

B. Application for emergency relief (Article 37(2) and (3))

C. The emergency arbitrator’s powers (Article 37(4) and (5))

D. Tribunal may reconsider once constituted (Article 37(6))

E. Costs and security for costs (Article 37(7) and (9))

F. Party may seek judicial emergency relief (Article 37(8))

Article 37

1. Unless the parties agree otherwise, the provisions of this Article 37 shall apply to arbitrations conducted under arbitration clauses or agreements entered on or after May 1, 2006.

2. A party in need of emergency relief prior to the constitution of the tribunal shall notify the administrator and all other parties in writing of the nature of the relief sought and the reasons why such relief is required on an emergency basis. The application shall also set forth the reasons why the party is entitled to such relief. Such notice may be given by e-mail, facsimile transmission or other reliable means, but must include a statement certifying that all other parties have been notified or an explanation of the steps taken in good faith to notify other parties.

3. Within one business day of receipt of notice as provided in paragraph 2, the administrator shall appoint a single emergency arbitrator from a special panel of emergency arbitrators designated to rule on emergency applications. Prior to accepting appointment, a prospective emergency arbitrator shall disclose to the administrator any circumstance likely to give rise to justifiable doubts to the arbitrator’s impartiality or independence. Any challenge to the appointment of the emergency arbitrator must be made within one business day of the communication by the administrator to the parties of the appointment of the emergency arbitrator and the circumstances disclosed.

4. The emergency arbitrator shall as soon as possible, but in any event within two business days of appointment, establish a schedule for consideration of the application for emergency relief. Such schedule shall provide a reasonable opportunity to all parties to be heard, but may provide for proceedings by telephone conference or on written submissions as alternatives to a formal hearing. The emergency arbitrator shall have the authority vested in the
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tribunal under Article 15, including the authority to rule on her/his own jurisdiction, and shall resolve any disputes over the applicability of this Article 37.

5. The emergency arbitrator shall have the power to order or award any interim or conservancy measure the emergency arbitrator deems necessary, including injunctive relief and measures for the protection or conservation of property. Any such measure may take the form of an interim award or of an order. The emergency arbitrator shall give reasons in either case. The emergency arbitrator may modify or vacate the interim award or order for good cause shown.

6. The emergency arbitrator shall have no further power to act after the tribunal is constituted. Once the tribunal has been constituted, the tribunal may reconsider, modify or vacate the interim award or order of emergency relief issued by the emergency arbitrator. The emergency arbitrator may not serve as a member of the tribunal unless the parties agree otherwise.

7. Any interim award or order of emergency relief may be conditioned on provision by the party seeking such relief of appropriate security.

8. A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with this Article 37 or with the agreement to arbitrate or a waiver of the right to arbitrate. If the administrator is directed by a judicial authority to nominate a special master to consider and report on an application for emergency relief, the administrator shall proceed as in Paragraph 2 of this article and the references to the emergency arbitrator shall be read to mean the special master, except that the special master shall issue a report rather than an interim award.

9. The costs associated with applications for emergency relief shall initially be apportioned by the emergency arbitrator or special master, subject to the power of the tribunal to determine finally the apportionment of such costs.

I. Introduction

Article 37 came into force on 1 May 2006 and, at the time, represented a groundbreaking innovation in how to resolve the intractable problem of providing emergency relief prior to the appointment of a tribunal. Through the procedures detailed in Article 37, a party may apply to secure expedited emergency relief even before an arbitrator has been appointed. On receipt of such an application, the ICDR will appoint an emergency arbitrator, who is tasked with considering the application and who has the power to order interim awards, to protect or conserve property, and to make other orders of emergency relief. Prior to the advent of Article 37, a party requiring emergency relief before the tribunal was constituted had to approach the relevant national court for some form of preliminary relief. The court process could be time-consuming, costly, and unpredictable. More importantly, it left parties at the mercy of the local judiciary, the avoidance of which was often precisely why they had opted instead to go to arbitration. In addition, such applications could be rendered pointless in jurisdictions in which courts denied
applications for such relief as being inconsistent with the existence of an arbitration agreement.\(^1\)

Article 37 has its genesis in the analogous provision adopted in 1999 as part of the AAA Commercial Rules: the Optional Rules for Emergency Measures of Protection.\(^2\) As the name suggests, parties had to opt in prospectively to avail themselves of this mechanism. In contrast, Article 37 applies automatically to all parties who entered into an arbitration clause or agreement covered by the ICDR Rules on or after 1 May 2006.

Importantly, these emergency measures of protection exist separately from Article 21, which empowers the arbitral tribunal—if it has already been constituted—to order interim measures of protection. Further, and significantly, a party may still choose to go to a court of competent jurisdiction to obtain emergency relief, such as a preliminary injunction, a temporary restraining order, or an order to preserve evidence. The real utility of Article 37 lies in situations in which the tribunal has not yet been appointed and a party fears that the appropriate courts will not grant interim relief or it will be ineffective.

According to ICDR senior management, as of October 2010, the Article 37 procedures had been formally invoked on 14 occasions, resulting in 11 interim awards being rendered (of the other cases, one was withdrawn, one settled, and one was pending at the time of inquiry). The time from filing of the application to issue of the interim order was, on average, approximately three weeks. Anecdotal evidence suggests that the threat of these procedures being invoked may also have influenced parties’ behaviour such that formal recourse to Article 37 became unnecessary.\(^3\) Given that Article 37 is relatively new and that there is little publicly available information on its application, it is difficult to comment on its practical utility. Nevertheless, Article 37 has been the subject of many commentaries.\(^4\)

In order to better appreciate Article 37, it is necessary briefly to give an overview of the other competing mechanisms offering emergency relief under other arbitration

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1 See discussion of Art 21 at para 21.08 above (discussing jurisdictions in which courts were reticent to exert jurisdiction in the face of an arbitration clause).
3 Comments made by ICDR senior management (October 2010).
rules or laws. As an important starting point, since 1990, the ICC has offered a ‘Pre-arbitral Referee Procedure’ that permits parties to have a dispute submitted to a referee for, amongst other things, emergency orders. The referee, unless otherwise agreed, has the power:

(a) to order any conservatory measures necessary to prevent either immediate damage or irreparable loss;
(b) to order a party to make to a payment that ought to be made;
(c) to order a party to abide by the party’s contractual obligations, including the signing or delivery of any document, or the procuring by a party of the signature or delivery of a document; and
(d) to order preservation of evidence.

However, to obtain the benefit of the Pre-arbitral Referee Procedure, the parties must have expressly incorporated the procedures into the arbitration clause or some other written agreement. While the referee’s orders are ‘binding’ on the parties until the referee or the tribunal decides otherwise, courts have held that the referee’s orders are not enforceable, because they are not ‘arbitral awards’ under the New York Convention.

The LCIA has attempted to address the issue within its rules themselves by allowing a party to apply for ‘expedited formation’ of a tribunal. The LCIA may, in its complete discretion, abridge any time limit under the LCIA Rules for formation of the tribunal. The parties must then rely on the tribunal’s powers to make interim awards. While the effect is to permit the LCIA to shorten the process of constituting the tribunal, there is still potential for considerable delay as the LCIA is not authorized to override the right of the parties to nominate party-appointed arbitrators. The LCIA typically shortens the time limit within which the respondent must reply to the arbitration demand, but observers note that only rarely is the process significantly expedited.

5 Available online at <http://www.iccwbo.org/court/arbitration/id5095/index.html>
6 ICC Rules for a Pre-arbitral Referee Procedure, Art 2.1.
7 See the ICC’s recommended clause at <http://www.iccwbo.org/court/arbitration/id5095/index.html>: ‘Any party to this contract shall have the right to have recourse to and shall be bound by the Pre-arbitral Referee Procedure of the International Chamber of Commerce in accordance with its Rules for a Pre-arbitral Referee Procedure.’
8 ICC Rules for a Pre-arbitral Referee Procedure, Art 6.3.
9 Meredith and Birch, op cit.
10 LCIA Rules, Art 9.
11 Ibid, Art 25.
12 Ibid, Art 9.3.
13 N Blackaby, C Partasides, A Redfern, and M Hunter, Redfern and Hunter on Law and Practice of International Commercial Arbitration (5th edn, Oxford University Press, Oxford, 2009) paras 6-259–6-262. In one case, the LCIA required that the sole arbitrator be appointed by the parties within 48 hours of the arbitration demand.
The UNCITRAL Rules do not contain an analogous provision. Article 17 of the UNCITRAL Model Law does, however, provide another approach by encouraging states to adopt an arbitration law that deepens the arbitral tribunal’s post-constitution powers to provide emergency relief. The Model Law was extensively revised in 2006 to acknowledge the importance of interim awards in arbitral proceedings and to include optional additional provisions for so-called ‘preliminary orders’. Thus, pursuant to Article 17(B), a ‘party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested’. The 2006 adoption of this expanded Article 17 was very controversial, with most criticism focused on the potential for making *ex parte* applications. Whatever the merits of this approach, most commentators conclude that concerns remain about the effectiveness of such ‘preliminary orders’, which are explicitly binding on the parties, but do not constitute an award and are not ‘subject to enforcement by a court’. More fundamentally, in contrast to Article 37 of the ICDR Rules, the UNCITRAL Model Law does not provide a mechanism for emergency relief prior to the tribunal’s constitution.

The revised Rules of the Netherlands Arbitration Institute (NAI), effective 1 January 2010, allow for ‘Summary Arbitral Procedures’, under which parties in need of an immediate provisional measure can request that the NAI Secretariat appoint a tribunal to decide the summary proceedings. The NAI Summary Arbitral Procedures have much in common with Article 37—they allow for the appointment of a sole arbitrator who has the discretion to grant emergency awards before, if appropriate, a permanent arbitration panel charged with hearing the merits is constituted. Importantly, both the Rules and the Netherlands Arbitration Act specifically state that decisions rendered in Summary Arbitral Procedures are regarded as ‘arbitral awards’ subject to immediate enforcement.

In January 2010, the SCC modified its Arbitration Rules to incorporate procedures for the appointment of an emergency arbitrator with powers to issue interim awards.

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15 UNCITRAL Model Law, 2006 Revisions, Art 17(B).
17 UNCITRAL Model Law, Art 17(C)(5).
18 Netherlands Arbitration Institute (NAI) Arbitration Rules, Section Four A, Art 42a ff.
19 Ibid, Art 42(l).
20 Netherlands Arbitration Act, art 1051(3).
before an arbitration panel is appointed. The SCC Rules are also very similar to Article 37. Upon application for relief, a single emergency arbitrator is appointed by the SCC Board. The arbitrator may conduct proceedings as he or she sees fit, but must issue a decision in five days absent an extension from the SCC Board. That award is binding and enforceable, but subject to review by the emergency arbitrator and by the tribunal, once constituted. Given the recent creation of this new provision, its effectiveness has yet to be determined.

37.10 In July 2010, the SIAC introduced Rules for Emergency Proceedings, both in the form of expedited procedures (Article 5) and a process to appoint an ‘emergency arbitrator’ empowered to give emergency relief prior to the tribunal’s appointment (Schedule 1). With respect to the latter, the SIAC chairman (or his or her deputy) appoints an emergency arbitrator within one business day of receipt of a party’s application; within two business days of the appointment, the emergency arbitrator must set a schedule to consider the application. The emergency arbitrator has power to order or award any interim relief that he or she deems necessary. As long as the tribunal is constituted within 90 days of the interim award, the award is binding, but subject to review by the tribunal. This SIAC initiative clearly draws on the Article 37 mechanism and it will be interesting to see how popular it becomes with arbitration users.

II. Textual commentary

A. Applicability (Article 37(1))

**Article 37(1)**

Unless the parties agree otherwise, the provisions of this Article 37 shall apply to arbitrations conducted under arbitration clauses or agreements entered on or after May 1, 2006.

37.11 Article 37’s predecessor, the Optional Rules for Emergency Measures of Protection, was developed by the AAA in 1999 to provide temporary relief to parties after a case

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22 Ibid, Art 4(1).
23 Ibid, Art 7.
24 Ibid, Art 8(1).
26 SIAC Rules, Sch 1(2).
27 Ibid, (5).
28 Ibid, (6).
29 Ibid, (7)–(9).
was filed, but prior to the tribunal’s constitution. Because the Optional Rules had to be agreed to by both parties, they were not frequently used. Thus, a key feature of Article 37 is that it is applicable to all arbitrations conducted pursuant to agreements or clauses entered into on or after 1 May 2006, unless otherwise agreed.

B. Application for emergency relief (Article 37(2) and (3))

**Article 37(2)**

A party in need of emergency relief prior to the constitution of the tribunal shall notify the administrator and all other parties in writing of the nature of the relief sought and the reasons why such relief is required on an emergency basis. The application shall also set forth the reasons why the party is entitled to such relief. Such notice may be given by e-mail, facsimile transmission or other reliable means, but must include a statement certifying that all other parties have been notified or an explanation of the steps taken in good faith to notify other parties.

**Article 37(3)**

Within one business day of receipt of notice as provided in paragraph 2, the administrator shall appoint a single emergency arbitrator from a special panel of emergency arbitrators designated to rule on emergency applications. Prior to accepting appointment, a prospective emergency arbitrator shall disclose to the administrator any circumstance likely to give rise to justifiable doubts as to the arbitrator’s impartiality or independence. Any challenge to the appointment of the emergency arbitrator must be made within one business day of the communication by the administrator to the parties of the appointment of the emergency arbitrator and the circumstances disclosed.

The application for emergency relief must come after the demand for arbitration has been filed (pursuant to Article 2), but before the panel is appointed. The SCC Rules, interestingly, do not require a request for arbitration prior to the request for emergency relief. The SCC considered this unnecessary, ‘as it limits the usefulness of the provisions without providing any advantages’.

Article 37(2) provides that the party seeking emergency relief shall notify the administrator and all other parties in writing of the nature of the relief sought, and the reasons why such relief is required on an emergency basis. The notice must include a statement ‘certifying that all other parties have been notified or an explanation of the steps taken in good faith to notify other parties’. On its face, therefore, there is no provision for making such an application on an ex parte basis. Similarly, the NAI, SIAC, and SCC Rules all require notice to the opposing party.

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32 NAI Arbitration Rules, Art 42d; SIAC Rules, Sch 1(1); see Rules, App II, Art 3.
In a situation in which there is concern that a party, once notified of the claim, will try to hide assets or otherwise take pre-emptive action, Article 37 can thus be cumbersome. In such a case, where available, *ex parte* judicial relief may be preferable.

37.14 While there is no prescribed form for the application, commentators have noted that the first four requests, filed between May 2006 and May 2008, were each approximately ten pages long and contained significant detail. More recent information shows that the applications have ranged from a two-page letter to a 60-page formal application with 500 pages of supporting documentation. In the absence of formal requirements and by analogy to a litigation procedure, some Article 37 applications are supported by affidavit evidence of the key facts and as to the ‘emergency’ nature of the application. But the procedure is intended to be flexible and there is not yet any established practice.

37.15 Article 37(3) provides that the emergency arbitrator shall be appointed by the ICDR ‘administrator’, within one business day of the request for emergency relief. The first point to note is that, despite the use of ‘shall’ suggesting that the ICDR administrator is not intended to perform any ‘gatekeeper’ function, the ICDR will do a preliminary review to determine that the Article 37 requirements have been met. ICDR senior management then performs the task of selecting an appropriate arbitrator from the standing panel of qualified emergency arbitrators. The emergency panel list is not made available to the public, but it is made up of senior members of the global arbitration community, with at least 15 years’ experience (as is required of all members of the ICDR panel of arbitrators). The emergency arbitrator is selected based on availability and area of expertise. Relying on somewhat vaguer language, the NAI requires the administrator to appoint an arbitrator ‘as soon as possible after the receipt of the request’. The new SCC provision, however, attempts to reduce any possible uncertainty in the timeline by specifying that the SCC Board has 24 hours after receipt of the application in which to appoint an emergency arbitrator.

37.16 Prior to accepting appointment, it is incumbent on the emergency arbitrator to disclose to the administrator any circumstance likely to give rise to justifiable doubts as to that individual’s impartiality or independence. This mirrors the standard of

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34 Discussion with ICDR senior management (October 2010).
35 Ibid.
37 SCC, Draft New Rules with Notes, Appx II, Art 4, available online at <http://www.sccinstitute.com/filearchive/2/25690/Rules_on_an_Emergency_Arbitrator_on-Interim_Measures_NOTES.pdf> (rejecting the, ‘one business day’ standard because of the uncertainty inherent in such a phrase).
II. Textual commentary

arbitrator impartiality required by Article 7. Article 37(3) requires that any challenge to the emergency arbitrator must be made within one business day of the administrator’s communication of the appointment and of the circumstances disclosed. As with the appointment power, the duty to consider and rule on any challenge lies solely with the ICDR. Apparently, there have, to date, been a total of four challenges to emergency arbitrators, resulting in one case of removal and appointment of a new arbitrator.

By referring to the decision-maker as an ‘arbitrator’, Article 37 makes clear that the emergency relief procedure, the appointment of the emergency arbitrator, and the ultimate orders and awards are all to be treated as part of an ‘arbitration’ and therefore subject to the applicable local arbitration laws and international arbitration treaties. This is not the same in the ICC’s ‘referee’ procedure, in which at least some courts have held that the referee is not an arbitrator.

C. The emergency arbitrator’s powers (Article 37(4) and (5))

**Article 37(4)**

The emergency arbitrator shall as soon as possible, but in any event within two business days of appointment, establish a schedule for consideration of the application for emergency relief. Such schedule shall provide a reasonable opportunity to all parties to be heard, but may provide for proceedings by telephone conference or on written submissions as alternatives to a formal hearing. The emergency arbitrator shall have the authority vested in the tribunal under Article 15, including the authority to rule on her/his own jurisdiction, and shall resolve any disputes over the applicability of this Article 37.

**Article 37(5)**

The emergency arbitrator shall have the power to order or award any interim or conservancy measure the emergency arbitrator deems necessary, including injunctive relief and measures for the protection or conservation of property. Any such measure may take the form of an interim award or of an order. The emergency arbitrator shall give reasons in either case. The emergency arbitrator may modify or vacate the interim award or order for good cause shown.

As soon as possible, but in any event within two business days of appointment, the emergency arbitrator must establish a schedule for considering the merits of the emergency relief application. While, under these procedures, the arbitrator must

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38. See discussion of Art 7 in Chapter 7 above.
39. Information based on a discussion with ICDR senior management (October 2010). See also Lemenez and Quigley, op cit, 65 (noting that the ICDR upheld the challenge and within one business day a replacement was appointed, but that the replacement arbitrator resigned almost immediately, leading the ICDR to appoint a second replacement, again within one business day).
provide a reasonable opportunity to all parties to be heard’, a formal hearing is not required. The rules go on to specify that a phone conference or written submission may suffice. While Article 23(2) provides that, as long as the parties are ‘duly notified under [the] Rules’, the tribunal may proceed with the arbitration if a party fails to appear, it is unclear if Article 23(2) would extend to allow an emergency arbitrator to proceed with the hearing if a party fails to appear.

Article 37(4) makes clear that the emergency arbitrator has the powers provided under Article 15, including being entitled to rule on his or her own jurisdiction and on the applicability of Article 37. This is presumably intended to avoid any attempts by an unhappy respondent to undermine the Article 37 procedure by mounting a court challenge to the emergency arbitrator’s jurisdiction.

Article 37(5) grants the emergency arbitrator broad powers to order ‘any interim or conservancy measure . . . deem[ed] necessary, including injunctive relief and measures for the protection or conservation of property’. Importantly, paragraph (5) makes clear that any emergency measure ‘may take the form of an interim award or of an order’. The distinction between ‘interim awards’, ‘orders’, and other forms of decision has been addressed in the context of Article 27(7). However, unlike their UNCITRAL counterparts, the intention of the Article 37 drafters was manifestly to ensure that the resulting ‘measures’ are immediately enforceable under the New York Convention or applicable local arbitration laws. Further evidencing the desire to ensure enforceability and consistent with the similar requirement in Article 27(2), the interim award or order must be reasoned. US courts faced with such interim awards outside the Article 37 context have held that, where they have the requisite finality, they will be enforceable under the New York Convention. In Yonir Technologies, Inc v Duration Sys (1992) Ltd, the federal district court held that:

Arbitrators have the authority to award interim relief in order to protect their final award from being meaningless . . . and equitable awards involving the preservation of assets related to the subject of arbitration are generally considered ‘final’ arbitral awards subject to judicial review.

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41 See discussion of what constitutes a ‘hearing’ for purposes of Art 20 at paras 20.04–20.05 above.  
42 See discussion of Art 15 in Chapter 15 above. ICDR senior management advises that an emergency arbitrator has already had to rule on a challenge to jurisdiction (October 2010).  
43 See discussion of Art 27(7) at para 27.14 above.  
44 See discussion of Art 27(2) at para 27.06 above.  
45 See eg Konkar Maritime Enterprises v Compagnie Belge d’Affrètement, 668 FSupp 267, 272 (SDNY 1987) (confirming that an order to establish an escrow account was enforceable). See also SM Widman, ‘When It’s Over Before It’s Completed: The Finality of Interim Awards’ (2006) 24 Alternatives to the High Cost of Litigation 97. See also Sperry Intl Trade, Inc v Government of Israel, 689 F2d 301, 306 (2d Cir 1982) (enforcing an interim award issued under the pre-amendment ICDR International Rules providing that disputed monies be paid into an escrow fund pending an award on the merits).  
46 244 FSupp2d 195 (SDNY 2002).  
47 Ibid, 204. Similarly, in Pacific Reinsurance Mgmt Corp v Ohio Reinsurance Corp, 935 F2d 1019, 1023 (9th Cir 1991), the court held that a preliminary procedural award requiring the posting of a security was a final award subject to review.
While an Article 37 award or order has yet to be considered by any court, and this may depend on the subject matter of the relief granted, the US precedents support finding such emergency measures enforceable.\footnote{Yonir Technologies Inc v Duration Sys, 244 F Supp 2d 195 (SDNY 2002); Pacific Reinsurance Mgmt Corp v Ohio Reinsurance Corp, 935 F2d 1019 (9th Cir 1991); Arrowhead Global Solutions v Datapath Inc, 166 Fed Appx, 39 (4th Cir 2006).}

Pursuant to Article 37(5), the emergency arbitrator retains the power to modify or vacate the interim award or order for good cause shown. This is a pragmatic necessity given that, as with applications for emergency relief in court, the decision-maker has to respond very quickly to a potentially uncertain factual and legal scenario. It is quite conceivable that, before the full tribunal has been appointed, the emergency arbitrator will have to deal with an application to vacate or modify the emergency measure.\footnote{As of October 2010, ICDR senior management advises that an emergency arbitrator has not vacated his or her own emergency measure.}

**D. Tribunal may reconsider once constituted (Article 37(6))**

*Article 37(6)*

The emergency arbitrator shall have no further power to act after the tribunal is constituted. Once the tribunal has been constituted, the tribunal may reconsider, modify or vacate the interim award or order of emergency relief issued by the emergency arbitrator. The emergency arbitrator may not serve as a member of the tribunal unless the parties agree otherwise.

The emergency arbitrator becomes *functus officio* once the tribunal in the merits proceeding is constituted. The emergency arbitrator may not serve as a member of the tribunal unless otherwise agreed by the parties. Once in place, the tribunal may reconsider, modify, or vacate the interim award or order. Again, this acknowledges that, with a full tribunal in place and an opportunity for more comprehensive analysis, it may be decided that the initial interim award or order is no longer appropriate.

**E. Costs and security for costs (Article 37(7) and (9))**

*Article 37(7)*

Any interim award or order of emergency relief may be conditioned on provision by the party seeking such relief of appropriate security.
Chapter 37: Article 37—Emergency Measures of Protection

Article 37(9)

The costs associated with applications for emergency relief shall initially be apportioned by the emergency arbitrator or special master, subject to the power of the tribunal to determine finally the apportionment of such costs.

37.24 Article 37(7) permits the emergency arbitrator to condition any emergency interim award or order on the applicant’s provision of ‘appropriate security’. No guidance is given on what may be appropriate security. Reference might be had to the practice in the courts of the place of arbitration in applications for interim relief. Any such determination is likely to be highly fact-specific. The ICDR advises that security has been ordered on an application for emergency measures.50

37.25 While there is no filing fee associated with the application, the parties must pay the arbitrator’s fee and expenses. The arbitrator is paid an hourly fee that is agreed to by the parties, the arbitrator, and the ICDR. According to commentators, the arbitrators in the first four cases spent between 10 and 40 hours on each case.51 Article 37(9) states that the emergency arbitrator decides the extent to which the costs of dealing with the application are to be apportioned between the parties. This therefore falls in the first instance to the emergency arbitrator’s discretion, but is subject to the tribunal’s ultimate power to make a final determination on apportionment of costs.

F. Party may seek judicial emergency relief (Article 37(8))

Article 37(8)

A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with this Article 37 or with the agreement to arbitrate or a waiver of the right to arbitrate. If the administrator is directed by a judicial authority to nominate a special master to consider and report on an application for emergency relief, the administrator shall proceed as in Paragraph 2 of this article and the references to the emergency arbitrator shall be read to mean the special master, except that the special master shall issue a report rather than an interim award.

37.26 Article 37(8) makes explicit that a party is still free to go to the appropriate courts to seek emergency relief in aid of the arbitration. Doing so is not to be considered a waiver of the right to arbitrate. This mirrors Article 21(3), in which it is confirmed that a request for judicial interim measures is not incompatible with the arbitration agreement.52

50 Discussion with ICDR senior management (October 2010).
52 See discussion of Art 21(3) at para 21.08 above.
Article 37(8) also states that if a judicial authority directs the ICDR administrator to appoint a ‘special master’, the administrator shall do so in accordance with Article 37. This is an additional route to Article 37 that has its genesis in the AAA Commercial Rules’ Optional Rules for Emergency Measures of Protection. In the USA, Federal Rules of Civil Procedure, r 53(a)(1), provides that the court may appoint a special master to ‘perform duties consented to by the parties’. The special master presents a final report to the court, which becomes a final judgment absent appeal. Under Article 37(8), anticipating that some courts will prefer to appoint a special master that has powers under the applicable arbitration rules, the special master shall take the role of the emergency arbitrator, but without producing an award.

53 Fed R Civ Pro 53(e).
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APPENDIX 1

ICDR International Dispute Resolution Procedures
(Including Mediation and Arbitration Rules)

Rules Amended and Effective June 1, 2009
Fee Schedule Amended and Effective June 1, 2010

Introduction

The international business community uses arbitration to resolve commercial disputes arising in the global marketplace. Supportive laws are in place. The New York Convention of 1958 has been widely adopted, providing a favorable legislative climate that enables the enforcement of arbitration clauses. International commercial arbitration awards are recognized by national courts in most parts of the world, even more than foreign court judgments. A key component to the successful resolution of an international commercial dispute is the role played by the administrative institution. The International Centre for Dispute Resolution® (ICDR) is the international division of the American Arbitration Association (AAA) charged with the exclusive administration of all of the AAA’s international matters. The ICDR’s experience, international expertise and multilingual staff forms an integral part of the dispute resolution process. The ICDR’s international system is premised on its ability to move the matter forward, facilitate communications, ensure that qualified arbitrators and mediators are appointed, control costs, understand cultural sensitivities, resolve procedural impasses and properly interpret and apply its International Mediation and Arbitration Rules. Additionally, the ICDR has many cooperative agreements with arbitral institutions around the world for facilitating the administration of its international cases.

International Mediation

The parties might wish to submit their dispute to an international mediation prior to arbitration. In mediation, an impartial and independent mediator assists the parties in reaching a settlement but does not have the authority to make a binding decision or award. International Mediation is administered by the ICDR in accordance with its International Mediation Rules. There is no additional administrative fee where parties to a pending arbitration attempt to mediate their dispute under the ICDR’s auspices.

If the parties want to adopt mediation as a part of their contractual dispute settlement procedure, they can insert the following mediation clause into their contract in conjunction with a standard arbitration provision:

If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation in accordance with the International Mediation Rules of the International Centre for Dispute Resolution before resorting to arbitration, litigation or some other dispute resolution procedure.

If the parties want to use a mediator to resolve an existing dispute, they can enter into the following submission:

The parties hereby submit the following dispute to mediation administered by the International Centre for Dispute Resolution in accordance with its International Mediation Rules. (The clause may also provide for
the qualifications of the mediator(s), method of payment, locale of meetings and any other item of concern to the parties.)

The ICDR can schedule the mediation anywhere in the world and will propose a list of specialized international mediators.

International Arbitration

As the ICDR is a division of the AAA, parties can arbitrate future disputes under these Rules by inserting either of the following clauses into their contracts:

"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 Arbitration Rules."

or

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

The parties may wish to consider adding:

(a) “The number of arbitrators shall be (one or three)”;  
(b) “The place of arbitration shall be (city and/or country)”; or  
(c) “The language(s) of the arbitration shall be ________________.”

Parties are encouraged, when writing their contracts or when a dispute arises, to request a conference, in person or by telephone, with the ICDR, to discuss an appropriate method for selection of arbitrators or any other matter that might facilitate efficient arbitration of the dispute.

Under these Rules, the parties are free to adopt any mutually agreeable procedure for appointing arbitrators, or may designate arbitrators upon whom they agree. Parties can reach agreements concerning appointing arbitrators either when writing their contracts or after a dispute has arisen. This flexible procedure permits parties to utilize whatever method they consider best suits their needs. For example, parties may choose to have a sole arbitrator or a tribunal of three or more. They may agree that arbitrators shall be appointed by the ICDR, or that each side shall designate one arbitrator and those two shall name a third, with the ICDR making appointments if the tribunal is not promptly formed by that procedure. Parties may mutually request the ICDR to submit to them a list of arbitrators from which each can delete names not acceptable to it, or the parties may instruct the ICDR to appoint arbitrators without the submission of lists, or may leave that matter to the sole discretion of the ICDR. Parties also may agree on a variety of other methods for establishing the tribunal. In any event, if parties are unable to agree on a procedure for appointing arbitrators or on the designation of arbitrators, the ICDR, after inviting consultation by the parties, will appoint the arbitrators. The Rules thus provide for the fullest exercise of party autonomy, while assuring that the ICDR is available to act if the parties cannot reach mutual agreement. By providing for arbitration under these Rules, parties can avoid the uncertainty of having to petition a local court to resolve procedural impasses. These Rules, as administered by the ICDR, are intended to provide prompt, effective and economical arbitration services to the global business community.

Whenever a singular term is used in the Rules, such as “party,” “claimant” or “arbitrator,” that term shall include the plural if there is more than one such entity.

Parties filing an international case with the International Centre for Dispute Resolution, or the American Arbitration Association, may file online via AAAWebFile® at <www.adr.org>. For filing assistance, parties may directly contact the ICDR in New York, Bahrain, Singapore or any one of the AAA’s regional offices.

If you would like to file a case by mail or fax, please complete the appropriate form(s) and forward to AAA/ICDR Case Filing Services.
International Mediation Rules

1. Agreement of Parties
Whenever parties have agreed in writing to mediate disputes under these International Mediation Rules, or have provided for mediation or conciliation of existing or future international disputes under the auspices of the International Centre for Dispute Resolution, the international division of the American Arbitration Association, or the American Arbitration Association without designating particular Rules, they shall be deemed to have made these Rules, as amended and in effect as of the date of the submission of the dispute, a part of their agreement.

The parties by mutual agreement may vary any part of these Rules including, but not limited to, agreeing to conduct the mediation via telephone or other electronic or technical means.

2. Initiation of Mediation
Any party or parties to a dispute may initiate mediation under the ICDR’s auspices by making a request for mediation to any of the ICDR’s regional offices or case management centers via telephone, email, regular mail or fax. Requests for mediation may also be filed online via AAA WebFile at <www.adr.org>.

The party initiating the mediation shall simultaneously notify the other party or parties of the request. The initiating party shall provide the following information to the ICDR and the other party or parties as applicable:

(i) A copy of the mediation provision of the parties’ contract or the parties’ stipulation to mediate.
(ii) The names, regular mail addresses, email addresses, and telephone numbers of all parties to the dispute and representatives, if any, in the mediation.
(iii) A brief statement of the nature of the dispute and the relief requested.
(iv) Any specific qualifications the mediator should possess.

Where there is no preexisting stipulation or contract by which the parties have provided for mediation of existing or future disputes under the auspices of the ICDR, a party may request the ICDR to invite another party to participate in “mediation by voluntary submission”. Upon receipt of such a request, the ICDR will contact the other party or parties involved in the dispute and attempt to obtain a submission to mediation.

3. Representation
Subject to any applicable law, any party may be represented by persons of the party’s choice. The names and addresses of such persons shall be communicated in writing to all parties and to the ICDR.
Appendices

4. Appointment of the Mediator

Parties may search the online profiles of the ICDR’s Panel of Mediators at <www.aaamediation.com> in an effort to agree on a mediator. If the parties have not agreed to the appointment of a mediator and have not provided any other method of appointment, the mediator shall be appointed in the following manner:

a. Upon receipt of a request for mediation, the ICDR will send to each party a list of mediators from the ICDR’s Panel of Mediators. The parties are encouraged to agree to a mediator from the submitted list and to advise the ICDR of their agreement.

b. If the parties are unable to agree upon a mediator, each party shall strike unacceptable names from the list, number the remaining names in order of preference, and return the list to the ICDR. If a party does not return the list within the time specified, all mediators on the list shall be deemed acceptable. From among the mediators who have been mutually approved by the parties, and in accordance with the designated order of mutual preference, the ICDR shall invite a mediator to serve.

c. If the parties fail to agree on any of the mediators listed, or if acceptable mediators are unable to serve, or if for any other reason the appointment cannot be made from the submitted list, the ICDR shall have the authority to make the appointment from among other members of the Panel of Mediators without the submission of additional lists.

5. Mediator’s Impartiality and Duty to Disclose

ICDR mediators are required to abide by the Model Standards of Conduct for Mediators in effect at the time a mediator is appointed to a case. Where there is a conflict between the Model Standards and any provision of these Mediation Rules, these Mediation Rules shall govern. The Standards require mediators to (i) decline a mediation if the mediator cannot conduct it in an impartial manner, and (ii) disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator’s impartiality.

Prior to accepting an appointment, ICDR mediators are required to make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for the mediator. ICDR mediators are required to disclose any circumstance likely to create a presumption of bias or prevent a resolution of the parties’ dispute within the time frame desired by the parties. Upon receipt of such disclosures, the ICDR shall immediately communicate the disclosures to the parties for their comments.

The parties may, upon receiving disclosure of actual or potential conflicts of interest of the mediator, waive such conflicts and proceed with the mediation. In the event that a party disagrees as to whether the mediator shall serve, or in the event that the mediator’s conflict of interest might reasonably be viewed as undermining the integrity of the mediation, the mediator shall be replaced.

6. Vacancies

If any mediator shall become unwilling or unable to serve, the ICDR will appoint another mediator, unless the parties agree otherwise, in accordance with section 4.

7. Duties and Responsibilities of the Mediator

i. The mediator shall conduct the mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.

ii. The mediator is authorized to conduct separate or ex parte meetings and other communications with the parties and/or their representatives, before, during, and after any scheduled mediation conference. Such communications may be conducted via telephone, in writing, via email, online, in person or otherwise.

iii. The parties are encouraged to exchange all documents pertinent to the relief requested. The mediator may request the exchange of memoranda on issues, including the underlying interests and the history of the parties’ negotiations. Information that a party wishes to keep confidential may be sent to the mediator, as necessary, in a separate communication with the mediator.
iv. The mediator does not have the authority to impose a settlement on the parties but will attempt to help them reach a satisfactory resolution of their dispute. Subject to the discretion of the mediator, the mediator may make oral or written recommendations for settlement to a party privately or, if the parties agree, to all parties jointly.

v. In the event that a complete settlement of all or some issues in dispute is not achieved within the scheduled mediation conference(s), the mediator may continue to communicate with the parties, for a period of time, in an ongoing effort to facilitate a complete settlement.

vi. The mediator is not a legal representative of any party and has no fiduciary duty to any party.

8. Responsibilities of the Parties

The parties shall ensure that appropriate representatives of each party, having authority to consummate a settlement, attend the mediation conference.

Prior to and during the scheduled mediation conference(s) the parties and their representatives shall, as appropriate to each party's circumstances, exercise their best efforts to prepare for and engage in a meaningful and productive mediation.

9. Privacy

Mediation conferences and related mediation communications are private proceedings. The parties and their representatives may attend mediation conferences. Other persons may attend only with the permission of the parties and with the consent of the mediator.

10. Confidentiality

Subject to applicable law or the parties' agreement, confidential information disclosed to a mediator by the parties or by other participants (witnesses) in the course of the mediation shall not be divulged by the mediator. The mediator shall maintain the confidentiality of all information obtained in the mediation, and all records, reports, or other documents received by a mediator while serving in that capacity shall be confidential.

The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceeding or judicial forum.

The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial, or other proceeding the following, unless agreed to by the parties or required by applicable law:

a. Views expressed or suggestions made by a party or other participant with respect to a possible settlement of the dispute;

b. Admissions made by a party or other participant in the course of the mediation proceedings;

c. Proposals made or views expressed by the mediator; or

d. The fact that a party had or had not indicated willingness to accept a proposal for settlement made by the mediator.

11. No Stenographic Record

There shall be no stenographic record of the mediation process.

12. Termination of Mediation

The mediation shall be terminated:

a. By the execution of a settlement agreement by the parties; or

b. By a written or verbal declaration of the mediator to the effect that further efforts at mediation would not contribute to a resolution of the parties' dispute; or

c. By a written or verbal declaration of all parties to the effect that the mediation proceedings are terminated; or

d. When there has been no communication between the mediator and any party or party's representative for 21 days following the conclusion of the mediation conference.
13. Exclusion of Liability
Neither the ICDR nor any mediator is a necessary party in judicial proceedings relating to the mediation. Neither the ICDR nor any mediator shall be liable to any party for any error, act or omission in connection with any mediation conducted under these Rules.

14. Interpretation and Application of Rules
The mediator shall interpret and apply these Rules insofar as they relate to the mediator’s duties and responsibilities. All other Rules shall be interpreted and applied by the ICDR.

15. Deposits
Unless otherwise directed by the mediator, the ICDR will require the parties to deposit in advance of the mediation conference such sums of money as it, in consultation with the mediator, deems necessary to cover the costs and expenses of the mediation and shall render an accounting to the parties and return any unexpended balance at the conclusion of the mediation.

16. Expenses
All expenses of the mediation, including required traveling and other expenses or charges of the mediator, shall be borne equally by the parties unless they agree otherwise. The expenses of participants for either side shall be paid by the party requesting the attendance of such participants.

17. Cost of the Mediation
There is no filing fee to initiate a mediation or a fee to request the ICDR to invite parties to mediate.

The cost of mediation is based on the hourly mediation rate published on the mediator’s ICDR profile. This rate covers both mediator compensation and an allocated portion for the ICDR’s services. There is a four-hour minimum charge for a mediation conference. Expenses referenced in Section M-16 may also apply.

If a matter submitted for mediation is withdrawn or cancelled or results in a settlement after the agreement to mediate is filed but prior to the mediation conference the cost is $250 plus any mediator time and charges incurred.

The parties will be billed equally for all costs unless they agree otherwise.

If you have questions about mediation costs or services visit our website at <www.icdr.org> or contact us at + 1 212.484.4181.

18. Language
If the parties have not agreed otherwise, the language(s) of the mediation shall be that of the documents containing the mediation agreement.

Conference Room Rental

The costs described above do not include the use of ICDR conference rooms. Conference rooms are available on a rental basis. Please contact your local ICDR office for availability and rates.

International Arbitration Rules

Article 1

a. Where parties have agreed in writing to arbitrate disputes under these International Arbitration Rules or have provided for arbitration of an international dispute by the International Centre for Dispute Resolution or the American Arbitration Association without designating particular Rules, the arbitration shall take place in accordance with these Rules, as in effect at the date of commencement of the arbitration, subject to whatever modifications the parties may adopt in writing.
b. These Rules govern the arbitration, except that, where any such rule is in conflict with any provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

c. These Rules specify the duties and responsibilities of the administrator, the International Centre for Dispute Resolution, a division of the American Arbitration Association. The administrator may provide services through its Centre, located in New York, or through the facilities of arbitral institutions with which it has agreements of cooperation.

COMMENCING THE ARBITRATION

Notice of Arbitration and Statement of Claim

Article 2
1. The party initiating arbitration ("claimant") shall give written notice of arbitration to the administrator and at the same time to the party against whom a claim is being made ("respondent").
2. Arbitral proceedings shall be deemed to commence on the date on which the administrator receives the notice of arbitration.
3. The notice of arbitration shall contain a statement of claim including the following:
   a) a demand that the dispute be referred to arbitration;
   b) the names, addresses and telephone numbers of the parties;
   c) a reference to the arbitration clause or agreement that is invoked;
   d) a reference to any contract out of or in relation to which the dispute arises;
   e) a description of the claim and an indication of the facts supporting it;
   f) the relief or remedy sought and the amount claimed; and
   g) may include proposals as to the means of designating and the number of arbitrators, the place of arbitration and the language(s) of the arbitration.
4. Upon receipt of the notice of arbitration, the administrator shall communicate with all parties with respect to the arbitration and shall acknowledge the commencement of the arbitration.

Statement of Defense and Counterclaim

Article 3
1. Within 30 days after the commencement of the arbitration, a respondent shall submit a written statement of defense, responding to the issues raised in the notice of arbitration, to the claimant and any other parties, and to the administrator.
2. At the time a respondent submits its statement of defense, a respondent may make counterclaims or assert setoffs as to any claim covered by the agreement to arbitrate, as to which the claimant shall within 30 days submit a written statement of defense to the respondent and any other parties and to the administrator.
3. A respondent shall respond to the administrator, the claimant and other parties within 30 days after the commencement of the arbitration as to any proposals the claimant may have made as to the number of arbitrators, the place of the arbitration or the language(s) of the arbitration, except to the extent that the parties have previously agreed as to these matters.
4. The arbitral tribunal, or the administrator if the arbitral tribunal has not yet been formed, may extend any of the time limits established in this article if it considers such an extension justified.

Amendments to Claims

Article 4
During the arbitral proceedings, any party may amend or supplement its claim, counterclaim or defense, unless the tribunal considers it inappropriate to allow such amendment or supplement because of the party's delay in making it, prejudice to the other parties or any other circumstances.
Appendices

A party may not amend or supplement a claim or counterclaim if the amendment or supplement would fall outside the scope of the agreement to arbitrate.

THE TRIBUNAL

Number of Arbitrators

Article 5
If the parties have not agreed on the number of arbitrators, one arbitrator shall be appointed unless the administrator determines in its discretion that three arbitrators are appropriate because of the large size, complexity or other circumstances of the case.

Appointment of Arbitrators

Article 6
1. The parties may mutually agree upon any procedure for appointing arbitrators and shall inform the administrator as to such procedure.

2. The parties may mutually designate arbitrators, with or without the assistance of the administrator. When such designations are made, the parties shall notify the administrator so that notice of the appointment can be communicated to the arbitrators, together with a copy of these Rules.

3. If within 45 days after the commencement of the arbitration, all of the parties have not mutually agreed on a procedure for appointing the arbitrator(s) or have not mutually agreed on the designation of the arbitrator(s), the administrator shall, at the written request of any party, appoint the arbitrator(s) and designate the presiding arbitrator. If all of the parties have mutually agreed upon a procedure for appointing the arbitrator(s), but all appointments have not been made within the time limits provided in that procedure, the administrator shall, at the written request of any party, perform all functions provided for in that procedure that remain to be performed.

4. In making such appointments, the administrator, after inviting consultation with the parties, shall endeavor to select suitable arbitrators. At the request of any party or on its own initiative, the administrator may appoint nationals of a country other than that of any of the parties.

5. Unless the parties have agreed otherwise no later than 45 days after the commencement of the arbitration, if the notice of arbitration names two or more claimants or two or more respondents, the administrator shall appoint all the arbitrators.

Impartiality and Independence of Arbitrators

Article 7
1. Arbitrators acting under these Rules shall be impartial and independent. Prior to accepting appointment, a prospective arbitrator shall disclose to the administrator any circumstance likely to give rise to justifiable doubts as to the arbitrator’s impartiality or independence. If, at any stage during the arbitration, new circumstances arise that may give rise to such doubts, an arbitrator shall promptly disclose such circumstances to the parties and to the administrator. Upon receipt of such information from an arbitrator or a party, the administrator shall communicate it to the other parties and to the tribunal.

2. No party or anyone acting on its behalf shall have any ex parte communication relating to the case with any arbitrator, or with any candidate for appointment as party-appointed arbitrator except to advise the candidate of the general nature of the controversy and of the anticipated proceedings and to discuss the candidate’s qualifications, availability or independence in relation to the parties, or to discuss the suitability of candidates for selection as a third arbitrator where the parties or party designated arbitrators are to participate in that selection. No party or anyone acting on its behalf shall have any ex parte communication relating to the case with any candidate for presiding arbitrator.
Appendix 1: ICDR International Dispute Resolution Procedures

**Challenge of Arbitrators**

**Article 8**
1. A party may challenge any arbitrator whenever circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence. A party wishing to challenge an arbitrator shall send notice of the challenge to the administrator within 15 days after being notified of the appointment of the arbitrator or within 15 days after the circumstances giving rise to the challenge become known to that party.
2. The challenge shall state in writing the reasons for the challenge.
3. Upon receipt of such a challenge, the administrator shall notify the other parties of the challenge. When an arbitrator has been challenged by one party, the other party or parties may agree to the acceptance of the challenge and, if there is agreement, the arbitrator shall withdraw. The challenged arbitrator may also withdraw from office in the absence of such agreement. In neither case does withdrawal imply acceptance of the validity of the grounds for the challenge.

**Article 9**
If the other party or parties do not agree to the challenge or the challenged arbitrator does not withdraw, the administrator in its sole discretion shall make the decision on the challenge.

**Replacement of an Arbitrator**

**Article 10**
If an arbitrator withdraws after a challenge, or the administrator sustains the challenge, or the administrator determines that there are sufficient reasons to accept the resignation of an arbitrator, or an arbitrator dies, a substitute arbitrator shall be appointed pursuant to the provisions of Article 6, unless the parties otherwise agree.

**Article 11**
1. If an arbitrator on a three-person tribunal fails to participate in the arbitration for reasons other than those identified in Article 10, the two other arbitrators shall have the power in their sole discretion to continue the arbitration and to make any decision, ruling or award, notwithstanding the failure of the third arbitrator to participate. In determining whether to continue the arbitration or to render any decision, ruling or award without the participation of an arbitrator, the two other arbitrators shall take into account the stage of the arbitration, the reason, if any, expressed by the third arbitrator for such nonparticipation and such other matters as they consider appropriate in the circumstances of the case. In the event that the two other arbitrators determine not to continue the arbitration without the participation of the third arbitrator, the administrator on proof satisfactory to it shall declare the office vacant, and a substitute arbitrator shall be appointed pursuant to the provisions of Article 6, unless the parties otherwise agree.
2. If a substitute arbitrator is appointed under either Article 10 or Article 11, the tribunal shall determine at its sole discretion whether all or part of any prior hearings shall be repeated.

**General Conditions**

**Representation**

**Article 12**
Any party may be represented in the arbitration. The names, addresses and telephone numbers of representatives shall be communicated in writing to the other parties and to the administrator. Once the tribunal has been established, the parties or their representatives may communicate in writing directly with the tribunal.
Place of Arbitration

Article 13
1. If the parties disagree as to the place of arbitration, the administrator may initially determine the place of arbitration, subject to the power of the tribunal to determine finally the place of arbitration within 60 days after its constitution. All such determinations shall be made having regard for the contentions of the parties and the circumstances of the arbitration.

2. The tribunal may hold conferences or hear witnesses or inspect property or documents at any place it deems appropriate. The parties shall be given sufficient written notice to enable them to be present at any such proceedings.

Language

Article 14
If the parties have not agreed otherwise, the language(s) of the arbitration shall be that of the documents containing the arbitration agreement, subject to the power of the tribunal to determine otherwise based upon the contentions of the parties and the circumstances of the arbitration. The tribunal may order that any documents delivered in another language shall be accompanied by a translation into the language(s) of the arbitration.

Pleas as to Jurisdiction

Article 15
1. The tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.

2. The tribunal shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the tribunal that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

3. A party must object to the jurisdiction of the tribunal or to the arbitrability of a claim or counterclaim no later than the filing of the statement of defense, as provided in Article 3, to the claim or counterclaim that gives rise to the objection. The tribunal may rule on such objections as a preliminary matter or as part of the final award.

Conduct of the Arbitration

Article 16
1. Subject to these Rules, the tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.

2. The tribunal, exercising its discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute. It may conduct a preparatory conference with the parties for the purpose of organizing, scheduling and agreeing to procedures to expedite the subsequent proceedings.

3. The tribunal may in its discretion direct the order of proof, bifurcate proceedings, exclude cumulative or irrelevant testimony or other evidence and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.

4. Documents or information supplied to the tribunal by one party shall at the same time be communicated by that party to the other party or parties.
**Further Written Statements**

**Article 17**

1. The tribunal may decide whether the parties shall present any written statements in addition to statements of claims and counterclaims and statements of defense, and it shall fix the periods of time for submitting any such statements.

2. The periods of time fixed by the tribunal for the communication of such written statements should not exceed 45 days. However, the tribunal may extend such time limits if it considers such an extension justified.

**Notices**

**Article 18**

1. Unless otherwise agreed by the parties or ordered by the tribunal, all notices, statements and written communications may be served on a party by air mail, air courier, facsimile transmission, telex, telegram or other written forms of electronic communication addressed to the party or its representative at its last known address or by personal service.

2. For the purpose of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice, statement or written communication is received. If the last day of such period is an official holiday at the place received, the period is extended until the first business day which follows. Official holidays occurring during the running of the period of time are included in calculating the period.

**Evidence**

**Article 19**

1. Each party shall have the burden of proving the facts relied on to support its claim or defense.

2. The tribunal may order a party to deliver to the tribunal and to the other parties a summary of the documents and other evidence which that party intends to present in support of its claim, counterclaim or defense.

3. At any time during the proceedings, the tribunal may order parties to produce other documents, exhibits or other evidence it deems necessary or appropriate.

**Hearings**

**Article 20**

1. The tribunal shall give the parties at least 30 days advance notice of the date, time and place of the initial oral hearing. The tribunal shall give reasonable notice of subsequent hearings.

2. At least 15 days before the hearings, each party shall give the tribunal and the other parties the names and addresses of any witnesses it intends to present, the subject of their testimony and the languages in which such witnesses will give their testimony.

3. At the request of the tribunal or pursuant to mutual agreement of the parties, the administrator shall make arrangements for the interpretation of oral testimony or for a record of the hearing.

4. Hearings are private unless the parties agree otherwise or the law provides to the contrary. The tribunal may require any witness or witnesses to retire during the testimony of other witnesses. The tribunal may determine the manner in which witnesses are examined.

5. Evidence of witnesses may also be presented in the form of written statements signed by them.

6. The tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered by any party. The tribunal shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client.
Appendices

INTERIM MEASURES OF PROTECTION

Article 21
1. At the request of any party, the tribunal may take whatever interim measures it deems necessary, including injunctive relief and measures for the protection or conservation of property.
2. Such interim measures may take the form of an interim award, and the tribunal may require security for the costs of such measures.
3. A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.
4. The tribunal may in its discretion apportion costs associated with applications for interim relief in any interim award or in the final award.

EXPERTS

Article 22
1. The tribunal may appoint one or more independent experts to report to it, in writing, on specific issues designated by the tribunal and communicated to the parties.
2. The parties shall provide such an expert with any relevant information or produce for inspection any relevant documents or goods that the expert may require. Any dispute between a party and the expert as to the relevance of the requested information or goods shall be referred to the tribunal for decision.
3. Upon receipt of an expert’s report, the tribunal shall send a copy of the report to all parties and shall give the parties an opportunity to express, in writing, their opinion on the report. A party may examine any document on which the expert has relied in such a report.
4. At the request of any party, the tribunal shall give the parties an opportunity to question the expert at a hearing. At this hearing, parties may present expert witnesses to testify on the points at issue.

DEFAULT

Article 23
1. If a party fails to file a statement of defense within the time established by the tribunal without showing sufficient cause for such failure, as determined by the tribunal, the tribunal may proceed with the arbitration.
2. If a party, duly notified under these Rules, fails to appear at a hearing without showing sufficient cause for such failure, as determined by the tribunal, the tribunal may proceed with the arbitration.
3. If a party, duly invited to produce evidence or take any other steps in the proceedings, fails to do so within the time established by the tribunal without showing sufficient cause for such failure, as determined by the tribunal, the tribunal may make the award on the evidence before it.

CLOSURE OF HEARING

Article 24
1. After asking the parties if they have any further testimony or evidentiary submissions and upon receiving negative replies or if satisfied that the record is complete, the tribunal may declare the hearings closed.
2. The tribunal in its discretion, on its own motion or upon application of a party, may reopen the hearings at any time before the award is made.
Appendix 1: ICDR International Dispute Resolution Procedures

Waiver of Rules

Article 25
A party who knows that any provision of the Rules or requirement under the Rules has not been complied with, but proceeds with the arbitration without promptly stating an objection in writing thereto, shall be deemed to have waived the right to object.

Awards, Decisions and Rulings

Article 26
1. When there is more than one arbitrator, any award, decision or ruling of the arbitral tribunal shall be made by a majority of the arbitrators. If any arbitrator fails to sign the award, it shall be accompanied by a statement of the reason for the absence of such signature.
2. When the parties or the tribunal so authorize, the presiding arbitrator may make decisions or rulings on questions of procedure, subject to revision by the tribunal.

Form and Effect of the Award

Article 27
1. Awards shall be made in writing, promptly by the tribunal, and shall be final and binding on the parties. The parties undertake to carry out any such award without delay.
2. The tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons need be given.
3. The award shall contain the date and the place where the award was made, which shall be the place designated pursuant to Article 13.
4. An award may be made public only with the consent of all parties or as required by law.
5. Copies of the award shall be communicated to the parties by the administrator.
6. If the arbitration law of the country where the award is made requires the award to be filed or registered, the tribunal shall comply with such requirement.
7. In addition to making a final award, the tribunal may make interim, interlocutory or partial orders and awards.
8. Unless otherwise agreed by the parties, the administrator may publish or otherwise make publicly available selected awards, decisions and rulings that have been edited to conceal the names of the parties and other identifying details or that have been made publicly available in the course of enforcement or otherwise.

Applicable Laws and Remedies

Article 28
1. The tribunal shall apply the substantive law(s) or rules of law designated by the parties as applicable to the dispute. Failing such a designation by the parties, the tribunal shall apply such law(s) or rules of law as it determines to be appropriate.
2. In arbitrations involving the application of contracts, the tribunal shall decide in accordance with the terms of the contract and shall take into account usages of the trade applicable to the contract.
3. The tribunal shall not decide as amiable compositeur or ex aequo et bono unless the parties have expressly authorized it to do so.
4. A monetary award shall be in the currency or currencies of the contract unless the tribunal considers another currency more appropriate, and the tribunal may award such pre-award and post-award interest, simple or compound, as it considers appropriate, taking into consideration the contract and applicable law.

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5. Unless the parties agree otherwise, the parties expressly waive and forego any right to punitive, exemplary or similar damages unless a statute requires that compensatory damages be increased in a specified manner. This provision shall not apply to any award of arbitration costs to a party to compensate for dilatory or bad faith conduct in the arbitration.

**Settlement or Other Reasons for Termination**

**Article 29**

1. If the parties settle the dispute before an award is made, the tribunal shall terminate the arbitration and, if requested by all parties, may record the settlement in the form of an award on agreed terms. The tribunal is not obliged to give reasons for such an award.

2. If the continuation of the proceedings becomes unnecessary or impossible for any other reason, the tribunal shall inform the parties of its intention to terminate the proceedings. The tribunal shall thereafter issue an order terminating the arbitration, unless a party raises justifiable grounds for objection.

**Interpretation or Correction of the Award**

**Article 30**

1. Within 30 days after the receipt of an award, any party, with notice to the other parties, may request the tribunal to interpret the award or correct any clerical, typographical or computation errors or make an additional award as to claims presented but omitted from the award.

2. If the tribunal considers such a request justified, after considering the contentions of the parties, it shall comply with such a request within 30 days after the request.

**Costs**

The tribunal shall fix the costs of arbitration in its award. The tribunal may apportion such costs among the parties if it determines that such apportionment is reasonable, taking into account the circumstances of the case.

Such costs may include:

a) the fees and expenses of the arbitrators;

b) the costs of assistance required by the tribunal, including its experts;

c) the fees and expenses of the administrator;

d) the reasonable costs for legal representation of a successful party; and

e) any such costs incurred in connection with an application for interim or emergency relief pursuant to Article 21.

**Compensation of Arbitrators**

**Article 32**

Arbitrators shall be compensated based upon their amount of service, taking into account their stated rate of compensation and the size and complexity of the case. The administrator shall arrange an appropriate daily or hourly rate, based on such considerations, with the parties and with each of the arbitrators as soon as practicable after the commencement of the arbitration. If the parties fail to agree on the terms of compensation, the administrator shall establish an appropriate rate and communicate it in writing to the parties.

**Deposit of Costs**

**Article 33**

1. When a party files claims, the administrator may request the filing party to deposit appropriate amounts as an advance for the costs referred to in Article 31, paragraphs (a.), (b.) and (c.).
2. During the course of the arbitral proceedings, the tribunal may request supplementary deposits from the parties.

3. If the deposits requested are not paid in full within 30 days after the receipt of the request, the administrator shall so inform the parties, in order that one or the other of them may make the required payment. If such payments are not made, the tribunal may order the suspension or termination of the proceedings.

4. After the award has been made, the administrator shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.

Confidentiality

Article 34
Confidential information disclosed during the proceedings by the parties or by witnesses shall not be divulged by an arbitrator or by the administrator. Except as provided in Article 27, unless otherwise agreed by the parties, or required by applicable law, the members of the tribunal and the administrator shall keep confidential all matters relating to the arbitration or the award.

Exclusion of Liability

Article 35
The members of the tribunal and the administrator shall not be liable to any party for any act or omission in connection with any arbitration conducted under these Rules, except that they may be liable for the consequences of conscious and deliberate wrongdoing.

Interpretation of Rules

Article 36
The tribunal shall interpret and apply these Rules insofar as they relate to its powers and duties. The administrator shall interpret and apply all other Rules.

Emergency Measures of Protection

Article 37
1. Unless the parties agree otherwise, the provisions of this Article 37 shall apply to arbitrations conducted under arbitration clauses or agreements entered on or after May 1, 2006.

2. A party in need of emergency relief prior to the constitution of the tribunal shall notify the administrator and all other parties in writing of the nature of the relief sought and the reasons why such relief is required on an emergency basis. The application shall also set forth the reasons why the party is entitled to such relief. Such notice may be given by e-mail, facsimile transmission or other reliable means, but must include a statement certifying that all other parties have been notified or an explanation of the steps taken in good faith to notify other parties.

3. Within one business day of receipt of notice as provided in paragraph 2, the administrator shall appoint a single emergency arbitrator from a special panel of emergency arbitrators designated to rule on emergency applications. Prior to accepting appointment, a prospective emergency arbitrator shall disclose to the administrator any circumstance likely to give rise to justifiable doubts to the arbitrator's impartiality or independence. Any challenge to the appointment of the emergency arbitrator must be made within one business day of the communication by the administrator to the parties of the appointment of the emergency arbitrator and the circumstances disclosed.

4. The emergency arbitrator shall as soon as possible, but in any event within two business days of appointment, establish a schedule for consideration of the application for emergency relief. Such schedule shall provide a reasonable opportunity to all parties to be heard, but may provide for proceedings by telephone conference or on written submissions as alternatives to a formal hearing. The emergency arbitrator shall have the authority vested in the tribunal under Article 15, including
the authority to rule on her/his own jurisdiction, and shall resolve any disputes over the applicability of this Article 37.

5. The emergency arbitrator shall have the power to order or award any interim or conservancy measure the emergency arbitrator deems necessary, including injunctive relief and measures for the protection or conservation of property. Any such measure may take the form of an interim award or of an order. The emergency arbitrator shall give reasons in either case. The emergency arbitrator may modify or vacate the interim award or order for good cause shown.

6. The emergency arbitrator shall have no further power to act after the tribunal is constituted. Once the tribunal has been constituted, the tribunal may reconsider, modify or vacate the interim award or order of emergency relief issued by the emergency arbitrator. The emergency arbitrator may not serve as a member of the tribunal unless the parties agree otherwise.

7. Any interim award or order of emergency relief may be conditioned on provision by the party seeking such relief of appropriate security.

8. A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with this Article 37 or with the agreement to arbitrate or a waiver of the right to arbitrate. If the administrator is directed by a judicial authority to nominate a special master to consider and report on an application for emergency relief, the administrator shall proceed as in Paragraph 2 of this article and the references to the emergency arbitrator shall be read to mean the special master, except that the special master shall issue a report rather than an interim award.

9. The costs associated with applications for emergency relief shall initially be apportioned by the emergency arbitrator or special master, subject to the power of the tribunal to determine finally the apportionment of such costs.
APPENDIX 2

International Case Filing Administrative Fee Schedules

The ICDR has two administrative fee options for parties filing claims or counterclaims, the Standard Fee Schedule and Flexible Fee Schedule. The Standard Fee Schedule has a two payment schedule, and the Flexible Fee Schedule has a three payment schedule which offers lower initial filing fees, but potentially higher total administrative fees of approximately 12% to 19% for cases that proceed to a hearing. The administrative fees of the ICDR are based on the amount of the claim or counterclaim. Arbitrator compensation is not included in this schedule. Unless the parties agree otherwise, arbitrator compensation and administrative fees are subject to allocation by the arbitrator in the award.

Fees for incomplete or deficient filings: Where the applicable arbitration agreement does not reference the ICDR or the AAA, the ICDR will attempt to obtain the agreement of the other parties to the dispute to have the arbitration administered by the ICDR. However, where the ICDR is unable to obtain the agreement of the parties to have the ICDR administer the arbitration, the ICDR will administratively close the case and will not proceed with the administration of the arbitration. In these cases, the ICDR will return the filing fees to the filing party, less the amount specified in the fee schedule below for deficient filings.

Parties that file demands for arbitration that are incomplete or otherwise do not meet the filing requirements contained in these Rules shall also be charged the amount specified below for deficient filings if they fail or are unable to respond to the ICDR’s request to correct the deficiency.

Fees for additional services: The ICDR reserves the right to assess additional administrative fees for services performed by the ICDR beyond those provided for in these Rules which may be required by the parties’ agreement or stipulation.

Suspension for Nonpayment: If arbitrator compensation or administrative charges have not been paid in full, the administrator may so inform the parties in order that one of them may advance the required payment. If such payments are not made, the tribunal may order the suspension or termination of the proceedings. If no arbitrator has yet been appointed, the ICDR may suspend the proceedings.

Standard Fee Schedule

An Initial Filing Fee is payable in full by a filing party when a claim, counterclaim, or additional claim is filed. A Final Fee will be incurred for all cases that proceed to their first hearing. This fee will be payable in advance at the time that the first hearing is scheduled. This fee will be refunded at the conclusion of the case if no hearings have occurred. However, if the administrator is not notified at least 24 hours before the time of the scheduled hearing, the Final Fee will remain due and will not be refunded.

These fees will be billed in accordance with the following schedule:

<table>
<thead>
<tr>
<th>Amount of Claim</th>
<th>Initial Filing Fee</th>
<th>Final Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Above $0 to $10,000</td>
<td>$775</td>
<td>$200</td>
</tr>
<tr>
<td>Above $10,000 to $75,000</td>
<td>$975</td>
<td>$300</td>
</tr>
<tr>
<td>Above $75,000 to $150,000</td>
<td>$1,850</td>
<td>$750</td>
</tr>
<tr>
<td>Above $150,000 to $300,000</td>
<td>$2,800</td>
<td>$1,250</td>
</tr>
</tbody>
</table>

(Continued)
Appendices

<table>
<thead>
<tr>
<th>Amount of Claim</th>
<th>Initial Filing Fee</th>
<th>Final Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Above $300,000 to $500,000</td>
<td>$4,350</td>
<td>$1,750</td>
</tr>
<tr>
<td>Above $500,000 to $1,000,000</td>
<td>$6,200</td>
<td>$2,500</td>
</tr>
<tr>
<td>Above $1,000,000 to $5,000,000</td>
<td>$8,200</td>
<td>$3,250</td>
</tr>
<tr>
<td>Above $5,000,000 to $10,000,000</td>
<td>$10,200</td>
<td>$4,000</td>
</tr>
<tr>
<td>Above $10,000,000</td>
<td>Base fee of $12,800 plus .01% of the amount of claim above $10,000,000 Fee Capped at $65,000</td>
<td>$6,000</td>
</tr>
</tbody>
</table>

Nonmonetary Claims\(^1\) $3,350 $1,250
Consent Award\(^2\) $350
Deficient Claim Filing\(^3\) $350

\(^1\) This fee is applicable only when a claim or counterclaim is not for a monetary amount. Where a monetary claim amount is not known, parties will be required to state a range of claims or be subject to the highest possible filing fee (see fee range for claims above $10,000,000).

\(^2\) The ICDR may assist the parties with the appointment of an arbitrator for the sole purpose of having their Consent Award signed.

\(^3\) The Deficient Claim Filing Fee shall not be charged in cases filed by a consumer in an arbitration governed by the Supplementary Procedures for the Resolution of Consumer-Related Disputes, or in cases filed by an Employee who is submitting their dispute to arbitration pursuant to an employer promulgated plan.

\(^4\) The ICDR may assess additional fees where procedures or services outside the Rules sections are required under the parties’ agreement or by stipulation.

Fees are subject to increase if the amount of a claim or counterclaim is modified after the initial filing date. Fees are subject to decrease if the amount of a claim or counterclaim is modified before the first hearing.

The minimum fees for any case having three or more arbitrators are $2,800 for the filing fee, plus a $1,250 Case Service Fee.

Parties on cases filed under either the Flexible Fee Schedule or the Standard Fee Schedule that are held in abeyance for one year will be assessed an annual abeyance fee of $300. If a party refuses to pay the assessed fee, the other party or parties may pay the entire fee on behalf of all parties, otherwise the matter will be administratively closed.

For more information, please contact the ICDR at +212.484.4181.

REFUND SCHEDULE FOR STANDARD FEE SCHEDULE

The ICDR offers a refund schedule on filing fees connected with the Standard Fee Schedule. For cases with claims up to $75,000, a minimum filing fee of $350 will not be refunded. For all other cases, a minimum fee of $600 will not be refunded. Subject to the minimum fee requirements, refunds will be calculated as follows:

- 100% of the filing fee, above the minimum fee, will be refunded if the case is settled or withdrawn within five calendar days of filing.
- 50% of the filing fee will be refunded if the case is settled or withdrawn between six and 30 calendar days of filing.
- 25% of the filing fee will be refunded if the case is settled or withdrawn between 31 and 60 calendar days of filing.

No refund will be made once an arbitrator has been appointed (this includes one arbitrator on a three-arbitrator panel). No refunds will be granted on awarded cases.

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Appendix 2: International Case Filing Administrative Fee Schedules

Note: The date of receipt of the demand for arbitration with the ICDR will be used to calculate refunds of filing fees for both claims and counterclaims.

Flexible Fee Schedule

A non-refundable Initial Filing Fee is payable in full by a filing party when a claim, counterclaim, or additional claim is filed. Upon receipt of the Demand for Arbitration, the ICDR will promptly initiate the case and notify all parties as well as establish the due date for filing of an Answer, which may include a Counterclaim. In order to proceed with the further administration of the arbitration and appointment of the arbitrator(s), the appropriate, non-refundable Proceed Fee outlined below must be paid.

If a Proceed Fee is not submitted within ninety (90) days of the filing of the Claimant’s Demand for Arbitration, the ICDR will administratively close the file and notify all parties.

No refunds or refund schedule will apply to the Filing or Proceed Fees once received.

The Flexible Fee Schedule below also may be utilized for the filing of counterclaims. However, as with the Claimant’s claim, the counterclaim will not be presented to the arbitrator until the Proceed Fee is paid.

A Final Fee will be incurred for all claims and/or counterclaims that proceed to their first hearing. This fee will be payable in advance when the first hearing is scheduled, but will be refunded at the conclusion of the case if no hearings have occurred. However, if the administrator is not notified of a cancellation at least 24 hours before the time of the scheduled hearing, the Final Fee will remain due and will not be refunded.

All fees will be billed in accordance with the following schedule:

<table>
<thead>
<tr>
<th>Amount of Claim</th>
<th>Initial Filing Fee</th>
<th>Proceed Fee</th>
<th>Final Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Above $0 to $10,000</td>
<td>$400</td>
<td>475</td>
<td>$200</td>
</tr>
<tr>
<td>Above $10,000 to $75,000</td>
<td>$625</td>
<td>$500</td>
<td>$300</td>
</tr>
<tr>
<td>Above $75,000 to $150,000</td>
<td>$850</td>
<td>$1250</td>
<td>$750</td>
</tr>
<tr>
<td>Above $150,000 to $300,000</td>
<td>$1,000</td>
<td>$2125</td>
<td>$1,250</td>
</tr>
<tr>
<td>Above $300,000 to $500,000</td>
<td>$1,500</td>
<td>$3,400</td>
<td>$1,750</td>
</tr>
<tr>
<td>Above $500,000 to $1,000,000</td>
<td>$2,500</td>
<td>$4,500</td>
<td>$2,500</td>
</tr>
<tr>
<td>Above $1,000,000 to $5,000,000</td>
<td>$2,500</td>
<td>$6,700</td>
<td>$3,250</td>
</tr>
<tr>
<td>Above $5,000,000 to $10,000,000</td>
<td>$3,500</td>
<td>$8,200</td>
<td>$4,000</td>
</tr>
<tr>
<td>Above $10,000,000</td>
<td>$4,500</td>
<td>$10,300 plus .01% of claim amount over $10,000,000 up to $65,000</td>
<td>$6,000</td>
</tr>
<tr>
<td>Nonmonetary1</td>
<td>$2,000</td>
<td>$2,000</td>
<td>$1,250</td>
</tr>
<tr>
<td>Consent Award2</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Deficient Claim Filing Fee</td>
<td>$350</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Additional Services3</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

1 This fee is applicable only when a claim or counterclaim is not for a monetary amount. Where a monetary claim amount is not known, parties will be required to state a range of claims or be subject to the highest possible filing fee (see fee range for claims above $10,000,000).

2 The ICDR may assist the parties with the appointment of an arbitrator for the sole purpose of having their Consent Award signed.

3 The ICDR reserves the right to assess additional administrative fees for services performed by the ICDR beyond those provided for in these Rules and which may be required by the parties’ agreement or stipulation.
All fees are subject to increase if the amount of a claim or counterclaim is modified after the initial filing date. Fees are subject to decrease if the amount of a claim or counterclaim is modified before the first hearing.

The minimum fees for any case having three or more arbitrators are $1,000 for the Initial Filing Fee; $2,125 for the Proceed Fee; and $1,250 for the Final Fee.

Under the Flexible Fee Schedule, a party’s obligation to pay the Proceed Fee shall remain in effect regardless of any agreement of the parties to stay, postpone or otherwise modify the arbitration proceedings. Parties that, through mutual agreement, have held their case in abeyance for one year will be assessed an annual abeyance fee of $300. If a party refuses to pay the assessed fee, the other party or parties may pay the entire fee on behalf of all parties, otherwise the matter will be closed.

Note: The date of receipt by the ICDR of the demand/notice for arbitration will be used to calculate the ninety(90)-day time limit for payment of the Proceed Fee.

For more information, please contact the ICDR at +212.484.4181.

There is no Refund Schedule in the Flexible Fee Schedule.

**Hearing Room Rental**

The fees described above do not cover the cost of hearing rooms, which are available on a rental basis. Check with the ICDR for availability and rates.
APPENDIX 3

ICDR Guidelines for Arbitrators Concerning Exchanges of Information

Introduction

The American Arbitration Association (AAA) and its international arm, the International Centre for Dispute Resolution® (ICDR) are committed to the principle that commercial arbitration, and particularly international commercial arbitration, should provide a simpler, less expensive and more expeditious form of dispute resolution than resort to national courts.

While arbitration must be a fair process, care must also be taken to prevent the importation of procedural measures and devices from different court systems, which may be considered conducive to fairness within those systems, but which are not appropriate to the conduct of arbitrations in an international context and which are inconsistent with an alternative form of dispute resolution that is simpler, less expensive and more expeditious. One of the factors contributing to complexity, expense and delay in recent years has been the migration from court systems into arbitration of procedural devices that allow one party to a court proceeding access to information in the possession of the other, without full consideration of the differences between arbitration and litigation.

The purpose of these guidelines is to make it clear to arbitrators that they have the authority, the responsibility and, in certain jurisdictions, the mandatory duty to manage arbitration proceedings so as to achieve the goal of providing a simpler, less expensive, and more expeditious process. Unless the parties agree otherwise in writing, these guidelines will become effective in all international cases administered by the ICDR commenced after May 31, 2008, and may be adopted at the discretion of the tribunal in pending cases. They will be reflected in amendments incorporated into the next revision of the International Arbitration Rules. They may be adopted in arbitration clauses or by agreement at any time in any other arbitration administered by the AAA.

1. In General

a. The tribunal shall manage the exchange of information among the parties in advance of the hearings with a view to maintaining efficiency and economy. The tribunal and the parties should endeavor to avoid unnecessary delay and expense while at the same time balancing the goals of avoiding surprise, promoting equality of treatment, and safeguarding each party’s opportunity to present its claims and defenses fairly.

b. The parties may provide the tribunal with their views on the appropriate level of information exchange for each case, but the tribunal retains final authority to apply the above standard. To the extent that the Parties wish to depart from this standard, they may do so only on the basis of an express agreement among all of them in writing and in consultation with the tribunal.

2. Documents on which a Party Relies

Parties shall exchange, in advance of the hearing, all documents upon which each intends to rely.

3. Documents in the Possession of Another Party

a. In addition to any disclosure pursuant to paragraph 2, the tribunal may, upon application, require one party to make available to another party documents in the party’s possession, not otherwise available to the party seeking the documents, that are reasonably believed to exist and to be relevant and material to the outcome of the case. Requests for documents shall contain a description of specific documents or classes of documents, along with an explanation of their relevance and materiality to the outcome of the case.
b. The tribunal may condition any exchange of documents subject to claims of commercial or technical confidentiality on appropriate measures to protect such confidentiality.

4. Electronic Documents
When documents to be exchanged are maintained in electronic form, the party in possession of such documents may make them available in the form (which may be paper copies) most convenient and economical for it, unless the Tribunal determines, on application and for good cause, that there is a compelling need for access to the documents in a different form. Requests for documents maintained in electronic form should be narrowly focused and structured to make searching for them as economical as possible. The Tribunal may direct testing or other means of focusing and limiting any search.

5. Inspections
The tribunal may, on application and for good cause, require a party to permit inspection on reasonable notice of relevant premises or objects.

6. Other Procedures
a. Arbitrators should be receptive to creative solutions for achieving exchanges of information in ways that avoid costs and delay, consistent with the principles of due process expressed in these Guidelines.

b. Depositions, interrogatories, and requests to admit, as developed in American court procedures, are generally not appropriate procedures for obtaining information in international arbitration.

7. Privileges and Professional Ethics
The tribunal should respect applicable rules of privilege or professional ethics and other legal impediments. When the parties, their counsel or their documents would be subject under applicable law to different rules, the tribunal should to the extent possible apply the same rule to both sides, giving preference to the rule that provides the highest level of protection.

8. Costs and Compliance
a. In resolving any dispute about pre-hearing exchanges of information, the tribunal shall require a requesting party to justify the time and expense that its request may involve, and may condition granting such a request on the payment of part or all of the cost by the party seeking the information. The tribunal may also allocate the costs of providing information among the parties, either in an interim order or in an award.

b. In the event any party fails to comply with an order for information exchange, the tribunal may draw adverse inferences and may take such failure into account in allocating costs.
APPENDIX 4

AAA Commercial Arbitration Rules and Mediation Procedures
(Including Procedures for Large, Complex, Commercial Disputes)

Commercial Mediation Procedures

M-1. Agreement of Parties
Whenever, by stipulation or in their contract, the parties have provided for mediation or conciliation
of existing or future disputes under the auspices of the American Arbitration Association (AAA) or
under these procedures, the parties and their representatives, unless agreed otherwise in writing, shall
be deemed to have made these procedural guidelines, as amended and in effect as of the date of filing
of a request for mediation, a part of their agreement and designate the AAA as the administrator of
their mediation.

The parties by mutual agreement may vary any part of these procedures including, but not limited to,
agreeing to conduct the mediation via telephone or other electronic or technical means.

M-2. Initiation of Mediation
Any party or parties to a dispute may initiate mediation under the AAA's auspices by making a request
for mediation to any of the AAA's regional offices or case management centers via telephone, email,
regular mail or fax. Requests for mediation may also be filed online via WebFile at <www.adr.org>.
The party initiating the mediation shall simultaneously notify the other party or parties of the request.
The initiating party shall provide the following information to the AAA and the other party or parties
as applicable:

i. A copy of the mediation provision of the parties' contract or the parties' stipulation to mediate.
ii. The names, regular mail addresses, email addresses, and telephone numbers of all parties to the
dispute and representatives, if any, in the mediation.
iii. A brief statement of the nature of the dispute and the relief requested.
iv. Any specific qualifications the mediator should possess.

Where there is no preexisting stipulation or contract by which the parties have provided for mediation
of existing or future disputes under the auspices of the AAA, a party may request the AAA to invite
another party to participate in “mediation by voluntary submission”. Upon receipt of such a request,
the AAA will contact the other party or parties involved in the dispute and attempt to obtain a submis-
sion to mediation.

M-3. Representation
Subject to any applicable law, any party may be represented by persons of the party's choice. The
names and addresses of such persons shall be communicated in writing to all parties and to the AAA.

M-4. Appointment of the Mediator
Parties may search the online profiles of the AAA's Panel of Mediators at <www.aaamediation.com>
in an effort to agree on a mediator. If the parties have not agreed to the appointment of a mediator and
have not provided any other method of appointment, the mediator shall be appointed in the follow-
ing manner:

i. Upon receipt of a request for mediation, the AAA will send to each party a list of mediators from
the AAA's Panel of Mediators. The parties are encouraged to agree to a mediator from the submit-
ted list and to advise the AAA of their agreement.
ii. If the parties are unable to agree upon a mediator, each party shall strike unacceptable names from the list, number the remaining names in order of preference, and return the list to the AAA. If a party does not return the list within the time specified, all mediators on the list shall be deemed acceptable. From among the mediators who have been mutually approved by the parties, and in accordance with the designated order of mutual preference, the AAA shall invite a mediator to serve.

iii. If the parties fail to agree on any of the mediators listed, or if acceptable mediators are unable to serve, or if for any other reason the appointment cannot be made from the submitted list, the AAA shall have the authority to make the appointment from among other members of the Panel of Mediators without the submission of additional lists.

M-5. Mediator’s Impartiality and Duty to Disclose

AAA mediators are required to abide by the Model Standards of Conduct for Mediators in effect at the time a mediator is appointed to a case. Where there is a conflict between the Model Standards and any provision of these Mediation Procedures, these Mediation Procedures shall govern. The Standards require mediators to (i) decline a mediation if the mediator cannot conduct it in an impartial manner, and (ii) disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator’s impartiality.

Prior to accepting an appointment, AAA mediators are required to make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for the mediator. AAA mediators are required to disclose any circumstance likely to create a presumption of bias or prevent a resolution of the parties’ dispute within the time-frame desired by the parties. Upon receipt of such disclosures, the AAA shall immediately communicate the disclosures to the parties for their comments.

The parties may, upon receiving disclosure of actual or potential conflicts of interest of the mediator, waive such conflicts and proceed with the mediation. In the event that a party disagrees as to whether the mediator shall serve, or in the event that the mediator’s conflict of interest might reasonably be viewed as undermining the integrity of the mediation, the mediator shall be replaced.

M-6. Vacancies

If any mediator shall become unwilling or unable to serve, the AAA will appoint another mediator, unless the parties agree otherwise, in accordance with section M-4.

M-7. Duties and Responsibilities of the Mediator

i. The mediator shall conduct the mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.

ii. The mediator is authorized to conduct separate or ex parte meetings and other communications with the parties and/or their representatives, before, during, and after any scheduled mediation conference. Such communications may be conducted via telephone, in writing, via email, online, in person or otherwise.

iii. The parties are encouraged to exchange all documents pertinent to the relief requested. The mediator may request the exchange of memoranda on issues, including the underlying interests and the history of the parties’ negotiations. Information that a party wishes to keep confidential may be sent to the mediator, as necessary, in a separate communication with the mediator.

iv. The mediator does not have the authority to impose a settlement on the parties but will attempt to help them reach a satisfactory resolution of their dispute. Subject to the discretion of the mediator, the mediator may make oral or written recommendations for settlement to a party privately or, if the parties agree, to all parties jointly.

v. In the event a complete settlement of all or some issues in dispute is not achieved within the scheduled mediation session(s), the mediator may continue to communicate with the parties, for a period of time, in an ongoing effort to facilitate a complete settlement.

vi. The mediator is not a legal representative of any party and has no fiduciary duty to any party.
M-8. Responsibilities of the Parties

The parties shall ensure that appropriate representatives of each party, having authority to consummate a settlement, attend the mediation conference.

Prior to and during the scheduled mediation conference session(s) the parties and their representatives shall, as appropriate to each party’s circumstances, exercise their best efforts to prepare for and engage in a meaningful and productive mediation.

M-9. Privacy

Mediation sessions and related mediation communications are private proceedings. The parties and their representatives may attend mediation sessions. Other persons may attend only with the permission of the parties and with the consent of the mediator.

M-10. Confidentiality

Subject to applicable law or the parties’ agreement, confidential information disclosed to a mediator by the parties or by other participants (witnesses) in the course of the mediation shall not be divulged by the mediator. The mediator shall maintain the confidentiality of all information obtained in the mediation, and all records, reports, or other documents received by a mediator while serving in that capacity shall be confidential.

The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceeding or judicial forum.

The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial, or other proceeding the following, unless agreed to by the parties or required by applicable law:

i. Views expressed or suggestions made by a party or other participant with respect to a possible settlement of the dispute;
ii. Admissions made by a party or other participant in the course of the mediation proceedings;
iii. Proposals made or views expressed by the mediator; or
iv. The fact that a party had or had not indicated willingness to accept a proposal for settlement made by the mediator.

M-11. No Stenographic Record

There shall be no stenographic record of the mediation process.

M-12. Termination of Mediation

The mediation shall be terminated:

i. By the execution of a settlement agreement by the parties; or
ii. By a written or verbal declaration of the mediator to the effect that further efforts at mediation would not contribute to a resolution of the parties’ dispute; or
iii. By a written or verbal declaration of all parties to the effect that the mediation proceedings are terminated; or
iv. When there has been no communication between the mediator and any party or party’s representative for 21 days following the conclusion of the mediation conference.

M-13. Exclusion of Liability

Neither the AAA nor any mediator is a necessary party in judicial proceedings relating to the mediation. Neither the AAA nor any mediator shall be liable to any party for any error, act or omission in connection with any mediation conducted under these procedures.

M-14. Interpretation and Application of Procedures

The mediator shall interpret and apply these procedures insofar as they relate to the mediator’s duties and responsibilities. All other procedures shall be interpreted and applied by the AAA.

M-15. Deposits

Unless otherwise directed by the mediator, the AAA will require the parties to deposit in advance of the mediation conference such sums of money as it, in consultation with the mediator, deems
necessary to cover the costs and expenses of the mediation and shall render an accounting to the parties and return any unexpended balance at the conclusion of the mediation.

**M-16. Expenses**

All expenses of the mediation, including required traveling and other expenses or charges of the mediator, shall be borne equally by the parties unless they agree otherwise. The expenses of participants for either side shall be paid by the party requesting the attendance of such participants.

**M-17. Cost of the Mediation**

There is no filing fee to initiate a mediation or a fee to request the AAA to invite parties to mediate. The cost of mediation is based on the hourly mediation rate published on the mediator’s AAA profile. This rate covers both mediator compensation and an allocated portion for the AAA's services. There is a four-hour minimum charge for a mediation conference. Expenses referenced in Section M-16 may also apply.

If a matter submitted for mediation is withdrawn or cancelled or results in a settlement after the agreement to mediate is filed but prior to the mediation conference the cost is $250 plus any mediator time and charges incurred.

The parties will be billed equally for all costs unless they agree otherwise.

If you have questions about mediation costs or services visit our website at <www.adr.org> or contact your local AAA office.

**CONFERENCE ROOM RENTAL**

The costs described above do not include the use of AAA conference rooms. Conference rooms are available on a rental basis. Please contact your local AAA office for availability and rates.

**Commercial Arbitration Rules**

**R-1. Agreement of Parties**

(a) The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter AAA) under its Commercial Arbitration Rules or for arbitration by the AAA of a domestic commercial dispute without specifying particular rules. These rules and any amendment of them shall apply in the form in effect at the time the administrative requirements are met for a demand for arbitration or submission agreement received by the AAA. The parties, by written agreement, may vary the procedures set forth in these rules. After appointment of the arbitrator, such modifications may be made only with the consent of the arbitrator.

(b) Unless the parties determine otherwise, the Expedited Procedures shall apply in any case in which no disclosed claim or counterclaim exceeds $75,000, exclusive of interest and arbitration fees and costs. Parties may also agree to use these procedures in larger cases. Unless the parties agree otherwise, these procedures will not apply in cases involving more than two parties. The Expedited Procedures shall be applied as described in Sections E-1 through E-10 of these rules, in addition to any other portion of these rules that is not in conflict with the Expedited Procedures.

(c) Unless the parties agree otherwise, the Procedures for Large, Complex Commercial Disputes shall apply to all cases in which the disclosed claim or counterclaim of any party is at least $500,000, exclusive of claimed interest, arbitration fees and costs. Parties may also agree to use the Procedures in cases involving claims or counterclaims under $500,000, or in nonmonetary cases. The Procedures for Large, Complex Commercial Disputes shall be applied as described in Sections L-1 through L-4 of these rules, in addition to any other portion of these rules that is not in conflict with the Procedures for Large, Complex Commercial Disputes.

(d) All other cases shall be administered in accordance with Sections R-1 through R-54 of these rules.
The AAA applies the Supplementary Procedures for Consumer-Related Disputes to arbitration clauses in agreements between individual consumers and businesses where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are nonnegotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices. The product or service must be for personal or household use. The AAA will have the discretion to apply or not to apply the Supplementary Procedures and the parties will be able to bring any disputes concerning the application or non-application to the attention of the arbitrator. Consumers are not prohibited from seeking relief in a small claims court for disputes or claims within the scope of its jurisdiction, even in consumer arbitration cases filed by the business.

A dispute arising out of an employer promulgated plan will be administered under the AAA's Employment Arbitration Rules and Mediation Procedures.

R-2. AAA and Delegation of Duties
When parties agree to arbitrate under these rules, or when they provide for arbitration by the AAA and an arbitration is initiated under these rules, they thereby authorize the AAA to administer the arbitration. The authority and duties of the AAA are prescribed in the agreement of the parties and in these rules, and may be carried out through such of the AAA's representatives as it may direct. The AAA may, in its discretion, assign the administration of an arbitration to any of its offices.

R-3. National Roster of Arbitrators
The AAA shall establish and maintain a National Roster of Commercial Arbitrators (“National Roster”) and shall appoint arbitrators as provided in these rules. The term “arbitrator” in these rules refers to the arbitration panel, constituted for a particular case, whether composed of one or more arbitrators, or to an individual arbitrator, as the context requires.

R-4. Initiation under an Arbitration Provision in a Contract
(a) Arbitration under an arbitration provision in a contract shall be initiated in the following manner:
   (i) The initiating party (the “claimant”) shall, within the time period, if any, specified in the contract(s), give to the other party (the “respondent”) written notice of its intention to arbitrate (the “demand”), which demand shall contain a statement setting forth the nature of the dispute, the names and addresses of all other parties, the amount involved, if any, the remedy sought, and the hearing locale requested.
   (ii) The claimant shall file at any office of the AAA two copies of the demand and two copies of the arbitration provisions of the contract, together with the appropriate filing fee as provided in the schedule included with these rules.
   (iii) The AAA shall confirm notice of such filing to the parties.
   (b) A respondent may file an answering statement in duplicate with the AAA within 15 days after confirmation of notice of filing of the demand is sent by the AAA. The respondent shall, at the time of any such filing, send a copy of the answering statement to the claimant. If a counterclaim is asserted, it shall contain a statement setting forth the nature of the counterclaim, the amount involved, if any, and the remedy sought. If a counterclaim is made, the party making the counterclaim shall forward to the AAA with the answering statement the appropriate fee provided in the schedule included with these rules.
   (c) If no answering statement is filed within the stated time, respondent will be deemed to deny the claim. Failure to file an answering statement shall not operate to delay the arbitration.
   (d) When filing any statement pursuant to this section, the parties are encouraged to provide descriptions of their claims in sufficient detail to make the circumstances of the dispute clear to the arbitrator.

R-5. Initiation under a Submission
Parties to any existing dispute may commence an arbitration under these rules by filing at any office of the AAA two copies of a written submission to arbitrate under these rules, signed by the parties. It shall contain a statement of the nature of the dispute, the names and addresses of all parties, any
claims and counterclaims, the amount involved, if any, the remedy sought, and the hearing locale requested, together with the appropriate filing fee as provided in the schedule included with these rules. Unless the parties state otherwise in the submission, all claims and counterclaims will be deemed to be denied by the other party.

R-6. Changes of Claim

After filing of a claim, if either party desires to make any new or different claim or counterclaim, it shall be made in writing and filed with the AAA. The party asserting such a claim or counterclaim shall provide a copy to the other party, who shall have 15 days from the date of such transmission within which to file an answering statement with the AAA. After the arbitrator is appointed, however, no new or different claim may be submitted except with the arbitrator’s consent.

R-7. Jurisdiction

(a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.

(b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

(c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

R-8. Mediation

At any stage of the proceedings, the parties may agree to conduct a mediation conference under the Commercial Mediation Procedures in order to facilitate settlement. The mediator shall not be an arbitrator appointed to the case. Where the parties to a pending arbitration agree to mediate under the AAA’s rules, no additional administrative fee is required to initiate the mediation.

R-9. Administrative Conference

At the request of any party or upon the AAA’s own initiative, the AAA may conduct an administrative conference, in person or by telephone, with the parties and/or their representatives. The conference may address such issues as arbitrator selection, potential mediation of the dispute, potential exchange of information, a timetable for hearings and any other administrative matters.

R-10. Fixing of Locale

The parties may mutually agree on the locale where the arbitration is to be held. If any party requests that the hearing be held in a specific locale and the other party files no objection thereto within 15 days after notice of the request has been sent to it by the AAA, the locale shall be the one requested. If a party objects to the locale requested by the other party, the AAA shall have the power to determine the locale, and its decision shall be final and binding.

R-11. Appointment from National Roster

(a) If the parties have not appointed an arbitrator and have not provided any other method of appointment, the arbitrator shall be appointed in the following manner: The AAA shall send simultaneously to each party to the dispute an identical list of 10 (unless the AAA decides that a different number is appropriate) names of persons chosen from the National Roster. The parties are encouraged to agree to an arbitrator from the submitted list and to advise the AAA of their agreement.

(b) If the parties are unable to agree upon an arbitrator, each party to the dispute shall have 15 days from the transmittal date in which to strike names objected to, number the remaining names in order of preference, and return the list to the AAA. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual
Appendix 4: AAA Commercial Arbitration Rules and Mediation Procedures

preference, the AAA shall invite the acceptance of an arbitrator to serve. If the parties fail to agree on any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from among other members of the National Roster without the submission of additional lists.

(c) Unless the parties agree otherwise when there are two or more claimants or two or more respondents, the AAA may appoint all the arbitrators.

R-12. Direct Appointment by a Party

(a) If the agreement of the parties names an arbitrator or specifies a method of appointing an arbitrator, that designation or method shall be followed. The notice of appointment, with the name and address of the arbitrator, shall be filed with the AAA by the appointing party. Upon the request of any appointing party, the AAA shall submit a list of members of the National Roster from which the party may, if so desires, make the appointment.

(b) Where the parties have agreed that each party is to name one arbitrator, the arbitrators so named must meet the standards of Section R-17 with respect to impartiality and independence unless the parties have specifically agreed pursuant to Section R-17(a) that the party-appointed arbitrators are to be non-neutral and need not meet those standards.

(c) If the agreement specifies a period of time within which an arbitrator shall be appointed and any party fails to make the appointment within that period, the AAA shall make the appointment.

(d) If no period of time is specified in the agreement, the AAA shall notify the party to make the appointment. If within 15 days after such notice has been sent, an arbitrator has not been appointed by a party, the AAA shall make the appointment.

R-13. Appointment of Chairperson by Party-Appointed Arbitrators or Parties

(a) If, pursuant to Section R-12, either the parties have directly appointed arbitrators, or the arbitrators have been appointed by the AAA, and the parties have authorized them to appoint a chairperson within a specified time and no appointment is made within that time or any agreed extension, the AAA may appoint the chairperson.

(b) If no period of time is specified for appointment of the chairperson and the party-appointed arbitrators or the parties do not make the appointment within 15 days from the date of the appointment of the last party-appointed arbitrator, the AAA may appoint the chairperson.

(c) If the parties have agreed that their party-appointed arbitrators shall appoint the chairperson from the National Roster, the AAA shall furnish to the party-appointed arbitrators, in the manner provided in Section R-11, a list selected from the National Roster, and the appointment of the chairperson shall be made as provided in that Section.

R-14. Nationality of Arbitrator

Where the parties are nationals of different countries, the AAA, at the request of any party or on its own initiative, may appoint as arbitrator a national of a country other than that of any of the parties. The request must be made before the time set for the appointment of the arbitrator as agreed by the parties or set by these rules.

R-15. Number of Arbitrators

If the arbitration agreement does not specify the number of arbitrators, the dispute shall be heard and determined by one arbitrator, unless the AAA, in its discretion, directs that three arbitrators be appointed. A party may request three arbitrators in the demand or answer, which request the AAA will consider in exercising its discretion regarding the number of arbitrators appointed to the dispute.

R-16. Disclosure

(a) Any person appointed or to be appointed as an arbitrator shall disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration.
Appendices

(b) Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others.

(c) In order to encourage disclosure by arbitrators, disclosure of information pursuant to this Section R-16 is not to be construed as an indication that the arbitrator considers that the disclosed circumstance is likely to affect impartiality or independence.

R-17. Disqualification of Arbitrator

(a) Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for

(i) partiality or lack of independence,

(ii) inability or refusal to perform his or her duties with diligence and in good faith, and

(iii) any grounds for disqualification provided by applicable law. The parties may agree in writing, however, that arbitrators directly appointed by a party pursuant to Section R-12 shall be nonneutral, in which case such arbitrators need not be impartial or independent and shall not be subject to disqualification for partiality or lack of independence.

(b) Upon objection of a party to the continued service of an arbitrator, or on its own initiative, the AAA shall determine whether the arbitrator should be disqualified under the grounds set out above, and shall inform the parties of its decision, which decision shall be conclusive.

R-18. Communication with Arbitrator

(a) No party and no one acting on behalf of any party shall communicate ex parte with an arbitrator or a candidate for arbitrator concerning the arbitration, except that a party, or someone acting on behalf of a party, may communicate ex parte with a candidate for direct appointment pursuant to Section R-12 in order to advise the candidate of the general nature of the controversy and of the anticipated proceedings and to discuss the candidate's qualifications, availability, or independence in relation to the parties or to discuss the suitability of candidates for selection as a third arbitrator where the parties or party-designated arbitrators are to participate in that selection.

(b) Section R-18(a) does not apply to arbitrators directly appointed by the parties who, pursuant to Section R-17(a), the parties have agreed in writing are non-neutral. Where the parties have so agreed under Section R-17(a), the AAA shall as an administrative practice suggest to the parties that they agree further that Section R-18(a) should nonetheless apply prospectively.

R-19. Vacancies

(a) If for any reason an arbitrator is unable to perform the duties of the office, the AAA may, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in accordance with the applicable provisions of these rules.

(b) In the event of a vacancy in a panel of neutral arbitrators after the hearings have commenced, the remaining arbitrator or arbitrators may continue with the hearing and determination of the controversy, unless the parties agree otherwise.

(c) In the event of the appointment of a substitute arbitrator, the panel of arbitrators shall determine in its sole discretion whether it is necessary to repeat all or part of any prior hearings.

R-20. Preliminary Hearing

(a) At the request of any party or at the discretion of the arbitrator or the AAA, the arbitrator may schedule as soon as practicable a preliminary hearing with the parties and/or their representatives. The preliminary hearing may be conducted by telephone at the arbitrator's discretion.

(b) During the preliminary hearing, the parties and the arbitrator should discuss the future conduct of the case, including clarification of the issues and claims, a schedule for the hearings and any other preliminary matters.

R-21. Exchange of Information

(a) At the request of any party or at the discretion of the arbitrator, consistent with the expedited nature of arbitration, the arbitrator may direct

i) the production of documents and other information, and

ii) the identification of any witnesses to be called.
Appendix 4: AAA Commercial Arbitration Rules and Mediation Procedures

(b) At least five business days prior to the hearing, the parties shall exchange copies of all exhibits they intend to submit at the hearing.

(c) The arbitrator is authorized to resolve any disputes concerning the exchange of information.

R-22. Date, Time, and Place of Hearing

The arbitrator shall set the date, time, and place for each hearing. The parties shall respond to requests for hearing dates in a timely manner, be cooperative in scheduling the earliest practicable date, and adhere to the established hearing schedule. The AAA shall send a notice of hearing to the parties at least 10 days in advance of the hearing date, unless otherwise agreed by the parties.

R-23. Attendance at Hearings

The arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary. Any person having a direct interest in the arbitration is entitled to attend hearings. The arbitrator shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other person other than a party and its representatives.

R-24. Representation

Any party may be represented by counsel or other authorized representative. A party intending to be so represented shall notify the other party and the AAA of the name and address of the representative at least three days prior to the date set for the hearing at which that person is first to appear. When such a representative initiates an arbitration or responds for a party, notice is deemed to have been given.

R-25. Oaths

Before proceeding with the first hearing, each arbitrator may take an oath of office and, if required by law, shall do so. The arbitrator may require witnesses to testify under oath administered by any duly qualified person and, if it is required by law or requested by any party, shall do so.

R-26. Stenographic Record

Any party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify the other parties of these arrangements at least three days in advance of the hearing. The requesting party or parties shall pay the cost of the record. If the transcript is agreed by the parties, or determined by the arbitrator to be the official record of the proceeding, it must be provided to the arbitrator and made available to the other parties for inspection, at a date, time, and place determined by the arbitrator.

R-27. Interpreters

Any party wishing an interpreter shall make all arrangements directly with the interpreter and shall assume the costs of the service.

R-28. Postponements

The arbitrator may postpone any hearing upon agreement of the parties, upon request of a party for good cause shown, or upon the arbitrator’s own initiative.

R-29. Arbitration in the Absence of a Party or Representative

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award.

R-30. Conduct of Proceedings

(a) The claimant shall present evidence to support its claim. The respondent shall then present evidence to support its defense. Witnesses for each party shall also submit to questions from the arbitrator and the adverse party. The arbitrator has the discretion to vary this procedure, provided
that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.

(b) The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute and may direct the order of proof, bifurcate proceedings and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.

(c) The parties may agree to waive oral hearings in any case.

R-31. Evidence

(a) The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. Conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent, in default or has waived the right to be present.

(b) The arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant.

(c) The arbitrator shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client.

(d) An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.

R-32. Evidence by Affidavit and Post-hearing Filing of Documents or Other Evidence

(a) The arbitrator may receive and consider the evidence of witnesses by declaration or affidavit, but shall give it only such weight as the arbitrator deems it entitled to after consideration of any objection made to its admission.

(b) If the parties agree or the arbitrator directs that documents or other evidence be submitted to the arbitrator after the hearing, the documents or other evidence shall be filed with the AAA for transmission to the arbitrator. All parties shall be afforded an opportunity to examine and respond to such documents or other evidence.

R-33. Inspection or Investigation

An arbitrator finding it necessary to make an inspection or investigation in connection with the arbitration shall direct the AAA to so advise the parties. The arbitrator shall set the date and time and the AAA shall notify the parties. Any party who so desires may be present at such an inspection or investigation. In the event that one or all parties are not present at the inspection or investigation, the arbitrator shall make an oral or written report to the parties and afford them an opportunity to comment.

R-34. Interim Measures**

(a) The arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods.

(b) Such interim measures may take the form of an interim award, and the arbitrator may require security for the costs of such measures.

(c) A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

** The Optional Rules may be found below.

R-35. Closing of Hearing

The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearing closed. If briefs are to be filed, the hearing shall be declared closed as of the final date set by the arbitrator for the receipt of briefs. If documents are to be filed as provided in Section R-32 and the date set for their receipt is later than that set for the receipt of briefs, the later date shall be the closing date of the hearing. The time limit within which the arbitrator is required to
make the award shall commence, in the absence of other agreements by the parties, upon the closing of the hearing.

R-36. Reopening of Hearing
The hearing may be reopened on the arbitrator's initiative, or upon application of a party, at any time before the award is made. If reopening the hearing would prevent the making of the award within the specific time agreed on by the parties in the contract(s) out of which the controversy has arisen, the matter may not be reopened unless the parties agree on an extension of time. When no specific date is fixed in the contract, the arbitrator may reopen the hearing and shall have 30 days from the closing of the reopened hearing within which to make an award.

R-37. Waiver of Rules
Any party who proceeds with the arbitration after knowledge that any provision or requirement of these rules has not been complied with and who fails to state an objection in writing shall be deemed to have waived the right to object.

R-38. Extensions of Time
The parties may modify any period of time by mutual agreement. The AAA or the arbitrator may for good cause extend any period of time established by these rules, except the time for making the award. The AAA shall notify the parties of any extension.

R-39. Serving of Notice
(a) Any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these rules, for any court action in connection therewith, or for the entry of judgment on any award made under these rules may be served on a party by mail addressed to the party, or its representative at the last known address or by personal service, in or outside the state where the arbitration is to be held, provided that reasonable opportunity to be heard with regard to the dispute is or has been granted to the party.
(b) The AAA, the arbitrator and the parties may also use overnight delivery or electronic facsimile transmission (fax), to give the notices required by these rules. Where all parties and the arbitrator agree, notices may be transmitted by electronic mail (E-mail), or other methods of communication.
(c) Unless otherwise instructed by the AAA or by the arbitrator, any documents submitted by any party to the AAA or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.

R-40. Majority Decision
When the panel consists of more than one arbitrator, unless required by law or by the arbitration agreement, a majority of the arbitrators must make all decisions.

R-41. Time of Award
The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than 30 days from the date of closing the hearing, or, if oral hearings have been waived, from the date of the AAA’s transmittal of the final statements and proofs to the arbitrator.

R-42. Form of Award
(a) Any award shall be in writing and signed by a majority of the arbitrators. It shall be executed in the manner required by law.
(b) The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate.

R-43. Scope of Award
(a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract.
(b) In addition to a final award, the arbitrator may make other decisions, including interim, inter-locutory, or partial rulings, orders, and awards. In any interim, interlocutory, or partial award, the arbitrator may assess and apportion the fees, expenses, and compensation related to such award as the arbitrator determines is appropriate.

(c) In the final award, the arbitrator shall assess the fees, expenses, and compensation provided in Sections R-49, R-50, and R-51. The arbitrator may apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate.

(d) The award of the arbitrator(s) may include:
   (i) interest at such rate and from such date as the arbitrator(s) may deem appropriate; and
   (ii) an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement.

R-44. Award upon Settlement
If the parties settle their dispute during the course of the arbitration and if the parties so request, the arbitrator may set forth the terms of the settlement in a “consent award.” A consent award must include an allocation of arbitration costs, including administrative fees and expenses as well as arbitrator fees and expenses.

R-45. Delivery of Award to Parties
Parties shall accept as notice and delivery of the award the placing of the award or a true copy thereof in the mail addressed to the parties or their representatives at the last known addresses, personal or electronic service of the award, or the filing of the award in any other manner that is permitted by law.

R-46. Modification of Award
Within 20 days after the transmittal of an award, any party, upon notice to the other parties, may request the arbitrator, through the AAA, to correct any clerical, typographical, or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided. The other parties shall be given 10 days to respond to the request. The arbitrator shall dispose of the request within 20 days after transmittal by the AAA to the arbitrator of the request and any response thereto.

R-47. Release of Documents for Judicial Proceedings
The AAA shall, upon the written request of a party, furnish to the party, at the party's expense, certified copies of any papers in the AAA's possession that may be required in judicial proceedings relating to the arbitration.

R-48. Applications to Court and Exclusion of Liability
   (a) No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.
   (b) Neither the AAA nor any arbitrator in a proceeding under these rules is a necessary or proper party in judicial proceedings relating to the arbitration.
   (c) Parties to an arbitration under these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.
   (d) Parties to an arbitration under these rules shall be deemed to have consented that neither the AAA nor any arbitrator shall be liable to any party in any action for damages or injunctive relief for any act or omission in connection with any arbitration under these rules.

R-49. Administrative Fees
As a not-for-profit organization, the AAA shall prescribe an initial filing fee and a case service fee to compensate it for the cost of providing administrative services. The fees in effect when the fee or charge is incurred shall be applicable. The filing fee shall be advanced by the party or parties making a claim or counterclaim, subject to final apportionment by the arbitrator in the award. The AAA may, in the event of extreme hardship on the part of any party, defer or reduce the administrative fees.
R-50. Expenses
The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the arbitration, including required travel and other expenses of the arbitrator, AAA representatives, and any witness and the cost of any proof produced at the direct request of the arbitrator, shall be borne equally by the parties, unless they agree otherwise or unless the arbitrator in the award assesses such expenses or any part thereof against any specified party or parties.

R-51. Neutral Arbitrator's Compensation
(a) Arbitrators shall be compensated at a rate consistent with the arbitrator's stated rate of compensation.
(b) If there is disagreement concerning the terms of compensation, an appropriate rate shall be established with the arbitrator by the AAA and confirmed to the parties.
(c) Any arrangement for the compensation of a neutral arbitrator shall be made through the AAA and not directly between the parties and the arbitrator.

R-52. Deposits
The AAA may require the parties to deposit in advance of any hearings such sums of money as it deems necessary to cover the expense of the arbitration, including the arbitrator's fee, if any, and shall render an accounting to the parties and return any unexpended balance at the conclusion of the case.

R-53. Interpretation and Application of Rules
The arbitrator shall interpret and apply these rules insofar as they relate to the arbitrator's powers and duties. When there is more than one arbitrator and a difference arises among them concerning the meaning or application of these rules, it shall be decided by a majority vote. If that is not possible, either an arbitrator or a party may refer the question to the AAA for final decision. All other rules shall be interpreted and applied by the AAA.

R-54. Suspension for Nonpayment
If arbitrator compensation or administrative charges have not been paid in full, the AAA may so inform the parties in order that one of them may advance the required payment. If such payments are not made, the arbitrator may order the suspension or termination of the proceedings. If no arbitrator has yet been appointed, the AAA may suspend the proceedings.

Expedited Procedures

E-1. Limitation on Extensions
Except in extraordinary circumstances, the AAA or the arbitrator may grant a party no more than one seven-day extension of time to respond to the demand for arbitration or counterclaim as provided in Section R-4.

E-2. Changes of Claim or Counterclaim
A claim or counterclaim may be increased in amount, or a new or different claim or counterclaim added, upon the agreement of the other party, or the consent of the arbitrator. After the arbitrator is appointed, however, no new or different claim or counterclaim may be submitted except with the arbitrator's consent. If an increased claim or counterclaim exceeds $75,000, the case will be administered under the regular procedures unless all parties and the arbitrator agree that the case may continue to be processed under the Expedited Procedures.

E-3. Serving of Notices
In addition to notice provided by Section R-39(b), the parties shall also accept notice by telephone. Telephonic notices by the AAA shall subsequently be confirmed in writing to the parties. Should there be a failure to confirm in writing any such oral notice, the proceeding shall nevertheless be valid if notice has, in fact, been given by telephone.
E-4. Appointment and Qualifications of Arbitrator
(a) The AAA shall simultaneously submit to each party an identical list of five proposed arbitrators drawn from its National Roster from which one arbitrator shall be appointed.
(b) The parties are encouraged to agree to an arbitrator from this list and to advise the AAA of their agreement. If the parties are unable to agree upon an arbitrator, each party may strike two names from the list and return it to the AAA within seven days from the date of the AAA's mailing to the parties. If for any reason the appointment of an arbitrator cannot be made from the list, the AAA may make the appointment from other members of the panel without the submission of additional lists.
(c) The parties will be given notice by the AAA of the appointment of the arbitrator, who shall be subject to disqualification for the reasons specified in Section R-17. The parties shall notify the AAA within seven days of any objection to the arbitrator appointed. Any such objection shall be for cause and shall be confirmed in writing to the AAA with a copy to the other party or parties.

E-5. Exchange of Exhibits
At least two business days prior to the hearing, the parties shall exchange copies of all exhibits they intend to submit at the hearing. The arbitrator shall resolve disputes concerning the exchange of exhibits.

E-6. Proceedings on Documents
Where no party's claim exceeds $10,000, exclusive of interest and arbitration costs, and other cases in which the parties agree, the dispute shall be resolved by submission of documents, unless any party requests an oral hearing, or the arbitrator determines that an oral hearing is necessary. The arbitrator shall establish a fair and equitable procedure for the submission of documents.

E-7. Date, Time, and Place of Hearing
In cases in which a hearing is to be held, the arbitrator shall set the date, time, and place of the hearing, to be scheduled to take place within 30 days of confirmation of the arbitrator's appointment. The AAA will notify the parties in advance of the hearing date.

E-8. The Hearing
(a) Generally, the hearing shall not exceed one day. Each party shall have equal opportunity to submit its proofs and complete its case. The arbitrator shall determine the order of the hearing, and may require further submission of documents within two days after the hearing. For good cause shown, the arbitrator may schedule additional hearings within seven business days after the initial day of hearings.
(b) Generally, there will be no stenographic record. Any party desiring a stenographic record may arrange for one pursuant to the provisions of Section R-26.

E-9. Time of Award
Unless otherwise agreed by the parties, the award shall be rendered not later than 14 days from the date of the closing of the hearing or, if oral hearings have been waived, from the date of the AAA's transmittal of the final statements and proofs to the arbitrator.

E-10. Arbitrator's Compensation
Arbitrators will receive compensation at a rate to be suggested by the AAA regional office.

Procedures for Large, Complex Commercial Disputes

L-1. Administrative Conference
Prior to the dissemination of a list of potential arbitrators, the AAA shall, unless the parties agree otherwise, conduct an administrative conference with the parties and/or their attorneys or other representatives by conference call. The conference will take place within 14 days after the commencement of the arbitration. In the event the parties are unable to agree on a mutually acceptable time for
Appendix 4: AAA Commercial Arbitration Rules and Mediation Procedures

the conference, the AAA may contact the parties individually to discuss the issues contemplated herein. Such administrative conference shall be conducted for the following purposes and for such additional purposes as the parties or the AAA may deem appropriate:

(a) to obtain additional information about the nature and magnitude of the dispute and the anticipated length of hearing and scheduling;
(b) to discuss the views of the parties about the technical and other qualifications of the arbitrators;
(c) to obtain conflict statements from the parties; and
(d) to consider, with the parties, whether mediation or other non-adjudicative methods of dispute resolution might be appropriate.

L-2. Arbitrators

(a) Large, Complex Commercial Cases shall be heard and determined by either one or three arbitrators, as may be agreed upon by the parties. If the parties are unable to agree upon the number of arbitrators and a claim or counterclaim involves at least $1,000,000, then three arbitrator(s) shall hear and determine the case. If the parties are unable to agree on the number of arbitrators and each claim and counterclaim is less than $1,000,000, then one arbitrator shall hear and determine the case.

(b) The AAA shall appoint arbitrator(s) as agreed by the parties. If they are unable to agree on a method of appointment, the AAA shall appoint arbitrators from the Large, Complex Commercial Case Panel, in the manner provided in the Regular Commercial Arbitration Rules. Absent agreement of the parties, the arbitrator(s) shall not have served as the mediator in the mediation phase of the instant proceeding.

L-3. Preliminary Hearing

As promptly as practicable after the selection of the arbitrator(s), a preliminary hearing shall be held among the parties and/or their attorneys or other representatives and the arbitrator(s). Unless the parties agree otherwise, the preliminary hearing will be conducted by telephone conference call rather than in person. At the preliminary hearing the matters to be considered shall include, without limitation:

(a) service of a detailed statement of claims, damages and defenses, a statement of the issues asserted by each party and positions with respect thereto, and any legal authorities the parties may wish to bring to the attention of the arbitrator(s);
(b) stipulations to uncontested facts;
(c) the extent to which discovery shall be conducted;
(d) exchange and premarking of those documents which each party believes may be offered at the hearing;
(e) the identification and availability of witnesses, including experts, and such matters with respect to witnesses including their biographies and expected testimony as may be appropriate;
(f) whether, and the extent to which, any sworn statements and/or depositions may be introduced;
(g) the extent to which hearings will proceed on consecutive days;
(h) whether a stenographic or other official record of the proceedings shall be maintained;
(i) the possibility of utilizing mediation or other non-adjudicative methods of dispute resolution; and
(j) the procedure for the issuance of subpoenas.

By agreement of the parties and/or order of the arbitrator(s), the pre-hearing activities and the hearing procedures that will govern the arbitration will be memorialized in a Scheduling and Procedure Order.

L-4. Management of Proceedings

(a) Arbitrator(s) shall take such steps as they may deem necessary or desirable to avoid delay and to achieve a just, speedy and cost-effective resolution of Large, Complex Commercial Cases.

(b) Parties shall cooperate in the exchange of documents, exhibits and information within such party's control if the arbitrator(s) consider such production to be consistent with the goal of achieving a just, speedy and cost-effective resolution of a Large, Complex Commercial Case.
(c) The parties may conduct such discovery as may be agreed to by all the parties provided, however, that the arbitrator(s) may place such limitations on the conduct of such discovery as the arbitrator(s) shall deem appropriate. If the parties cannot agree on production of documents and other information, the arbitrator(s), consistent with the expedited nature of arbitration, may establish the extent of the discovery.

(d) At the discretion of the arbitrator(s), upon good cause shown and consistent with the expedited nature of arbitration, the arbitrator(s) may order depositions of, or the propounding of interrogatories to, such persons who may possess information determined by the arbitrator(s) to be necessary to determination of the matter.

(e) The parties shall exchange copies of all exhibits they intend to submit at the hearing 10 business days prior to the hearing unless the arbitrator(s) determine otherwise.

(f) The exchange of information pursuant to this rule, as agreed by the parties and/or directed by the arbitrator(s), shall be included within the Scheduling and Procedure Order.

(g) The arbitrator is authorized to resolve any disputes concerning the exchange of information.

(h) Generally hearings will be scheduled on consecutive days or in blocks of consecutive days in order to maximize efficiency and minimize costs.

Optional Rules for Emergency Measures of Protection

O-1. Applicability
Where parties by special agreement or in their arbitration clause have adopted these rules for emergency measures of protection, a party in need of emergency relief prior to the constitution of the panel shall notify the AAA and all other parties in writing of the nature of the relief sought and the reasons why such relief is required on an emergency basis. The application shall also set forth the reasons why the party is entitled to such relief. Such notice may be given by facsimile transmission, or other reliable means, but must include a statement certifying that all other parties have been notified or an explanation of the steps taken in good faith to notify other parties.

O-2. Appointment of Emergency Arbitrator
Within one business day of receipt of notice as provided in Section O-1, the AAA shall appoint a single emergency arbitrator from a special AAA panel of emergency arbitrators designated to rule on emergency applications. The emergency arbitrator shall immediately disclose any circumstance likely, on the basis of the facts disclosed in the application, to affect such arbitrator's impartiality or independence. Any challenge to the appointment of the emergency arbitrator must be made within one business day of the communication by the AAA to the parties of the appointment of the emergency arbitrator and the circumstances disclosed.

O-3. Schedule
The emergency arbitrator shall as soon as possible, but in any event within two business days of appointment, establish a schedule for consideration of the application for emergency relief. Such schedule shall provide a reasonable opportunity to all parties to be heard, but may provide for proceeding by telephone conference or on written submissions as alternatives to a formal hearing.

O-4. Interim Award
If after consideration the emergency arbitrator is satisfied that the party seeking the emergency relief has shown that immediate and irreparable loss or damage will result in the absence of emergency relief, and that such party is entitled to such relief, the emergency arbitrator may enter an interim award granting the relief and stating the reasons therefore.

O-5. Constitution of the Panel
Any application to modify an interim award of emergency relief must be based on changed circumstances and may be made to the emergency arbitrator until the panel is constituted; thereafter such a request shall be addressed to the panel. The emergency arbitrator shall have no further power to act
after the panel is constituted unless the parties agree that the emergency arbitrator is named as a member of the panel.

O-6. Security
Any interim award of emergency relief may be conditioned on provision by the party seeking such relief of appropriate security.

O-7. Special Master
A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate. If the AAA is directed by a judicial authority to nominate a special master to consider and report on an application for emergency relief, the AAA shall proceed as provided in Section O-1 of this article and the references to the emergency arbitrator shall be read to mean the special master, except that the special master shall issue a report rather than an interim award.

O-8. Costs
The costs associated with applications for emergency relief shall initially be apportioned by the emergency arbitrator or special master, subject to the power of the panel to determine finally the apportionment of such costs.
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APPENDIX 5

International Commercial Arbitration Supplementary Procedures
Amended and in Effect April 1, 1999

Introduction

The American Arbitration Association (AAA) administers international commercial cases under various arbitration rules either within or outside of the United States. The AAA’s International Arbitration Rules are generally applicable to international business disputes. In addition, the AAA provides administrative services under the Construction Industry Dispute Resolution Procedures, Wireless Industry Arbitration Rules, Patent Arbitration Rules, and specialized rules in various other fields.

The AAA also provides certain services under arbitration clauses that specify the Arbitration Rules adopted in 1976 by the United Nations Commission on International Trade Law. The AAA will act as appointing authority and assist in the handling of cases.

Recognizing that international arbitration cases often present unique procedural problems, the AAA has created the following supplementary procedures to facilitate such cases when rules other than the International Arbitration Rules govern the proceedings. Unless the parties advise otherwise by the due date for the return of the first list, the AAA will assume that they are desired.

1. Challenge of Arbitrators

Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence. An arbitrator appointed by a party may be challenged by that party only for reasons of which it becomes aware after the appointment has been made. After receiving a challenge, the AAA will determine whether the arbitrator should be disqualified and shall inform the parties of its decision, which shall be conclusive.

2. Exchange of Documents

At the request of any party, the AAA will make arrangements for the exchange of documentary evidence or lists of witnesses between the parties. In international cases, it is important that parties be able to anticipate what will transpire at the hearing. By cooperating in an exchange of relevant information, the parties can avoid unnecessary delays.

3. Documents to Arbitrator in Advance

In international cases, it is customary for an arbitrator to be provided with copies of the initiating documents and supplementary documents in advance of the first hearing. The AAA will make arrangements for such an exchange if it does not delay the proceedings.

4. Hearings

The AAA will assist in establishing the date, time, and place of hearings, giving advance notice thereof to the parties pursuant to the applicable rules. The AAA will attempt to schedule consecutive hearings to minimize unnecessary travel.

5. Language of the Arbitration

If the parties have not agreed otherwise, the language(s) of the arbitration shall be that of the documents containing the arbitration agreement, subject to the power of the tribunal to determine otherwise based upon the contentions of the parties and the circumstances of the arbitration.
The tribunal may order that any documents delivered in another language shall be accompanied by a translation into the language(s) of the arbitration.

6. Opinions
The tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons need be given.
APPENDIX 6

United Nations Commission on International Trade Law
(UNCITRAL) Arbitration Rules

Resolution 31/98 Adopted by the General Assembly on 15 December 1976

Section I. Introductory rules

SCOPE OF APPLICATION

Article 1
1. Where the parties to a contract have agreed in writing* that disputes in relation to that contract shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree in writing.
2. These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

* Model Arbitration Clause

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force.

Note – Parties may wish to consider adding:
(a) The appointing authority shall be . . . (name of institution or person);
(b) The number of arbitrators shall be . . . (one or three);
(c) The place of arbitration shall be . . . (town or country);
(d) The language(s) to be used in the arbitral proceedings shall be . . .

NOTICE, CALCULATION OF PERIODS OF TIME

Article 2
1. For the purposes of these Rules, any notice, including a notification, communication or proposal, is deemed to have been received if it is physically delivered to the addressee or if it is delivered at his habitual residence, place of business or mailing address, or, if none of these can be found after making reasonable inquiry, then at the addressee=s last-known residence or place of business. Notice shall be deemed to have been received on the day it is so delivered.
2. For the purposes of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice, notification, communication or proposal is received. If the last day of such period is an official holiday or a non-business day at the residence or place of business of the addressee, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.
NOTICE OF ARBITRATION

Article 3
1. The party initiating recourse to arbitration (hereinafter called the “claimant”) shall give to the other party (hereinafter called the “respondent”) a notice of arbitration.
2. Arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent.
3. The notice of arbitration shall include the following:
   (a) A demand that the dispute be referred to arbitration;
   (b) The names and addresses of the parties;
   (c) A reference to the arbitration clause or the separate arbitration agreement that is invoked;
   (d) A reference to the contract out of or in relation to which the dispute arises;
   (e) The general nature of the claim and an indication of the amount involved, if any;
   (f) The relief or remedy sought;
   (g) A proposal as to the number of arbitrators (i.e. one or three), if the parties have not previously agreed thereon.
4. The notice of arbitration may also include:
   (a) The proposals for the appointments of a sole arbitrator and an appointing authority referred to in article 6, paragraph 1;
   (b) The notification of the appointment of an arbitrator referred to in article 7;
   (c) The statement of claim referred to in article 18.

REPRESENTATION AND ASSISTANCE

Article 4
The parties may be represented or assisted by persons of their choice. The names and addresses of such persons must be communicated in writing to the other party; such communication must specify whether the appointment is being made for purposes of representation or assistance.

Section II. Composition of the arbitral tribunal

NUMBER OF ARBITRATORS

Article 5
If the parties have not previously agreed on the number of arbitrators (i.e. one or three), and if within fifteen days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed.

APPOINTMENT OF ARBITRATORS (ARTICLES 6 TO 8)

Article 6
1. If a sole arbitrator is to be appointed, either party may propose to the other:
   (a) The names of one or more persons, one of whom would serve as the sole arbitrator; and
   (b) If no appointing authority has been agreed upon by the parties, the name or names of one or more institutions or persons, one of whom would serve as appointing authority.
2. If within thirty days after receipt by a party of a proposal made in accordance with paragraph 1 the parties have not reached agreement on the choice of a sole arbitrator, the sole arbitrator shall be appointed by the appointing authority agreed upon by the parties. If no appointing authority has been agreed upon by the parties, or if the appointing authority agreed upon refuses to act or fails to appoint the arbitrator within sixty days of the receipt of a party’s request therefore, either party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate an appointing authority.
3. The appointing authority shall, at the request of one of the parties, appoint the sole arbitrator as promptly as possible. In making the appointment the appointing authority shall use the following list-procedure, unless both parties agree that the list-procedure should not be used or unless the appointing authority determines in its discretion that the use of the list-procedure is not appropriate for the case:

(a) At the request of one of the parties the appointing authority shall communicate to both parties an identical list containing at least three names;
(b) Within fifteen days after the receipt of this list, each party may return the list to the appointing authority after having deleted the name or names to which he objects and numbered the remaining names on the list in the order of his preference;
(c) After the expiration of the above period of time the appointing authority shall appoint the sole arbitrator from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties;
(d) If for any reason the appointment cannot be made according to this procedure, the appointing authority may exercise its discretion in appointing the sole arbitrator.

4. In making the appointment, the appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.

Article 7
1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the tribunal.
2. If within thirty days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator he has appointed:
   (a) The first party may request the appointing authority previously designated by the parties to appoint the second arbitrator; or
   (b) If no such authority has been previously designated by the parties, or if the appointing authority previously designated refuses to act or fails to appoint the arbitrator within thirty days after receipt of a party's request therefor, the first party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate the appointing authority. The first party may then request the appointing authority so designated to appoint the second arbitrator. In either case, the appointing authority may exercise its discretion in appointing the arbitrator.

2. If within thirty days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by an appointing authority in the same way as a sole arbitrator would be appointed under article 6.

Article 8
1. When an appointing authority is requested to appoint an arbitrator pursuant to article 6 or article 7, the party which makes the request shall send to the appointing authority a copy of the notice of arbitration, a copy of the contract out of or in relation to which the dispute has arisen and a copy of the arbitration agreement if it is not contained in the contract. The appointing authority may require from either party such information as it deems necessary to fulfil its function.
2. Where the names of one or more persons are proposed for appointment as arbitrators, their full names, addresses and nationalities shall be indicated, together with a description of their qualifications.

CHALLENGE OF ARBITRATORS (ARTICLES 9 TO 12)

Article 9
A prospective arbitrator shall disclose to those who approach him in connexion with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality
Appendices

or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him of these circumstances.

Article 10
1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence.
2. A party may challenge the arbitrator appointed by him only for reasons of which he becomes aware after the appointment has been made.

Article 11
1. A party who intends to challenge an arbitrator shall send notice of his challenge within fifteen days after the appointment of the challenged arbitrator has been notified to the challenging party or within fifteen days after the circumstances mentioned in articles 9 and 10 became known to that party.
2. The challenge shall be notified to the other party, to the arbitrator who is challenged and to the other members of the arbitral tribunal. The notification shall be in writing and shall state the reasons for the challenge.
3. When an arbitrator has been challenged by one party, the other party may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his office. In neither case does this imply acceptance of the validity of the grounds for the challenge. In both cases the procedure provided in article 6 or 7 shall be used in full for the appointment of the substitute arbitrator, even if during the process of appointing the challenged arbitrator a party had failed to exercise his right to appoint or to participate in the appointment.

Article 12
1. If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the decision on the challenge will be made:
   (a) When the initial appointment was made by an appointing authority, by that authority;
   (b) When the initial appointment was not made by an appointing authority, but an appointing authority has been previously designated, by that authority;
   (c) In all other cases, by the appointing authority to be designated in accordance with the procedure for designating an appointing authority as provided for in article 6.
2. If the appointing authority sustains the challenge, a substitute arbitrator shall be appointed or chosen pursuant to the procedure applicable to the appointment or choice of an arbitrator as provided in articles 6 to 9 except that, when this procedure would call for the designation of an appointing authority, the appointment of the arbitrator shall be made by the appointing authority which decided on the challenge.

REPLACEMENT OF AN ARBITRATOR

Article 13
1. In the event of the death or resignation of an arbitrator during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in articles 6 to 9 that was applicable to the appointment or choice of the arbitrator being replaced.
2. In the event that an arbitrator fails to act or in the event of the de jure or de facto impossibility of his performing his functions, the procedure in respect of the challenge and replacement of an arbitrator as provided in the preceding articles shall apply.

REPETITION OF HEARINGS IN THE EVENT IF THE REPLACEMENT OF AN ARBITRATOR

Article 14
If under articles 11 to 13 the sole or presiding arbitrator is replaced, any hearings held previously shall be repeated; if any other arbitrator is replaced, such prior hearings may be repeated at the discretion of the arbitral tribunal.
Section III. Arbitral proceedings

GENERAL PROVISIONS

Article 15
1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.
2. If either party so requests at any stage of the proceedings, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.
3. All documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by that party to the other party.

PLACE OF ARBITRATION

Article 16
1. Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration.
2. The arbitral tribunal may determine the locale of the arbitration within the country agreed upon by the parties. It may hear witnesses and hold meetings for consultation among its members at any place it deems appropriate, having regard to the circumstances of the arbitration.
3. The arbitral tribunal may meet at any place it deems appropriate for the inspection of goods, other property or documents. The parties shall be given sufficient notice to enable them to be present at such inspection.
4. The award shall be made at the place of arbitration.

LANGUAGE

Article 17
1. Subject to an agreement by the parties, the arbitral tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings. This determination shall apply to the statement of claim, the statement of defence, and any further written statements and, if oral hearings take place, to the language or languages to be used in such hearings.
2. The arbitral tribunal may order that any documents annexed to the statement of claim or statement of defence, and any supplementary documents or exhibits submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

STATEMENT OF CLAIM

Article 18
1. Unless the statement of claim was contained in the notice of arbitration, within a period of time to be determined by the arbitral tribunal, the claimant shall communicate his statement of claim in writing to the respondent and to each of the arbitrators. A copy of the contract, and of the arbitration agreement if not contained in the contract, shall be annexed thereto.
2. The statement of claim shall include the following particulars:
   (a) The names and addresses of the parties;
   (b) A statement of the facts supporting the claim;
   (c) The points at issue;
   (d) The relief or remedy sought.
   The claimant may annex to his statement of claim all documents he deems relevant or may add a reference to the documents or other evidence he will submit.
STATEMENT OF DEFENCE

Article 19
1. Within a period of time to be determined by the arbitral tribunal, the respondent shall communicate his statement of defence in writing to the claimant and to each of the arbitrators.
2. The statement of defence shall reply to the particulars \((b), (c)\) and \((d)\) of the statement of claim (article 18, para. 2). The respondent may annex to his statement the documents on which he relies for his defence or may add a reference to the documents or other evidence he will submit.
3. In his statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counter-claim arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off.
4. The provisions of article 18, paragraph 2, shall apply to a counter-claim and a claim relied on for the purpose of a set-off.

AMENDMENTS TO THE CLAIM OF DEFENCE

Article 20
During the course of the arbitral proceedings either party may amend or supplement his claim or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement.

PLEAS AS TO THE JURISDICTION OF THE ARBITRAL TRIBUNAL

Article 21
1. The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.
2. The arbitral tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of article 21, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail \(ipso jure\) the invalidity of the arbitration clause.
3. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counterclaim.
4. In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.

FURTHER WRITTEN STATEMENTS

Article 22
The arbitral tribunal shall decide which further written statements, in addition to the statement of claim and the statement of defence, shall be required from the parties or may be presented by them and shall fix the periods of time for communicating such statements.

PERIODS OF TIME

Article 23
The periods of time fixed by the arbitral tribunal for the communication of written statements (including the statement of claim and statement of defence) should not exceed forty-five days. However, the arbitral tribunal may extend the time-limits if it concludes that an extension is justified.
EVIDENCE AND HEARINGS (ARTICLES 24 AND 25)

Article 24
1. Each party shall have the burden of proving the facts relied on to support his claim or defence.
2. The arbitral tribunal may, if it considers it appropriate, require a party to deliver to the tribunal and to the other party, within such a period of time as the arbitral tribunal shall decide, a summary of the documents and other evidence which that party intends to present in support of the facts in issue set out in his statement of claim or statement of defence.
3. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine.

Article 25
1. In the event of an oral hearing, the arbitral tribunal shall give the parties adequate advance notice of the date, time and place thereof.
2. If witnesses are to be heard, at least fifteen days before the hearing each party shall communicate to the arbitral tribunal and to the other party the names and addresses of the witnesses he intends to present, the subject upon and the languages in which such witnesses will give their testimony.
3. The arbitral tribunal shall make arrangements for the translation of oral statements made at a hearing and for a record of the hearing if either is deemed necessary by the tribunal under the circumstances of the case, or if the parties have agreed thereto and have communicated such agreement to the tribunal at least fifteen days before the hearing.
4. Hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses. The arbitral tribunal is free to determine the manner in which witnesses are examined.
5. Evidence of witnesses may also be presented in the form of written statements signed by them.
6. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.

INTERIM MEASURES OF PROTECTION

Article 26
1. At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.
2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.
3. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

EXPERTS

Article 27
1. The arbitral tribunal may appoint one or more experts to report to it, in writing, on specific issues to be determined by the tribunal. A copy of the expert’s terms of reference, established by the arbitral tribunal, shall be communicated to the parties.
2. The parties shall give the expert any relevant information or produce for his inspection any relevant documents or goods that he may require of them. Any dispute between a party and such expert as to the relevance of the required information or production shall be referred to the arbitral tribunal for decision.
3. Upon receipt of the expert’s report, the arbitral tribunal shall communicate a copy of the report to the parties who shall be given the opportunity to express, in writing, their opinion on the report. A party shall be entitled to examine any document on which the expert has relied in his report.
4. At the request of either party the expert, after delivery of the report, may be heard at a hearing where the parties shall have the opportunity to be present and to interrogate the expert. At this hearing either party may present expert witnesses in order to testify on the points at issue. The provisions of article 25 shall be applicable to such proceedings.

DEFAULT

Article 28

1. If, within the period of time fixed by the arbitral tribunal, the claimant has failed to communicate his claim without showing sufficient cause for such failure, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings. If, within the period of time fixed by the arbitral tribunal, the respondent has failed to communicate his statement of defence without showing sufficient cause for such failure, the arbitral tribunal shall order that the proceedings continue.

2. If one of the parties, duly notified under these Rules, fails to appear at a hearing, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration.

3. If one of the parties, duly invited to produce documentary evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.

CLOSURE OF HEARINGS

Article 29

1. The arbitral tribunal may inquire of the parties if they have any further proof to offer or witnesses to be heard or submissions to make and, if there are none, it may declare the hearings closed.

2. The arbitral tribunal may, if it considers it necessary owing to exceptional circumstances, decide, on its own motion or upon application of a party, to reopen the hearings at any time before the award is made.

WAIVER OF RULES

Article 30

A party who knows that any provision of, or requirement under, these Rules has not been complied with and yet proceeds with the arbitration without promptly stating his objection to such non-compliance, shall be deemed to have waived his right to object.

Section IV. The award

DECISIONS

Article 31

1. When there are three arbitrators, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators.

2. In the case of questions of procedure, when there is no majority or when the arbitral tribunal so authorizes, the presiding arbitrator may decide on his own, subject to revision, if any, by the arbitral tribunal.

FORM AND EFFECT OF THE AWARD

Article 32

1. In addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or partial awards.

2. The award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay.
3. The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.

4. An award shall be signed by the arbitrators and it shall contain the date on which and the place where the award was made. Where there are three arbitrators and one of them fails to sign, the award shall state the reason for the absence of the signature.

5. The award may be made public only with the consent of both parties.

6. Copies of the award signed by the arbitrators shall be communicated to the parties by the arbitral tribunal.

7. If the arbitration law of the country where the award is made requires that the award be filed or registered by the arbitral tribunal, the tribunal shall comply with this requirement within the period of time required by law.

APPLICABLE LAW, AIMIABLE COMPOSITEUR

Article 33
1. The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

2. The arbitral tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorized the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration.

3. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

SETTLEMENT OR OTHER GROUNDS FOR TERMINATION

Article 34
1. If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by both parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award.

2. If, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason not mentioned in paragraph 1, the arbitral tribunal shall inform the parties of its intention to issue an order for the termination of the proceedings. The arbitral tribunal shall have the power to issue such an order unless a party raises justifiable grounds for objection.

3. Copies of the order for termination of the arbitral proceedings or of the arbitral award on agreed terms, signed by the arbitrators, shall be communicated by the arbitral tribunal to the parties. Where an arbitral award on agreed terms is made, the provisions of article 32, paragraphs 2 and 4 to 7, shall apply.

INTERPRETATION OF THE AWARD

Article 35
1. Within thirty days after the receipt of the award, either party, with notice to the other party, may request that the arbitral tribunal give an interpretation of the award.

2. The interpretation shall be given in writing within forty-five days after the receipt of the request. The interpretation shall form part of the award and the provisions of article 32, paragraphs 2 to 7, shall apply.

CORRECTION OF THE AWARD

Article 36
1. Within thirty days after the receipt of the award, either party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or
typographical errors, or any errors of similar nature. The arbitral tribunal may within thirty days after the communication of the award make such corrections on its own initiative.

2. Such corrections shall be in writing, and the provisions of article 32, paragraphs 2 to 7, shall apply.

**ADDITIONAL AWARD**

**Article 37**

1. Within thirty days after the receipt of the award, either party, with notice to the other party, may request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.

2. If the arbitral tribunal considers the request for an additional award to be justified and considers that the omission can be rectified without any further hearings or evidence, it shall complete its award within sixty days after the receipt of the request.

3. When an additional award is made, the provisions of article 32, paragraphs 2 to 7, shall apply.

**COSTS (ARTICLES 38 TO 40)**

**Article 38**

The arbitral tribunal shall fix the costs of arbitration in its award. The term “costs” includes only:

(a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;

(b) The travel and other expenses incurred by the arbitrators;

(c) The costs of expert advice and of other assistance required by the arbitral tribunal;

(d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;

(e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;

(f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.

**Article 39**

1. The fees of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case.

2. If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at The Hague, and if that authority has issued a schedule of fees for arbitrators in international cases which it administers, the arbitral tribunal in fixing its fees shall take that schedule of fees into account to the extent that it considers appropriate in the circumstances of the case.

3. If such appointing authority has not issued a schedule of fees for arbitrators in international cases, any party may at any time request the appointing authority to furnish a statement setting forth the basis for establishing fees which is customarily followed in international cases in which the authority appoints arbitrators. If the appointing authority consents to provide such a statement, the arbitral tribunal in fixing its fees shall take such information into account to the extent that it considers appropriate in the circumstances of the case.

4. In cases referred to in paragraphs 2 and 3, when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix its fees only after consultation with the appointing authority which may make any comment it deems appropriate to the arbitral tribunal concerning the fees.

**Article 40**

1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the
parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

3. When the arbitral tribunal issues an order for the termination of the arbitral proceedings or makes an award on agreed terms, it shall fix the costs of arbitration referred to in article 38 and article 39, paragraph 1, in the text of that order or award.

4. No additional fees may be charged by an arbitral tribunal for interpretation or correction or completion of its award under articles 35 to 37.

DEPOSIT OF COSTS

Article 41

1. The arbitral tribunal, on its establishment, may request each party to deposit an equal amount as an advance for the costs referred to in article 38, paragraphs (a), (b) and (c).

2. During the course of the arbitral proceedings the arbitral tribunal may request supplementary deposits from the parties.

3. If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at The Hague, and when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix the amounts of any deposits or supplementary deposits only after consultation with the appointing authority which may make any comments to the arbitral tribunal which it deems appropriate concerning the amount of such deposits and supplementary deposits.

4. If the required deposits are not paid in full within thirty days after the receipt of the request, the arbitral tribunal shall so inform the parties in order that one or another of them may make the required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.

5. After the award has been made, the arbitral tribunal shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.
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APPENDIX 7

UNCITRAL Arbitration Rules
(As Revised in 2010)

Section I. Introductory rules

SCOPE OF APPLICATION*

Article 1
1. Where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree.
2. The parties to an arbitration agreement concluded after 15 August 2010 shall be presumed to have referred to the Rules in effect on the date of commencement of the arbitration, unless the parties have agreed to apply a particular version of the Rules. That presumption does not apply where the arbitration agreement has been concluded by accepting after 15 August 2010 an offer made before that date.
3. These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

* A model arbitration clause for contracts can be found in the annex to the Rules.

NOTICE AND CALCULATION OF PERIODS OF TIME

Article 2
1. A notice, including a notification, communication or proposal, may be transmitted by any means of communication that provides or allows for a record of its transmission.
2. If an address has been designated by a party specifically for this purpose or authorized by the arbitral tribunal, any notice shall be delivered to that party at that address, and if so delivered shall be deemed to have been received. Delivery by electronic means such as facsimile or email may only be made to an address so designated or authorized.
3. In the absence of such designation or authorization, a notice is:
   (a) received if it is physically delivered to the addressee; or
   (b) deemed to have been received if it is delivered at the place of business, habitual residence or mailing address of the addressee.
4. If, after reasonable efforts, delivery cannot be effected in accordance with paragraphs 2 or 3, a notice is deemed to have been received if it is sent to the addressee’s last-known place of business, habitual residence or mailing address by registered letter or any other means that provides a record of delivery or of attempted delivery.
5. A notice shall be deemed to have been received on the day it is delivered in accordance with paragraphs 2, 3 or 4, or attempted to be delivered in accordance with paragraph 4. A notice transmitted by electronic means is deemed to have been received on the day it is sent, except that a notice of arbitration so transmitted is only deemed to have been received on the day when it reaches the addressee’s electronic address.
6. For the purpose of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice is received. If the last day of such period is an official holiday or a non-business day at the residence or place of business of the addressee, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.

**NOTICE OF ARBITRATION**

**Article 3**

1. The party or parties initiating recourse to arbitration (hereinafter called the “claimant”) shall communicate to the other party or parties (hereinafter called the “respondent”) a notice of arbitration.

2. Arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent.

3. The notice of arbitration shall include the following:
   (a) A demand that the dispute be referred to arbitration;
   (b) The names and contact details of the parties;
   (c) Identification of the arbitration agreement that is invoked;
   (d) Identification of any contract or other legal instrument out of or in relation to which the dispute arises or, in the absence of such contract or instrument, a brief description of the relevant relationship;
   (e) A brief description of the claim and an indication of the amount involved, if any;
   (f) The relief or remedy sought;
   (g) A proposal as to the number of arbitrators, language and place of arbitration, if the parties have not previously agreed thereon.

4. The notice of arbitration may also include:
   (a) A proposal for the designation of an appointing authority referred to in article 6, paragraph 1;
   (b) A proposal for the appointment of a sole arbitrator referred to in article 8, paragraph 1;
   (c) Notification of the appointment of an arbitrator referred to in articles 9 or 10.

5. The constitution of the arbitral tribunal shall not be hindered by any controversy with respect to the sufficiency of the notice of arbitration, which shall be finally resolved by the arbitral tribunal.

**RESPONSE TO THE NOTICE OF ARBITRATION**

**Article 4**

1. Within 30 days of the receipt of the notice of arbitration, the respondent shall communicate to the claimant a response to the notice of arbitration, which shall include:
   (a) The name and contact details of each respondent;
   (b) A response to the information set forth in the notice of arbitration, pursuant to article 3, paragraphs 3 (c) to (g).

2. The response to the notice of arbitration may also include:
   (a) Any plea that an arbitral tribunal to be constituted under these Rules lacks jurisdiction;
   (b) A proposal for the designation of an appointing authority referred to in article 6, paragraph 1;
   (c) A proposal for the appointment of a sole arbitrator referred to in article 8, paragraph 1;
   (d) Notification of the appointment of an arbitrator referred to in articles 9 or 10;
   (e) A brief description of counterclaims or claims for the purpose of a set-off, if any, including where relevant, an indication of the amounts involved, and the relief or remedy sought;
   (f) A notice of arbitration in accordance with article 3 in case the respondent formulates a claim against a party to the arbitration agreement other than the claimant.

3. The constitution of the arbitral tribunal shall not be hindered by any controversy with respect to the respondent’s failure to communicate a response to the notice of arbitration, or an incomplete or late response to the notice of arbitration, which shall be finally resolved by the arbitral tribunal.
Appendix 7: UNCITRAL Arbitration Rules

REPRESRENATION AND ASSISTANCE

Article 5
Each party may be represented or assisted by persons chosen by it. The names and addresses of such persons must be communicated to all parties and to the arbitral tribunal. Such communication must specify whether the appointment is being made for purposes of representation or assistance. Where a person is to act as a representative of a party, the arbitral tribunal, on its own initiative or at the request of any party, may at any time require proof of authority granted to the representative in such a form as the arbitral tribunal may determine.

DESIGNATING AND APPOINTING AUTHORITIES

Article 6
1. Unless the parties have already agreed on the choice of an appointing authority, a party may at any time propose the name or names of one or more institutions or persons, including the Secretary-General of the Permanent Court of Arbitration at The Hague (hereinafter called the “PCA”), one of whom would serve as appointing authority.
2. If all parties have not agreed on the choice of an appointing authority within 30 days after a proposal made in accordance with paragraph 1 has been received by all other parties, any party may request the Secretary-General of the PCA to designate the appointing authority.
3. Where these Rules provide for a period of time within which a party must refer a matter to an appointing authority and no appointing authority has been agreed on or designated, the period is suspended from the date on which a party initiates the procedure for agreeing on or designating an appointing authority until the date of such agreement or designation.
4. Except as referred to in article 41, paragraph 4, if the appointing authority refuses to act, or if it fails to appoint an arbitrator within 30 days after it receives a party's request to do so, fails to act within any other period provided by these Rules, or fails to decide on a challenge to an arbitrator within a reasonable time after receiving a party's request to do so, any party may request the Secretary-General of the PCA to designate a substitute appointing authority.
5. In exercising their functions under these Rules, the appointing authority and the Secretary-General of the PCA may require from any party and the arbitrators the information they deem necessary and they shall give the parties and, where appropriate, the arbitrators, an opportunity to present their views in any manner they consider appropriate. All such communications to and from the appointing authority and the Secretary-General of the PCA shall also be provided by the sender to all other parties.
6. When the appointing authority is requested to appoint an arbitrator pursuant to articles 8, 9, 10 or 14, the party making the request shall send to the appointing authority copies of the notice of arbitration and, if it exists, any response to the notice of arbitration.
7. The appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.

Section II. Composition of the arbitral tribunal

NUMBER OF ARBITRATORS

Article 7
1. If the parties have not previously agreed on the number of arbitrators, and if within 30 days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed.
2. Notwithstanding paragraph 1, if no other parties have responded to a party's proposal to appoint a sole arbitrator within the time limit provided for in paragraph 1 and the party or
parties concerned have failed to appoint a second arbitrator in accordance with articles 9 or 10, the appointing authority may, at the request of a party, appoint a sole arbitrator pursuant to the procedure provided for in article 8, paragraph 2, if it determines that, in view of the circumstances of the case, this is more appropriate.

APPPOINTMENT OF ARBITRATORS (ARTICLES 8 TO 10)

Article 8
1. If the parties have agreed that a sole arbitrator is to be appointed and if within 30 days after receipt by all other parties of a proposal for the appointment of a sole arbitrator the parties have not reached agreement thereon, a sole arbitrator shall, at the request of a party, be appointed by the appointing authority.
2. The appointing authority shall appoint the sole arbitrator as promptly as possible. In making the appointment, the appointing authority shall use the following list-procedure, unless the parties agree that the list-procedure should not be used or unless the appointing authority determines in its discretion that the use of the list-procedure is not appropriate for the case:
   (a) The appointing authority shall communicate to each of the parties an identical list containing at least three names;
   (b) Within 15 days after the receipt of this list, each party may return the list to the appointing authority after having deleted the name or names to which it objects and numbered the remaining names on the list in the order of its preference;
   (c) After the expiration of the above period of time the appointing authority shall appoint the sole arbitrator from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties;
   (d) If for any reason the appointment cannot be made according to this procedure, the appointing authority may exercise its discretion in appointing the sole arbitrator.

Article 9
1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal.
2. If within 30 days after the receipt of a party’s notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator it has appointed, the first party may request the appointing authority to appoint the second arbitrator.
3. If within 30 days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by the appointing authority in the same way as a sole arbitrator would be appointed under article 8.

Article 10
1. For the purposes of article 9, paragraph 1, where three arbitrators are to be appointed and there are multiple parties as claimant or as respondent, unless the parties have agreed to another method of appointment of arbitrators, the multiple parties jointly, whether as claimant or as respondent, shall appoint an arbitrator.
2. If the parties have agreed that the arbitral tribunal is to be composed of a number of arbitrators other than one or three, the arbitrators shall be appointed according to the method agreed upon by the parties.
3. In the event of any failure to constitute the arbitral tribunal under these Rules, the appointing authority shall, at the request of any party, constitute the arbitral tribunal and, in doing so, may revoke any appointment already made and appoint or reappoint each of the arbitrators and designate one of them as the presiding arbitrator.
DISCLOSURES BY AND CHALLENGE OF ARBITRATORS**
(ARTICLES 11 TO 13)

Article 11
When a person is approached in connection with his or her possible appointment as an arbitra-
tor, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his
or her impartiality or independence. An arbitrator, from the time of his or her appointment and
throughout the arbitral proceedings, shall without delay disclose any such circumstances to the
parties and the other arbitrators unless they have already been informed by him or her of these
circumstances.
** Model statements of independence pursuant to article 11 can be found in the annex to the Rules.

Article 12
1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the
arbitrator's impartiality or independence.
2. A party may challenge the arbitrator appointed by it only for reasons of which it becomes aware
after the appointment has been made.
3. In the event that an arbitrator fails to act or in the event of the de jure or de facto impossibility of
his or her performing his or her functions, the procedure in respect of the challenge of an arbitrator
as provided in article 13 shall apply.

Article 13
1. A party that intends to challenge an arbitrator shall send notice of its challenge within 15 days
after it has been notified of the appointment of the challenged arbitrator, or within 15 days after
the circumstances mentioned in articles 11 and 12 became known to that party.
2. The notice of challenge shall be communicated to all other parties, to the arbitrator who is
challenged and to the other arbitrators. The notice of challenge shall state the reasons for the
challenge.
3. When an arbitrator has been challenged by a party, all parties may agree to the challenge. The
arbitrator may also, after the challenge, withdraw from his or her office. In neither case does this
imply acceptance of the validity of the grounds for the challenge.
4. If, within 15 days from the date of the notice of challenge, all parties do not agree to the challenge
or the challenged arbitrator does not withdraw, the party making the challenge may elect to pursue
it. In that case, within 30 days from the date of the notice of challenge, it shall seek a decision on
the challenge by the appointing authority.

REPLACEMENT OF AN ARBITRATOR

Article 14
1. Subject to paragraph 2, in any event where an arbitrator has to be replaced during the course of
the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the
procedure provided for in articles 8 to 11 that was applicable to the appointment or choice of
the arbitrator being replaced. This procedure shall apply even if during the process of appointing
the arbitrator to be replaced, a party had failed to exercise its right to appoint or to participate
in the appointment.
2. If, at the request of a party, the appointing authority determines that, in view of the exceptional
circumstances of the case, it would be justified for a party to be deprived of its right to appoint a
substitute arbitrator, the appointing authority may, after giving an opportunity to the parties and
the remaining arbitrators to express their views: (a) appoint the substitute arbitrator; or (b) after
the closure of the hearings, authorize the other arbitrators to proceed with the arbitration and
make any decision or award.
REPETITION OF HEARINGS IN THE EVENT OF THE REPLACEMENT OF AN ARBITRATOR

Article 15
If an arbitrator is replaced, the proceedings shall resume at the stage where the arbitrator who was replaced ceased to perform his or her functions, unless the arbitral tribunal decides otherwise.

EXCLUSION OF LIABILITY

Article 16
Save for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the arbitrators, the appointing authority and any person appointed by the arbitral tribunal based on any act or omission in connection with the arbitration.

Section III. Arbitral proceedings

GENERAL PROVISIONS

Article 17
1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties’ dispute.
2. As soon as practicable after its constitution and after inviting the parties to express their views, the arbitral tribunal shall establish the provisional timetable of the arbitration. The arbitral tribunal may, at any time, after inviting the parties to express their views, extend or abridge any period of time prescribed under these Rules or agreed by the parties.
3. If at an appropriate stage of the proceedings any party so requests, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.
4. All communications to the arbitral tribunal by one party shall be communicated by that party to all other parties. Such communications shall be made at the same time, except as otherwise permitted by the arbitral tribunal if it may do so under applicable law.
5. The arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, unless the arbitral tribunal finds, after giving all parties, including the person or persons to be joined, the opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties. The arbitral tribunal may make a single award or several awards in respect of all parties so involved in the arbitration.

PLACE OF ARBITRATION

Article 18
1. If the parties have not previously agreed on the place of arbitration, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case. The award shall be deemed to have been made at the place of arbitration.
2. The arbitral tribunal may meet at any location it considers appropriate for deliberations. Unless otherwise agreed by the parties, the arbitral tribunal may also meet at any location it considers appropriate for any other purpose, including hearings.
Appendix 7: UNCITRAL Arbitration Rules

LANGUAGE

Article 19
1. Subject to an agreement by the parties, the arbitral tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings. This determination shall apply to the statement of claim, the statement of defence, and any further written statements and, if oral hearings take place, to the language or languages to be used in such hearings.
2. The arbitral tribunal may order that any documents annexed to the statement of claim or statement of defence, and any supplementary documents or exhibits submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

STATEMENT OF CLAIM

Article 20
1. The claimant shall communicate its statement of claim in writing to the respondent and to each of the arbitrators within a period of time to be determined by the arbitral tribunal. The claimant may elect to treat its notice of arbitration referred to in article 3 as a statement of claim, provided that the notice of arbitration also complies with the requirements of paragraphs 2 to 4 of this article.
2. The statement of claim shall include the following particulars:
   (a) The names and contact details of the parties;
   (b) A statement of the facts supporting the claim;
   (c) The points at issue;
   (d) The relief or remedy sought;
   (e) The legal grounds or arguments supporting the claim.
3. A copy of any contract or other legal instrument out of or in relation to which the dispute arises and of the arbitration agreement shall be annexed to the statement of claim.
4. The statement of claim should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant, or contain references to them.

STATEMENT OF DEFENCE

Article 21
1. The respondent shall communicate its statement of defence in writing to the claimant and to each of the arbitrators within a period of time to be determined by the arbitral tribunal. The respondent may elect to treat its response to the notice of arbitration referred to in article 4 as a statement of defence, provided that the response to the notice of arbitration also complies with the requirements of paragraph 2 of this article.
2. The statement of defence shall reply to the particulars (b) to (e) of the statement of claim (article 20, paragraph 2). The statement of defence should, as far as possible, be accompanied by all documents and other evidence relied upon by the respondent, or contain references to them.
3. In its statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counterclaim or rely on a claim for the purpose of a set-off provided that the arbitral tribunal has jurisdiction over it.
4. The provisions of article 20, paragraphs 2 to 4, shall apply to a counterclaim, a claim under article 4, paragraph 2 (f), and a claim relied on for the purpose of a set-off.

AMENDMENTS TO THE CLAIM OR DEFENCE

Article 22
During the course of the arbitral proceedings, a party may amend or supplement its claim or defence, including a counterclaim or a claim for the purpose of a set-off, unless the arbitral tribunal considers it inappropriate to allow such amendment or supplement having regard to the delay in making it or prejudice to other parties or any other circumstances. However, a claim or defence, including a
counterclaim or a claim for the purpose of a set-off, may not be amended or supplemented in such a manner that the amended or supplemented claim or defence falls outside the jurisdiction of the arbitral tribunal.

PLEAS AS TO THE JURISDICTION OF THE ARBITRAL TRIBUNAL

Article 23
1. The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null shall not entail automatically the invalidity of the arbitration clause.
2. A plea that the arbitral tribunal does not have jurisdiction shall be raised no later than in the statement of defence or, with respect to a counterclaim or a claim for the purpose of a set-off, in the reply to the counterclaim or to the claim for the purpose of a set-off. A party is not precluded from raising such a plea by the fact that it has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.
3. The arbitral tribunal may rule on a plea referred to in paragraph 2 either as a preliminary question or in an award on the merits. The arbitral tribunal may continue the arbitral proceedings and make an award, notwithstanding any pending challenge to its jurisdiction before a court.

FURTHER WRITTEN STATEMENTS

Article 24
The arbitral tribunal shall decide which further written statements, in addition to the statement of claim and the statement of defence, shall be required from the parties or may be presented by them and shall fix the periods of time for communicating such statements.

PERIODS OF TIME

Article 25
The periods of time fixed by the arbitral tribunal for the communication of written statements (including the statement of claim and statement of defence) should not exceed 45 days. However, the arbitral tribunal may extend the time limits if it concludes that an extension is justified.

INTERIM MEASURES

Article 26
1. The arbitral tribunal may, at the request of a party, grant interim measures.
2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to:
   (a) Maintain or restore the status quo pending determination of the dispute;
   (b) Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself;
   (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
   (d) Preserve evidence that may be relevant and material to the resolution of the dispute.
3. The party requesting an interim measure under paragraphs 2 (a) to (c) shall satisfy the arbitral tribunal that:
   (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
Appendix 7: UNCITRAL Arbitration Rules

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

4. With regard to a request for an interim measure under paragraph 2 (d), the requirements in paragraphs 3 (a) and (b) shall apply only to the extent the arbitral tribunal considers appropriate.

5. The arbitral tribunal may modify, suspend or terminate an interim measure it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

6. The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

7. The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the interim measure was requested or granted.

8. The party requesting an interim measure may be liable for any costs and damages caused by the measure to any party if the arbitral tribunal later determines that, in the circumstances then prevailing, the measure should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

9. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

EVIDENCE

Article 27
1. Each party shall have the burden of proving the facts relied on to support its claim or defence.

2. Witnesses, including expert witnesses, who are presented by the parties to testify to the arbitral tribunal on any issue of fact or expertise may be any individual, notwithstanding that the individual is a party to the arbitration or in any way related to a party. Unless otherwise directed by the arbitral tribunal, statements by witnesses, including expert witnesses, may be presented in writing and signed by them.

3. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine.

4. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.

HEARINGS

Article 28
1. In the event of an oral hearing, the arbitral tribunal shall give the parties adequate advance notice of the date, time and place thereof.

2. Witnesses, including expert witnesses, may be heard under the conditions and examined in the manner set by the arbitral tribunal.

3. Hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses, including expert witnesses, during the testimony of such other witnesses, except that a witness, including an expert witness, who is a party to the arbitration shall not, in principle, be asked to retire.

4. The arbitral tribunal may direct that witnesses, including expert witnesses, be examined through means of telecommunication that do not require their physical presence at the hearing (such as videoconference).

EXPERTS APPOINTED BY THE ARBITRAL TRIBUNAL

Article 29
1. After consultation with the parties, the arbitral tribunal may appoint one or more independent experts to report to it, in writing, on specific issues to be determined by the arbitral tribunal.
A copy of the expert's terms of reference, established by the arbitral tribunal, shall be communicated to the parties.

2. The expert shall, in principle before accepting appointment, submit to the arbitral tribunal and to the parties a description of his or her qualifications and a statement of his or her impartiality and independence. Within the time ordered by the arbitral tribunal, the parties shall inform the arbitral tribunal whether they have any objections as to the expert's qualifications, impartiality or independence. The arbitral tribunal shall decide promptly whether to accept any such objections. After an expert's appointment, a party may object to the expert's qualifications, impartiality or independence only if the objection is for reasons of which the party becomes aware after the appointment has been made. The arbitral tribunal shall decide promptly what, if any, action to take.

3. The parties shall give the expert any relevant information or produce for his or her inspection any relevant documents or goods that he or she may require of them. Any dispute between a party and such expert as to the relevance of the required information or production shall be referred to the arbitral tribunal for decision.

4. Upon receipt of the expert's report, the arbitral tribunal shall communicate a copy of the report to the parties, which shall be given the opportunity to express, in writing, their opinion on the report. A party shall be entitled to examine any document on which the expert has relied in his or her report.

5. At the request of any party, the expert, after delivery of the report, may be heard at a hearing where the parties shall have the opportunity to be present and to interrogate the expert. At this hearing, any party may present expert witnesses in order to testify on the points at issue. The provisions of article 28 shall be applicable to such proceedings.

DEFAULT

Article 30

1. If, within the period of time fixed by these Rules or the arbitral tribunal, without showing sufficient cause:
   (a) The claimant has failed to communicate its statement of claim, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings, unless there are remaining matters that may need to be decided and the arbitral tribunal considers it appropriate to do so;
   (b) The respondent has failed to communicate its response to the notice of arbitration or its statement of defence, the arbitral tribunal shall order that the proceedings continue, without treating such failure in itself as an admission of the claimant's allegations; the provisions of this subparagraph also apply to a claimant's failure to submit a defence to a counterclaim or to a claim for the purpose of a set-off.

2. If a party, duly notified under these Rules, fails to appear at a hearing, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration.

3. If a party, duly invited by the arbitral tribunal to produce documents, exhibits or other evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.

CLOSURE OF HEARINGS

Article 31

1. The arbitral tribunal may inquire of the parties if they have any further proof to offer or witnesses to be heard or submissions to make and, if there are none, it may declare the hearings closed.

2. The arbitral tribunal may, if it considers it necessary owing to exceptional circumstances, decide, on its own initiative or upon application of a party, to reopen the hearings at any time before the award is made.
Appendix 7: UNCITRAL Arbitration Rules

WAIVER OF RIGHT TO OBJECT

Article 32
A failure by any party to object promptly to any non-compliance with these Rules or with any requirement of the arbitration agreement shall be deemed to be a waiver of the right of such party to make such an objection, unless such party can show that, under the circumstances, its failure to object was justified.

Section IV. The award

DECISIONS

Article 33
1. When there is more than one arbitrator, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators.
2. In the case of questions of procedure, when there is no majority or when the arbitral tribunal so authorizes, the presiding arbitrator may decide alone, subject to revision, if any, by the arbitral tribunal.

FORM AND EFFECT OF THE AWARD

Article 34
1. The arbitral tribunal may make separate awards on different issues at different times.
2. All awards shall be made in writing and shall be final and binding on the parties. The parties shall carry out all awards without delay.
3. The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.
4. An award shall be signed by the arbitrators and it shall contain the date on which the award was made and indicate the place of arbitration. Where there is more than one arbitrator and any of them fails to sign, the award shall state the reason for the absence of the signature.
5. An award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority.
6. Copies of the award signed by the arbitrators shall be communicated to the parties by the arbitral tribunal.

APPLICABLE LAW, AMIABLE COMPOSITEUR

Article 35
1. The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate.
2. The arbitral tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorized the arbitral tribunal to do so.
3. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract, if any, and shall take into account any usage of trade applicable to the transaction.

SETTLEMENT OR OTHER GROUNDS FOR TERMINATION

Article 36
1. If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by the
parties and accepted by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award.

2. If, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason not mentioned in paragraph 1, the arbitral tribunal shall inform the parties of its intention to issue an order for the termination of the proceedings. The arbitral tribunal shall have the power to issue such an order unless there are remaining matters that may need to be decided and the arbitral tribunal considers it appropriate to do so.

3. Copies of the order for termination of the arbitral proceedings or of the arbitral award on agreed terms, signed by the arbitrators, shall be communicated by the arbitral tribunal to the parties. Where an arbitral award on agreed terms is made, the provisions of article 34, paragraphs 2, 4 and 5, shall apply.

**INTERPRETATION OF THE AWARD**

**Article 37**

1. Within 30 days after the receipt of the award, a party, with notice to the other parties, may request that the arbitral tribunal give an interpretation of the award.

2. The interpretation shall be given in writing within 45 days after the receipt of the request. The interpretation shall form part of the award and the provisions of article 34, paragraphs 2 to 6, shall apply.

**CORRECTION OF THE AWARD**

**Article 38**

1. Within 30 days after the receipt of the award, a party, with notice to the other parties, may request the arbitral tribunal to correct in the award any error in computation, any clerical or typographical error, or any error or omission of a similar nature. If the arbitral tribunal considers that the request is justified, it shall make the correction within 45 days of receipt of the request.

2. The arbitral tribunal may within 30 days after the communication of the award make such corrections on its own initiative.

3. Such corrections shall be in writing and shall form part of the award. The provisions of article 34, paragraphs 2 to 6, shall apply.

**ADDITIONAL AWARD**

**Article 39**

1. Within 30 days after the receipt of the termination order or the award, a party, with notice to the other parties, may request the arbitral tribunal to make an award or an additional award as to claims presented in the arbitral proceedings but not decided by the arbitral tribunal.

2. If the arbitral tribunal considers the request for an award or additional award to be justified, it shall render or complete its award within 60 days after the receipt of the request. The arbitral tribunal may extend, if necessary, the period of time within which it shall make the award.

3. When such an award or additional award is made, the provisions of article 34, paragraphs 2 to 6, shall apply.

**DEFINITION OF COSTS**

**Article 40**

1. The arbitral tribunal shall fix the costs of arbitration in the final award and, if it deems appropriate, in another decision.

2. The term "costs" includes only:
   (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 41;
Appendix 7: UNCITRAL Arbitration Rules

(b) The reasonable travel and other expenses incurred by the arbitrators;
(c) The reasonable costs of expert advice and of other assistance required by the arbitral tribunal;
(d) The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
(e) The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
(f) Any fees and expenses of the appointing authority as well as the fees and expenses of the Secretary-General of the PCA.

3. In relation to interpretation, correction or completion of any award under articles 37 to 39, the arbitral tribunal may charge the costs referred to in paragraphs 2 (b) to (f), but no additional fees.

FEES AND EXPENSES OF ARBITRATORS

Article 41

1. The fees and expenses of the arbitrators shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case.

2. If there is an appointing authority and it applies or has stated that it will apply a schedule or particular method for determining the fees for arbitrators in international cases, the arbitral tribunal in fixing its fees shall take that schedule or method into account to the extent that it considers appropriate in the circumstances of the case.

3. Promptly after its constitution, the arbitral tribunal shall inform the parties as to how it proposes to determine its fees and expenses, including any rates it intends to apply. Within 15 days of receiving that proposal, any party may refer the proposal to the appointing authority for review. If, within 45 days of receipt of such a referral, the appointing authority finds that the proposal of the arbitral tribunal is inconsistent with paragraph 1, it shall make any necessary adjustments thereto, which shall be binding upon the arbitral tribunal.

4. (a) When informing the parties of the arbitrators’ fees and expenses that have been fixed pursuant to article 40, paragraphs 2 (a) and (b), the arbitral tribunal shall also explain the manner in which the corresponding amounts have been calculated.

(b) Within 15 days of receiving the arbitral tribunal’s determination of fees and expenses, any party may refer for review such determination to the appointing authority. If no appointing authority has been agreed upon or designated, or if the appointing authority fails to act within the time specified in these Rules, then the review shall be made by the Secretary-General of the PCA.

(c) If the appointing authority or the Secretary-General of the PCA finds that the arbitral tribunal’s determination is inconsistent with the arbitral tribunal’s proposal (and any adjustment thereto) under paragraph 3 or is otherwise manifestly excessive, it shall, within 45 days of receiving such a referral, make any adjustments to the arbitral tribunal’s determination that are necessary to satisfy the criteria in paragraph 1. Any such adjustments shall be binding upon the arbitral tribunal.

(d) Any such adjustments shall either be included by the arbitral tribunal in its award or, if the award has already been issued, be implemented in a correction to the award, to which the procedure of article 38, paragraph 3, shall apply.

5. Throughout the procedure under paragraphs 3 and 4, the arbitral tribunal shall proceed with the arbitration, in accordance with article 17, paragraph 1.

6. A referral under paragraph 4 shall not affect any determination in the award other than the arbitral tribunal’s fees and expenses; nor shall it delay the recognition and enforcement of all parts of the award other than those relating to the determination of the arbitral tribunal’s fees and expenses.
Appendices

ALLOCATIONS OF COSTS

Article 42
1. The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
2. The arbitral tribunal shall in the final award or, if it deems appropriate, in any other award, determine any amount that a party may have to pay to another party as a result of the decision on allocation of costs.

DEPOSIT OF COSTS

Article 43
1. The arbitral tribunal, on its establishment, may request the parties to deposit an equal amount as an advance for the costs referred to in article 40, paragraphs 2 (a) to (c).
2. During the course of the arbitral proceedings the arbitral tribunal may request supplementary deposits from the parties.
3. If an appointing authority has been agreed upon or designated, and when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix the amounts of any deposits or supplementary deposits only after consultation with the appointing authority, which may make any comments to the arbitral tribunal that it deems appropriate concerning the amount of such deposits and supplementary deposits.
4. If the required deposits are not paid in full within 30 days after the receipt of the request, the arbitral tribunal shall so inform the parties in order that one or more of them may make the required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.
5. After a termination order or final award has been made, the arbitral tribunal shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.

Annex

MODEL ARBITRATION CLAUSE FOR CONTRACTS

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules.

Note — Parties should consider adding:
(a) The appointing authority shall be . . . (name of institution or person);
(b) The number of arbitrators shall be . . . (one or three);
(c) The place of arbitration shall be . . . (town and country);
(d) The language to be used in the arbitral proceedings shall be . . .

POSSIBLE WAIVER STATEMENT

Note—If the parties wish to exclude recourse against the arbitral award that may be available under the applicable law, they may consider adding a provision to that effect as suggested below, considering, however, that the effectiveness and conditions of such an exclusion depend on the applicable law.

Waiver: The parties hereby waive their right to any form of recourse against an award to any court or other competent authority, insofar as such waiver can validly be made under the applicable law.
MODEL STATEMENTS OF INDEPENDENCE PURSUANT TO ARTICLE 11 OF THE RULES

No circumstances to disclose: I am impartial and independent of each of the parties and intend to remain so. To the best of my knowledge, there are no circumstances, past or present, likely to give rise to justifiable doubts as to my impartiality or independence. I shall promptly notify the parties and the other arbitrators of any such circumstances that may subsequently come to my attention during this arbitration.

Circumstances to disclose: I am impartial and independent of each of the parties and intend to remain so. Attached is a statement made pursuant to article 11 of the UNCITRAL Arbitration Rules of (a) my past and present professional, business and other relationships with the parties and (b) any other relevant circumstances. [Include statement] I confirm that those circumstances do not affect my independence and impartiality. I shall promptly notify the parties and the other arbitrators of any such further relationships or circumstances that may subsequently come to my attention during this arbitration.

Note—Any party may consider requesting from the arbitrator the following addition to the statement of independence:

I confirm, on the basis of the information presently available to me, that I can devote the time necessary to conduct this arbitration diligently, efficiently and in accordance with the time limits in the Rules.
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APPENDIX 8

AAA Procedures for Cases Under the UNCITRAL Arbitration Rules

Effective August 1996

To facilitate handling of arbitration cases that the parties have agreed to conduct under the UNCITRAL Arbitration Rules, the American Arbitration Association will:

1. perform the functions of the appointing authority as set forth in the UNCITRAL Arbitration Rules whenever the AAA has been so designated by the parties either in the arbitration clause of their contract or in a separate agreement or
2. perform the administrative services described in this booklet when called for by the contract or when requested by all parties or by the arbitral tribunal.

Services as the Appointing Authority

1. Appointment of Sole or Presiding Arbitrator

When requested to appoint a sole or presiding arbitrator, the AAA will follow the list procedure set forth in the UNCITRAL Arbitration Rules (Article 6, paragraph 3). The AAA has extensive experience in using the list procedure because it utilizes a similar procedure to conduct cases under various other rules.

In selecting arbitrators, the AAA will use its extensive panel of arbitrators for commercial cases. That panel includes qualified persons of many different nationalities having varied professional and business backgrounds. The AAA will carefully consider the nature of the case, as described in the notice of arbitration, in order to include in the list persons having appropriate professional or business experience and language ability.

When appointing a sole or presiding arbitrator under the UNCITRAL Arbitration Rules, the AAA will follow its usual practice and, upon the request of either party, designate a person of a nationality other than the nationalities of the parties, unless otherwise provided by written agreement of the parties.

2. Appointment of the “Second” Arbitrator in Three-Arbitrator Cases

Under Article 7 of the UNCITRAL Arbitration Rules, when three arbitrators are to be appointed, each party is to appoint one arbitrator but, if a party fails to do so, the other party may request that the appointment of the second arbitrator be made by the appointing authority.

In accordance with the UNCITRAL Arbitration Rules, the AAA, when appointing a second arbitrator, will exercise its discretion and will not use the list procedure. The second arbitrator to be appointed under Article 7, paragraph 2(a), shall be impartial and independent of either party.

3. Decisions on Challenges to Arbitrators

Under Article 10 of the UNCITRAL Arbitration Rules, all arbitrators—including those appointed by one party—are required to be impartial and independent. Article 10 provides that any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts regarding the arbitrator’s impartiality or independence.

Article 12 of the UNCITRAL Arbitration Rules requires that all contested challenges be decided by the appointing authority. When deciding challenges at the request of any party, the AAA will appoint
a special committee to make the decision, consisting of three persons, a majority of whom will be of nationalities different from that of any party.

In deciding challenges, the AAA and any such committee will be guided by the principles set forth in the Code of Ethics for Arbitrators in Commercial Disputes, a code jointly adopted by the AAA and the American Bar Association.

4. Appointment of Substitute Arbitrators
The UNCITRAL Arbitration Rules provide that a substitute arbitrator will be appointed if an arbitrator dies or resigns during an arbitration proceeding or if a challenge against the arbitrator is sustained (Article 12, paragraph 2, and Article 13). In such cases, the AAA will perform the same function in appointing a substitute arbitrator as earlier described regarding other arbitrators.

5. Consultation on Fees of Arbitrators
The UNCITRAL Arbitration Rules provide that the fees of arbitrators shall be reasonable in amount, taking into consideration the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators, and other relevant circumstances of the case (Article 39, paragraph 2). The rules provide that parties may request the appointing authority to provide to the arbitrators and the parties a statement setting forth the basis for establishing fees that is customarily followed in cases in which the appointing authority acts (Article 39, paragraph 3). The AAA has no schedule of fees for arbitrators, but it will furnish a statement concerning customary fees based on its experience in administering large numbers of cases.

Administrative Services

Upon the request of all parties or the arbitral tribunal, the AAA will provide the following administrative services:

1. Communications
The experience of major arbitration agencies suggests that arbitrations are best served when communications—except at hearings—are transmitted through the arbitration administrator. Upon request, all oral or written communications from a party to the arbitral tribunal—except at hearings—may be directed to the AAA, which will transmit them to the arbitral tribunal and to the other parties.

Agreement by the parties that the AAA shall administer a case constitutes consent by the parties that, for purposes of compliance with the time requirements of the UNCITRAL Arbitration Rules, any written communication shall be deemed to have been received by the addressee when received by the AAA. When transmitting communications to a party, the AAA will use the address set forth in the notice of arbitration or any other address that has been furnished by a party in writing to the AAA.

2. Hearings
Upon request, the AAA will assist the arbitral tribunal to establish the date, time and place of hearings, giving such advance notice thereof to the parties as the tribunal determines pursuant to the UNCITRAL Arbitration Rules (Article 25, paragraph 1).

3. Hearing-Room Rental
The AAA will provide a room for hearings in the offices of the AAA on a rental basis. If a hearing room is not available in the offices of the AAA, the AAA will arrange a hearing room elsewhere. The cost of hearing rooms will be billed separately and excluded from the fees for administrative services.

4. Stenographic Transcripts
Upon request, the AAA will make arrangements for stenographic transcripts of hearings. The cost of stenographic transcripts will be billed separately and excluded from the fees for administrative services.
5. Interpretation
Upon request, the AAA will make arrangements for the services of interpreters at hearings. The cost of interpretation will be billed separately and excluded from the fee for administrative services.

6. Fees of Arbitrators and Deposits
Upon request, the AAA will make all arrangements concerning the amounts of the arbitrators’ fees, and advance deposits to be made on account of such fees in consultation with the parties and the arbitrators. The AAA does not fix the amount of fees of arbitrators and has no schedule for arbitrators in international commercial cases.

7. Other Services
Upon request, the AAA will consider providing other appropriate administrative services.
APPENDIX 9

List of AAA Rules Available on the AAA’s Website

Accident Claims

- Accident Claims Arbitration Rules. Effective January 1, 1994

Commercial

- Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes), January 1, 2010
- Non-Binding Arbitration Rules For Consumer Disputes And Business Disputes, April 2009
- Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes), June 1, 2009
- Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes), September 1, 2007
- Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes), September 15, 2005
- Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes), July 1, 2003
- Summary of Changes to Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes), Amended and Effective July 1, 2003

Commercial Finance

- Commercial Finance Rules, January 1, 2010
- Professional Accounting and Related Services Dispute Resolution Rules, January 1, 2010
- Commercial Finance Rules, June 1, 2009
- Commercial Finance Rules, September 1, 2007
- Professional Accounting and Related Services Dispute Resolution Rules, June 1, 2009
- Professional Accounting and Related Services Dispute Resolution Rules, September 1, 2007
- Financial Planning Disputes Commercial Mediation Rules, Amended and Effective July 1, 2003

Construction

- Construction Industry Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Construction Disputes), Effective January 1, 2010
- Home Construction Arbitration Rules and Mediation Procedures, Effective June 1, 2007
- Construction IDM
- Construction Industry Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Construction Disputes), Effective October 1, 2009
- Construction Industry Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Construction Disputes), Effective June 1, 2009
Appendices

• Construction Industry Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Construction Disputes). Effective September 1, 2007
• Construction Industry Arbitration Rules and Mediation Procedure, (Including Procedures for Large, Complex Construction Disputes), Effective September 15, 2005
• Residential Construction Disputes Supplementary Procedures, Effective September 15, 2005
• Construction Industry Arbitration Rules and Mediation Procedures, Effective July 1, 2003
• Summary of Changes to Construction Industry Rules and Mediation Procedures (Including Procedures for Large, Complex Construction Disputes), Amended and Effective July 1, 2003
• Residential Construction Disputes Supplementary Procedures, Effective July 1, 2003

Consumer

• Consumer-Related Disputes Supplementary Procedures, Effective September 15, 2005
• Consumer Arbitration Costs, Effective July 1, 2003
• Consumer-Related Disputes Supplementary Procedures, Effective July 1, 2003

Employment

• Employment Non-Binding Arbitration Rules, Effective January 1, 2010
• Employment Non-Binding Arbitration Rules, Effective April 15, 2009
• Employee Benefit Plan Claims Arbitration Rules
• Employment Arbitration Rules and Mediation Procedures—Amended and Effective November 1, 2009
• Employment Arbitration Rules and Mediation Procedures—Amended and Effective June 1, 2009
• Employment Arbitration Rules and Mediation Procedures, Effective July 1, 2006
• National Rules for the Resolution of Employment Disputes, Effective January 1, 2004

Grievance Mediation

• Grievance Mediation Procedures

Insurance

• Resolution of Intra-Industry U.S. Reinsurance and Insurance Disputes Supplementary Procedures, Effective January 1, 2010
• Minnesota No-Fault, Comprehensive or Collisions Damage Automobile Insurance Arbitration Rules, Effective July 1, 2008
• Insurance Arbitration Rules and Mediation Procedures, Effective February 1, 2008
• Resolution of Intra-Industry U.S. Reinsurance and Insurance Disputes Supplementary Procedures, Effective September 15, 2005
• Insurance Claims Dispute Resolution Procedures, Effective January 1, 1989
• Minnesota No-Fault Arbitration Rules August 5, 2003
• New Jersey No-Fault Automobile Arbitration Rules, Effective May 1, 2003
• Resolution of Intra-Industry U.S. Reinsurance and Insurance Disputes Supplementary Procedures, Effective July 1, 2003
• Title Insurance Arbitration Rules, Effective January 1, 2000
Appendix 9: List of AAA Rules Available on the AAA’s Website

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- International Dispute Resolution Procedures (Including Mediation and Arbitration Rules), Effective January 1, 2010
- International Dispute Resolution Procedures (Including Mediation and Arbitration Rules), Effective June 1, 2009
- ICDR International Dispute Resolution Procedures (Portuguese)—June 2009
- International Dispute Resolution Procedures (Including Mediation and Arbitration Rules), Effective March 1, 2008
- ICDR International Dispute Resolution Procedures (French)—March 2008
- ICDR International Dispute Resolution Procedures (Portuguese)—March 2008
- ICDR International Dispute Resolution Procedures (Spanish)—March 2008
- International Dispute Resolution Procedures, Effective September 1, 2007
- Summary of Changes: International Dispute Resolution Procedures (Effective May 1, 2006)
- International Dispute Resolution Procedures, Effective September 15, 2005
- International Dispute Resolution Procedures, Effective July 1, 2003
- Summary of Changes to International Dispute Resolution Procedures, Amended and Effective July 1, 2003
- CAMCA (Commercial Arbitration and Mediation Center for the Americas) Mediation and Arbitration Rules, Effective March 15, 1996
- Procedures for Cases under the UNCITRAL Arbitration Rules
- Procedures for Cases under the UNCITRAL Arbitration Rules, Effective September 1, 2000

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- Domain Name Disputes Supplementary Rules
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