

The New ICDR International Arbitration Rules

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The International Centre for Dispute Resolution (ICDR) of the American Arbitration Association (AAA) has completed a comprehensive review of its International Arbitration Rules and issued a revised set of rules, effective June 1, 2014. The revised rules are the result of a multi-year effort by the ICDR management team and an ICDR Subcommittee tasked with reviewing and recommending changes to the ICDR's International Arbitration Rules.²

While the ICDR's International Arbitration Rules have been modified from time to time since they were first issued in 1991, the new revisions effect by far the most significant changes made to the Rules to date.

The revisions are progressive and wide-ranging. They underscore that efficiency is a prime objective, codify certain well-established administrative practices and introduce several new provisions to reflect best international arbitration practices.

The changes effected by the revisions can be categorized as follows:

- The new Rules address matters, such as consolidation, joinder and e-disclosure, that the old Rules did not. These revisions conform the ICDR's International Arbitration Rules to best international practices.
- The new Rules maintain what is distinctive about ICDR arbitration, and further distinguish ICDR arbitration from other institutional options. For example, many users find the ICDR list method for appointing arbitrators to be the best way to resolve the tension between respect for party input and the excesses of party appointments. The old Rules, though, omitted any mention of the ICDR list method. The new Rules explain the list method and thereby provide new users of the Rules with transparency as to a well-established administrative practice. Even where the Rules have been revised to reflect best international practices, the revisions include innovations unique to the ICDR, such as a consolidation arbitrator to determine whether cases should be consolidated.
- The revisions go further than the old Rules in establishing procedures to avoid unnecessary delay and expense, expanding both the arbitrators' powers and the parties' obligations in this regard.
- Other changes are the product of wordsmithing, making clearer the content of the Rules, and correcting unintended inconsistencies.

Brief History of the ICDR International Arbitration Rules

The first step taken by the AAA to create a set of specialized international arbitration rules was the 1986 "Supplement for International Commercial Arbitration," which was added as an annex to the AAA Commercial Rules.

The AAA's first set of "International Arbitration Rules" was introduced in 1991, and was closely modeled on the UNCITRAL Arbitration Rules 1976.

In 1993, a minor revision of the International Arbitration Rules was made to provide that the Rules would apply only where the parties agreed to apply them, which inevitably slowed the growth of cases covered by the Rules.

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In 1996, the ICDR was created, and the Rules were amended in 1997 to give the ICDR exclusive administration of all international arbitrations before the AAA. There were also important changes to the Rules regarding the effective management of the proceedings, such as providing the tribunal with the authority to convene an organizational hearing (a procedure now recognized as global best practice), and providing the tribunal with the explicit authority to limit or exclude cumulative or repetitive evidence.

In 2003, a provision was added to allow the ICDR to publish awards under certain conditions. The ICDR also at that time combined its International Arbitration Rules with its International Mediation Rules into a single publication: the International Dispute Resolution Procedures.

In 2006, provisions on emergency relief before the formation of the tribunal were introduced. The ICDR was the first of the major arbitral institutions to introduce such provisions.

In 2009, additional minor revisions were made, primarily to the fee schedule.

Other than the above, the ICDR's International Arbitration Rules have remained essentially the same as when introduced in 1991.

Significant Changes

- 1. International Expedited Procedures (Articles 1(4) and E-1 to E-10):** The old Rules had no provision regarding expedited arbitration. The new Rules contain International Expedited Procedures (Articles E-1 to E-10), which provide for the appointment of a sole arbitrator and will apply in any case where no disclosed claim or counterclaim exceeds USD \$250,000 exclusive of interest and the costs of arbitration (unless the parties agree or the ICDR determines otherwise). Parties may also agree to use these Procedures in other cases. These Rules distinguish the ICDR from other arbitral institutions, as the ICC, LCIA and UNCITRAL Rules contain no such provisions (the ICC in 2003 published "Guidelines for Arbitrating Small Claims under the ICC Rules of Arbitration").
- 2. Mediation (Article 5):** The old Rules had no provisions regarding mediation. The new Rules state that, following the time for submission of an Answer, the ICDR may invite the parties to mediate in accordance with the ICDR's International Mediation Rules, and the parties may thereafter agree to mediate in accordance with the ICDR's International Mediation Rules at any stage of the proceedings. Unless the parties agree otherwise, any mediation shall proceed concurrently with the arbitration, and the mediator shall not be an arbitrator appointed to the case. These provisions distinguish the ICDR from other arbitral institutions, as the LCIA, SCC, SIAC and UNCITRAL Rules contain no such provisions.
- 3. Joinder (Article 7):** The old Rules had no provision regarding joinder. The new Rules contain a joinder provision allowing a party to join an additional party by submitting a Notice of Arbitration against the additional party. No additional party may be joined after the appointment of any arbitrator, unless all parties, including the additional party, otherwise agree.
- 4. Consolidation (Article 8):** The old Rules had no provision regarding consolidation. The new Rules contain a consolidation provision allowing a party to request the Administrator to appoint a consolidation arbitrator who will have the power to consolidate two or more arbitrations pending under the Rules, or under the Rules and other arbitration rules administered by the AAA or ICDR. The role of the consolidation arbitrator is unique to the ICDR.
- 5. Express description of the ICDR's "list" procedure as the default method of arbitrator appointment (Article 12(6)):** The old Rules provided for the ICDR to appoint the arbitrator(s) in the event the parties cannot agree on either the designation of the arbitrator(s) or a procedure for appointing them, and made no reference to the ICDR's "list" procedure that has been a distinguishing feature of ICDR practice (the list procedure is described in the AAA's Commercial

Arbitration Rules but not in the old ICDR Rules). The new Rules explain that, in the absence of party agreement on the method of appointment, the ICDR shall send to each party a list of arbitrator candidates and, failing agreement, the parties have 15 days to strike names and number the remaining names in order of preference. The ICDR shall then invite the acceptance of an arbitrator(s) to serve from among the persons who have been approved on the parties' lists and in accordance with the designated order of mutual preference.

6. **Impartiality and independence of arbitrators and arbitrator disclosure (Article 13):** The old Rules did not require arbitrators to confirm their impartiality, independence or availability to serve (though this was done in practice). Under previous practice, there was, moreover, a tacit disincentive for arbitrators to disclose circumstances that could give rise to justifiable doubts as to their impartiality and independence in situations where the arbitrator considered that the disclosures should not give rise to justifiable doubts. The new Rules require prospective arbitrators to sign a Notice of Appointment affirming their independence, impartiality and availability, and in which any circumstances that may give rise to justifiable doubts as to their independence or impartiality are disclosed. The new Rules also state that disclosure does not necessarily indicate a belief by the disclosing arbitrator or party that the disclosed information gives rise to justifiable doubts as to the arbitrator's independence or impartiality.
7. **Conduct of party representatives (Article 16):** The old Rules had no provision regarding the conduct of party representatives. The new Rules state that the conduct of party representatives shall be in accordance with such guidelines as the ICDR may issue on the subject. This provision can be seen as a placeholder until such time as the ICDR finalizes its review of guidelines as to party representation, at which time the ICDR may choose to include all or part of such guidelines in the Rules.
8. **Avoiding unnecessary delay and expense (Article 20(2) & (7); Article 21(8) & (9)):** The old Rules had no provision regarding either the parties' responsibility to avoid unnecessary delay and expense or the use of technology to increase efficiency and economy. The new Rules build on changes to the Rules in 1997 as well as the ICDR Guidelines for Arbitrators Concerning Exchanges of Information to make clear that efficiency is a prime objective of arbitrations under the Rules. They state that the parties shall make every effort to avoid unnecessary delay and expense and that the tribunal may allocate costs, draw adverse inferences and take such additional steps as are necessary to protect the efficiency and integrity of the arbitration. Furthermore, they give the tribunal express authority to take such action in resolving any dispute about pre-hearing exchanges of information or as a means of dealing with a party's failure to comply with an order for information exchange. The new Rules also state that, in establishing procedures for the case, the tribunal and the parties may consider how technology, including electronic communications, can be used to increase the efficiency and economy of the proceedings.
9. **Exchange of information (Article 21):** The old Rules contained minimal provisions regarding the exchange of information, providing merely that the tribunal may order a party to produce (i) a summary of the documents and other evidence which that party intends to present; and (ii) other documents, exhibits or other evidence the tribunal deems necessary or appropriate. The new Rules incorporate the essence of the ICDR Guidelines for Arbitrators Concerning Exchanges of Information, including the following provisions regarding the exchange of information:
 - a. The new Rules mandate that the tribunal manage the exchange of information among the parties with a view to maintaining efficiency and economy.
 - b. As a new mandatory rule, the parties shall exchange all documents upon which each intends to rely on a schedule set by the tribunal.
 - c. Echoing the standard in the IBA Rules on the Taking of Evidence (2010), the new Rules provide that the tribunal may, upon application, require one party to make available to another party those documents in the party's possession that are reasonably believed to exist and to be relevant and material to the outcome of the case.

- d. Upon application, the new Rules permit the tribunal to require a party to permit inspections on reasonable notice of relevant premises or objects.
- 10. Electronic documents (Article 21(6)):** The old Rules made no mention of electronic documents. The new Rules address this indispensable subject, stating that electronic documents may be made available in the form most convenient and economical for the possessing party, unless the tribunal determines otherwise, that requests for electronic documents should be narrowly focused and structured to make searching for them as economical as possible, and that the tribunal may direct testing or other means of focusing and limiting any search. These provisions, which stem from the ICDR Guidelines for Arbitrators Concerning Exchanges of Information, distinguish the ICDR from other arbitral institutions, as the ICC, LCIA, SCC, SIAC and UNCITRAL Rules contain no such provisions.
- 11. Express exclusion of US litigation procedures (Article 21(10)):** The old Rules made no mention of depositions and other features of US litigation. The new Rules state that depositions, interrogatories, and requests to admit are generally not appropriate procedures for obtaining information in arbitrations under these Rules. This provision is unique to the ICDR and is responsive to concern among users that U.S. litigation techniques might be incorporated into arbitrations in the US.
- 12. Privilege (Article 22):** The old Rules did not address applicable rules of privilege, other than to provide that the tribunal shall take into account applicable principles of legal privilege. The new Rules state that, 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 all parties, giving preference to the rule that provides the highest level of protection. This provision again stems from the ICDR Guidelines for Arbitrators Concerning Exchanges of Information and distinguishes the ICDR from other arbitral institutions, as the ICC, LCIA, SCC, SIAC and UNCITRAL Rules contain no such provisions.
- 13. Time of the award (Article 30):** In an expansion from the old Rules (which provided merely that the award be made “promptly by the tribunal”), the new Rules provide that, unless otherwise agreed by the parties, specified by law or determined by the ICDR, the final award shall be made no later than 60 days from the date of the closing of the hearing.
- 14. Internationalized language:** Throughout the new Rules, terms have been amended to bring the Rules in line with the language used in international arbitration. Examples include replacing “Statement of Claim” with “Notice of Arbitration,” and “Statement of Defense” with “Answer.”
- 15. Reduced references to the hearing as the focal event of the arbitration:** The old Rules contained multiple references to the hearing as the focal point of a case. The new Rules reduce these references, reflecting the reality that many international arbitrations have an extensive written phase before a hearing.³

Significant Changes Considered but Not Made

- 1. Arbitral tribunal to be consulted before seeking court assistance for production of information:** The old Rules made no mention of assistance from judicial authorities in respect of the exchange or production of information. In light of a series of discovery applications to US courts pursuant to 28 U.S.C. § 1782, the Subcommittee considered adding a provision that a

³ *But see* Article 23.2 (“At least 15 days before the hearing, 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.”) This provision may be seen as a vestige of early AAA rules. After debate, the ICDR decided to retain the rule because experience has shown that it is useful to parties and arbitrators.

party which intends to seek court assistance for the production of information either from another party or from a non-party for use in the arbitration, shall give notice to all parties and to the tribunal in order to permit the tribunal to issue an order or other direction regarding the prospective application for court assistance. Ultimately, the ICDR decided against including such a provision in part because of the risk that a requirement of prior consultation could be used to interfere with a party's right to make emergency applications to the courts for assistance outside the § 1782 context.

2. **Class arbitration:** The old Rules had no provision regarding class arbitration. The Subcommittee considered adding a provision that no arbitration under these Rules shall proceed as a class arbitration, absent the express consent of the all parties. The ICDR ultimately decided not to address this point of controversy under U.S. arbitration law.
3. **Default mediation:** The old Rules had no provision regarding mediation. In addition to the new provisions concerning mediation that were added, the Subcommittee considered a default mediation clause with an opt-out available, stating that, following the submission of an Answer, the ICDR may direct the parties to mediate their dispute in accordance with the ICDR's International Mediation Rules. Such clause would have had the effect of requiring the parties to mediate unless any party objected in writing. Ultimately the ICDR decided to empower the Administrator to invite the parties to mediate rather than to refer them to mediation, as the alternative was considered intrusive of party autonomy.
4. **Party representation:** The old Rules had no provision regarding the conduct of party representatives. The Subcommittee considered adding a provision giving the tribunal authority to rule on matters of party representation and to take any measures it deems appropriate to ensure the integrity and fairness of the proceedings. Instead, the ICDR decided to reserve authority to issue guidelines on the conduct of party representatives at a later date.

Additional Changes

1. **Deletion of "in writing" requirement (Article 1):** The old Rules provided for application of the Rules "[w]here parties have agreed *in writing* to arbitrate disputes . . ." The new Rules simply provide for their application "[w]here parties have agreed to arbitrate disputes . . ." Elimination of a formal writing requirement is consistent with modern national arbitration laws and the most recent revisions to the ICC Rules and the UNCITRAL Rules.
2. **Administrative conference (Article 4):** The old Rules had no provision regarding administrative conferences routinely conducted by the ICDR. The new Rules state that the ICDR may conduct an administrative conference before the tribunal is constituted to address issues such as arbitrator selection, mediation, process efficiencies and other administrative matters. The ICC, LCIA, SCC, SIAC and UNCITRAL Rules contain no such provision.
3. **Waiver of right to challenge an arbitrator (Article 13(3)):** The old Rules had no provision regarding waiver of the right to challenge an arbitrator. The new Rules state that failure of a party to disclose promptly circumstances that may give rise to justifiable doubts as to the arbitrator's impartiality or independence constitutes a waiver of the right to challenge an arbitrator based on those circumstances.
4. **Challenge of an arbitrator (Article 14):** The old Rules had no provision giving non-challenging parties an opportunity to respond to arbitrator challenges (though this was done in practice), and were silent on what information should be provided to the tribunal and the challenged arbitrator. The new Rules explain that, when a party challenges an arbitrator, all non-challenging parties have an opportunity to respond. The ICDR shall notify the tribunal only that a challenge has been

received, without identifying the party challenging, and may request information from the challenged arbitrator relating to the challenge.

5. **Removal of an arbitrator by the ICDR (Article 14(4)):** The old Rules had no provision allowing the ICDR to remove an arbitrator. The new Rules allow the ICDR, on its own initiative, to remove an arbitrator for failing to perform his or her duties.
6. **Place of arbitration (Article 17):** The old Rules did not address the tribunal's authority (though well-established in international practice) to conduct deliberations elsewhere than the place of arbitration. The new Rules clarify this authority and provide that if deliberations are held elsewhere than the place of arbitration, the arbitration shall be deemed conducted at the place of arbitration and any award shall be deemed made at the place of arbitration.
7. **Jurisdictional challenges before constitution of the tribunal (Article 19(4)):** The old Rules had no provision regarding jurisdictional challenges made before the constitution of the tribunal. The new Rules state that issues regarding arbitral jurisdiction raised before the constitution of the tribunal do not preclude the ICDR from proceeding with administration and shall be referred to the tribunal for determination once the tribunal is constituted.
8. **Witness examination (Article 23):** The old Rules provided that the tribunal "may require any witness or witnesses to retire during the testimony of other witnesses." The new Rules state more simply and broadly that the tribunal may determine who shall be present during witness examination and may direct that witnesses be examined through means that do not require their physical presence.
9. **Interpretation and correction of the award (Article 33):** The new Rules contain several new provisions on interpretation and correction of the award and additional awards. They now state that any interpretation, correction or additional award made by the tribunal shall contain reasoning and shall form part of the award. The tribunal may, on its own initiative, within 30 days of the date of the award, correct any clerical, typographical or computation errors or make an additional award as to claims presented but omitted from the award. The parties will be responsible for all costs associated with any request for interpretation, correction or an additional award, and the tribunal may allocate such costs.
10. **Arbitrators' fees and expenses (Article 35):** The new Rules contain several new provisions on arbitrators' fees and expenses. They now state that the fees and expenses of the arbitrators shall be reasonable in amount, taking into account the time spent by the arbitrators, the size and complexity of the case, and any other relevant circumstances. Any dispute regarding the fees and expenses of the arbitrators shall be determined by the ICDR.
11. **Deposits (Article 36(4)):** The old Rules were silent on what occurs when a party fails to pay the required deposit. The new Rules state that failure of a party asserting a claim or counterclaim to pay the required deposits shall be deemed a withdrawal of the claim or counterclaim.
12. **Confidentiality (Article 37):** The new Rules contain several new provisions on confidentiality. They now state that the tribunal may make orders concerning the confidentiality of the arbitration proceedings or any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information (unless the parties agree otherwise).
13. **Statements and proceedings outside of the arbitration (Article 38):** The old Rules had no provision regarding the obligation (or otherwise) to make statements about the arbitration outside of the proceedings. The new Rules state that neither the arbitrator(s), emergency arbitrator, consolidation arbitrator nor the ICDR shall be under any obligation to make any statement about the arbitration, and no party shall seek to make any such person a party or witness in any judicial or other proceedings relating to the arbitration.