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CHAPTER 1
A GUIDE TO ICDR CASE MANAGEMENT

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PART I

ARTICLES ON ICDR ARBITRATION PRACTICE

CHAPTER 1

A GUIDE TO ICDR CASE MANAGEMENT

Luis Manuel Martinez[*]

The International Centre for Dispute Resolution (ICDR) is the international division of the American Arbitration Association (AAA)[1] and since its creation in 1996 its focus has been on providing international conflict management services for the global business and legal communities. These services include a full range of international alternative dispute resolution (ADR) processes administered by multilingual staff applying tried and tested international arbitration and mediation rules. The ICDR administrators are divided into regionally specialized teams where their knowledge of local culture, different legal traditions and linguistic capabilities are important components of the administrative regime.[2] This framework provides a level of procedural predictability under the ICDR system and creates in its users an expectation of a quick, efficient and economical ADR process.

Meeting expectations is challenging under the best of circumstances. While justice, speed and economy are the generally accepted goals of ADR, expectations may vary depending on the role and strategy of the party in a particular matter and ultimately whether in their estimations

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[*] The opinions made are solely attributable to the author. They do not necessarily represent the views of the International Centre for Dispute Resolution, the International Division of the American Arbitration Association or the Inter-American Commercial Arbitration Commission.

[1] The global leader in conflict management since 1926, the AAA is a not-for-profit, public service organization committed to the resolution of disputes through the use of arbitration, mediation, conciliation, negotiation, democratic elections and other voluntary procedures. In 2011, over 187,000 cases were filed with the AAA in a full range of matters including commercial, construction, labor, employment, insurance, international and claims program disputes. The AAA has promulgated rules and procedures for commercial, construction, employment, labor and many other kinds of disputes. It has developed a roster of impartial expert arbitrators and mediators through 30 offices in the United States, and with the ICDR, which has offices in Mexico, Singapore, and Bahrain through the BCDR-AAA.

[2] The ICDR Case Management Team, located in our New York office, is staffed by professionals from throughout the world, many of whom are licensed to practice law in these jurisdictions. Some of the countries represented include Brazil, Colombia, Mexico, Italy, Germany, Romania, and Russia.

they prevailed or not.[3] The ICDR, strives to meet the expectations of its users but its efforts are balanced against its goals of preserving due process and the integrity of the ADR cases conducted under its auspices. It may be more accurate to describe the ICDR's role as one of managing expectations with its focus on the client and the aforementioned goals of ADR at the core of the ICDR system driving many of its initiatives.[4]

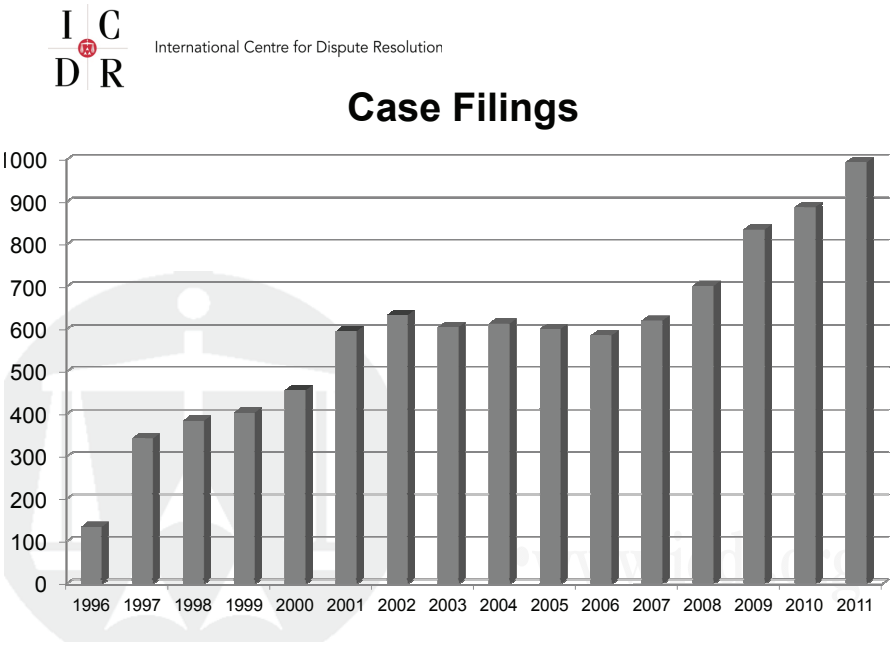
In the current economic climate managing expectations has not been made any easier. The ICDR has noted that its users during this economic downturn have striven for greater efficiencies and an increasingly sophisticated approach to conflict management. The need for greater efficiencies is no longer a mere platitude but rather the inescapable reality for today's international business manager facing increased competition and strict budgetary controls where untimely disputes and costly delays cannot be tolerated.

This new reality is not lost on the ICDR whose international arbitration caseload continues to be the largest in the world.[5]

[3] For further reading on whether arbitrators make compromise awards or are cases decided in favor of one party over another, see Stephanie E. Keer & Richard W. Naimark, *Arbitrators Do Not "Split the Baby", Empirical Evidence from International Business Arbitrations*, 18 J. INT'L ARB. 573 (2001).

[4] The ICDR/AAA's mission statement is as follows: "The American Arbitration Association is dedicated to effective, efficient, and economical methods of dispute resolution through education, technology and solutions-oriented service."

[5] The ICDR administered 994 new international arbitration cases in 2011. In 2010 the ICDR administered 888 cases, in 2009 the ICDR administered 836 cases and in 2008 the ICDR administered 703 cases.



Parties increasingly design their dispute resolution mechanism with an eye towards maximizing predictability and reducing time and costs under the ICDR system. An important caveat to note is whether you are in the drafting and negotiating phase or perhaps considering the formulation of a standing corporate ADR policy with preapproved ADR clauses, parties are encouraged to first review the ICDR's rules, policies and procedures to consider their impact as they design their dispute resolution process.[6] The review of these elements in advance will provide parties with the knowledge of the ICDR's framework to customize an arbitral regime that best meets the needs of their cross-border transaction.[7] Unfortunately it is not uncommon for an arbitration

[6] For an extensive review on the ICDR's rules and administrative processes, see Gusy, Hosking and Schwarz, *A Guide To the ICDR International Arbitration Rules*, Oxford University Press, 2011. See also Mark Appel, *Taking Your Case to the ICDR*, which can be found on the ICDR's website at www.ICDR.org.

[7] The ICDR's Conflict-Management Team can assist the parties in exploring various options for their dispute resolution agreement and can review customized clauses to maximize predictability and avoid surprises. The ICDR can provide insights regarding the formulation of corporate ADR strategies. For assistance ICDR regional contact information can be found at www.ICDR.org under ICDR Team Contacts.

agreement to be copied at the eleventh hour from a form book or another contract and pasted into the new contract too often resulting in surprise and the diminished satisfaction of the users or in the worst case scenario a process that may be frustrated by a pathological clause.[8] If time is of the essence parties should opt for the security of the ICDR's model clause or other options from its clause drafting guide.[9]

Not all arbitrations are created equal. In the world of international commercial arbitration, the difference between an efficient and economical resolution to a cross-border business dispute and finding oneself in a protracted, expensive arbitral process (where parties may be subjected to procedural irregularities, bad faith, dilatory tactics, biased or unqualified arbitrators) may hinge on whether the arbitration is administered by an arbitral institution and if one is selected, the rules policies and procedures of that institution.[10]

Moreover with the volume of arbitral institutions throughout the world today there are a number of unqualified administrators that have entered the market expecting to be successful from the outset without considering the full scope and responsibilities that administrators have to the users and the process. Some may be plagued with rosters of arbitrators that lack qualifications and inexperienced staff rendering administrative decisions that are unsound or motivated by self-interest. If challenges or procedural problems arise they may lack the independence

[8] Pathological clauses are arbitration agreements that are not capable of being performed and ultimately frustrate the parties' wishes to submit their disputes to arbitration. One example the ICDR encountered read as follows; "The arbitration shall be administered by the American Arbitration Association pursuant to the Rules of the International Chamber of Commerce." As it was impossible to combine the administrative role of the two institutions the parties were forced to turn to the courts for a clarification of their arbitral regime.

[9] For further information regarding ICDR arbitration and mediation clauses, please consult the *ICDR Guide to Drafting International Dispute Resolution Clauses* on the ICDR's website at www.ICDR.org.

[10] Arbitrations that are not managed by an arbitral institution are called ad hoc arbitrations. Some argue that ad hoc arbitration is less expensive because the parties do not have to pay administrative fees to an administering institution. However, others recognize that these savings are illusory since the administrative work has to be done by the arbitrator or by a person on either the arbitrator's staff or a third-party hired for the case. Neither arbitrators nor party staff can provide the experienced independent oversight of a respected arbitral institution and consistent interpretations of their arbitral rules as well as the implementation of the institution's policies that protect the arbitral process. For an example of a protective policy, the ICDR requires the implementation of its Consumer Due Process Protocol in all cases where a consumer is a party as referenced in note 11. For a discussion of the advantages and disadvantages of ad hoc arbitration, see Hunter Redfern, *Law and Practice of International Commercial Arbitration*, Sweet & Maxwell, 1-83 to 1-84.

to make determinations against a prominent arbitrator from their jurisdiction or fail to move the matter forward when faced with dilatory tactics by an economically powerful local party. One important concept that inexperienced administrative institutions may fail to grasp is while it is important to provide a service it must never be at the expense of the integrity of the arbitral process. That will erode the support and confidence of the judiciary and legislature in their jurisdiction's ADR legal regime and lead to a backlash against the future development of their arbitral culture as well as the recognition of their awards. The administrator's mission to protect the arbitral process at times requires that it not accept every case when the parties' agreement conflicts with due process, fair play and integrity.[11] International business managers recognize that there is an institutional difference when they place their confidence in the ICDR/AAA to administer their international ADR matters opting for an administrator that strives to meet the goals of ADR while safeguarding the process and rendering highly enforceable awards.[12]

I. The ICDR

The ICDR officially opened in New York City on June 1, 1996. Prior to that time international cases filed with the AAA since its founding in 1926 were administered by its network of regional offices in the United States. As a result, the AAA developed a wealth of experience in administering international cases. In the mid-1990s, the AAA recognized that it was time to build on that international experience and respond to the increase in demand for its international ADR services. This meant placing the administration of all international cases under one division and hiring multilingual attorneys with law degrees from a variety of nations to serve as case managers after they were trained in the application of the ICDR's administrative system and its International Arbitration Rules (IAR).

The ICDR's goals were to create a case administrative system with an international focus that incorporated cultural sensitivity as it was expected that international parties would come from many different counties and

[11] For example in the consumer arbitration field the AAA has a long established policy of procedural protections and policies before accepting consumer cases and they must be in compliance with its Consumer Due Process Protocol. *See* the AAA's website at the following link, www.adr.org/consumer_arbitration.

[12] *See* Luis Martinez, *The Introduction to Global Arbitration Review*, Asia-Pacific Arbitration Review 2008.

legal systems. The importance of being able to understand different cultural and legal traditions, verbal and nonverbal communications, cultural mores and biases are necessary skill sets for an international administrator and if lacking, can serve to derail or delay an international dispute resolution process. The ICDR staff can manage these cultural issues saving time and ultimately avoiding increased costs.[13]

Other goals were to apply a client driven common sense approach to the administrative process combining state of the art technology to efficiently track and oversee all aspects of the ICDR's cases. The ICDR system has been developed with the benefit of extensive user feedback and has evolved to offer a proactive administrative flexible process with less formality and without unnecessary procedural steps. Parties can then customize the ICDR arbitral regime for their particular needs subject only to the institutional requirement of due process, fair play and integrity.[14]

The ICDR's international administrative system is premised on its ability to perform several important tasks which include moving the matter forward, facilitating communications while acting as a buffer between the parties and the arbitrators, ensuring the appointment of qualified arbitrators, monitoring and controlling costs, understanding cultural sensitivities, resolving procedural impasses, and properly interpreting and applying its rules.

The ICDR has a full-time business development team and in addition to its headquarters in New York, has an office in Mexico City, and joint facilities with regional arbitration centres in Singapore and Bahrain.[15] It has a panel of more than 600 international arbitrators and mediators[16] and a network of important cooperative agreements with arbitral institutions around the world, which gives the ICDR access to additional hearing facilities and infrastructure along with local expertise on the ADR culture

[13] For a discussion on culture in international commercial arbitration, *see* William K. Slate II, *Paying Attention to Culture in International Commercial Arbitration*, 59 (3) Disp. Resol. J. 96 (Aug.-Oct. 2004).

[14] In addition the parties may not derogate from any mandatory provisions of the law applicable to the arbitration. *See* Article 1, (b) of the ICDR's International Arbitration Rules, (IAR).

[15] For further information regarding the ICDR's international alliances, please consult the *ICDR's Newsletter, The ICDR International Reporter, vol. 1* on the ICDR's website at www.ICDR.org.

[16] For information on applying to the ICDR's international panel of arbitrators and mediators please see the Application for International Roster on the ICDR's website at www.ICDR.org.

and legal framework to provide administrative services as needed globally.[17]

II. The ICDR International Arbitration Rules (IAR)

The ICDR administers cases pursuant to various sets of the AAA's rules and its own international arbitration and mediation rules.[18] If the parties have selected a specific set of rules in their arbitration clause they will be applied.[19] If the clause is silent as to a specific set of rules and it is an international matter the case will be administered pursuant to the ICDR's IAR.[20]

The ICDR's IAR were specifically designed for international disputes and incorporate the latest provisions that are expected in an international arbitration today. They provide the arbitrators with the framework to be able to consider different legal traditions and cultural differences along with the powers to render all necessary procedural determinations to bring the process to its conclusion with awards that will be recognized and enforced pursuant to the enforcement treaties.[21]

The IAR were modeled on the UNCITRAL Arbitration Rules and have undergone a number of revisions. The IAR contain all the necessary default mechanisms to ensure that the arbitration moves forward to its completion and is not frustrated by the failure of a party to perform or in the event of an impasse, and contain all the necessary gap fillers so that

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[17] Horacio A. Grigera Naón and Paul E. Mason, International Commercial Arbitration Practice: 21st Century Perspectives Chs. 43 and 55, Martinez & Ventrone (LexisNexis Matthew Bender).

[18] In 2003, the ICDR's International Arbitration Rules were renamed the "International Dispute Resolution Procedures" upon incorporating international mediation rules.

[19] In 2011 the ICDR administered 477 cases pursuant to the AAA's Commercial Arbitration Rules and Mediation Procedures, 96 cases pursuant to the Construction Industry Arbitration Rules and Mediation Procedures, 71 cases pursuant to the ICDR's Procedures for Cases under the UNCITRAL Arbitration Rules and 75 cases pursuant to the Employment Arbitration Rules and Mediation Procedures in addition to its 251cases under the ICDR's International Arbitration Rules.

[20] The ICDR's definition of an international matter is based on Article. 1 of the UNCITRAL Model Law, as adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended on 7 July 2006.

[21] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Done at New York, June 10, 1958, 21 UST 2517, TIAS No. 6997, 330 UNTS 3. As of this writing 145 countries are parties. The Inter-American Convention on International Commercial Arbitration, Done at Panama City, January 30, 1975 O.A.S.T.S. No. 42, 14 I.L.M. 336 (1975). As of this writing 19 countries are parties.

the parties need not worry about addressing every element individually in their arbitration agreement. They can then focus their attention on any particular elements they may wish to include in their customized process.[22]

III. Commencing the Case

The filing and initiation stage is an important phase of the arbitral process and presents the filer with a number of options. All new case filings are handled by the AAA/ICDR's specialized Intake Office.[23] The claimant has the option of filing the case with either the Intake Office directly or at any of the AAA's offices including the ICDR in New York. The case may also be filed electronically online.[24] If filing by mail the claimant starts the process by submitting a completed Notice of Arbitration form to comply with Article 2 of the IAR and the appropriate filing fee.[25] The Notice of Arbitration must be sent simultaneously to the respondent in compliance with Article 18 of the IAR.[26]

Article 2 states that the notice of arbitration must contain:

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;

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[22] The current International Dispute Resolution Procedures Amended and Effective June 1, 2009 and the current Fee Schedule Amended and Effective June 1, 2010.

[23] The ICDR/AAA Case Filing Services Office.
1101 Laurel Oak Road, Suite 100
Voorhees, NJ 08043
Phone: 856-435-6401
Toll free number in the US 877-495-4185
Fax number 877-304-8457
Fax number outside the US: 212-484-4178
Email box: casefiling@adr.org.

[24] For information on the various filing options see the ICDR website at www.ICDR.org.

[25] The Notice of Arbitration form and the submission form as well as a link to the AAA's Webfile can be found on the ICDR's website at www.ICDR.org.

[26] It is important to review Article 18 of the IAR to comply with the notice requirements for serving documents on the other side and to understand how periods of time are calculated for the arbitration.

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.

The ICDR is ultimately responsible for reviewing all newly initiated cases to ensure that the ICDR or AAA is named in the clause and that it has the authority to proceed with the administration of the case.[27] If the ICDR or AAA are not named in the clause the parties can agree to submit the matter to arbitration under its auspices by completing and signing a joint submission agreement. However it must be noted that parties are less likely to agree on anything after a dispute has arisen.

If any of the requirements of Article 2 above are not met the case cannot be commenced. The ICDR will contact the claimant to obtain the required information. If the respondent contends that the requirements for commencing the arbitration have still not been satisfied, the ICDR will determine whether to proceed to administer the case or request additional information from the claimant.[28] If the ICDR decides to

[27] A determination of the ICDR to proceed with the administration of an arbitration should not be confused with a determination of the ICDR as to the arbitrability of a dispute. A determination of the ICDR to administer an arbitration is only an administrative determination that the filing requirements contained in the applicable AAA/ICDR rules have been met. A determination regarding the arbitrability of a dispute, on the other hand, must be made by an arbitral tribunal or a court. *See* IAR Article 15.

[28] The Statement of Claim is referenced in Article 2 (3), (a) to (g). There is no requirement regarding the amount of detail that is required for the Statement of Claim and in a number of cases the ICDR has received submissions that provided the bare minimum to comply with Article 2 sending only a copy of the arbitration agreement and a completed Notice of Arbitration form. The amount of detail is really a question of strategy for each party to decide and the ICDR does not take a firm position as to the precise level of detail for the Statement of Claim pursuant to Article 2. While the ICDR's Notice of Arbitration form will address the IAR Article 2's requirements in some instances respondents have argued that the form alone is not sufficient and that the case was not properly commenced. In those cases the ICDR will determine whether the standards of Article 2 have been met. The ICDR can make the initial determination regarding this issue, see IAR Article 36 and note 29 *infra*. It should be noted that the arbitrators have the ability to request additional submissions as needed once appointed. In the majority of cases and in an increasing trend there has been a move towards Statement of Claims with greater detail and specificity providing the arbitrators with a better understanding of the claimant's position at the outset. This trend of providing more information at this early stage is useful for the arbitrators if called upon to make some early determinations regarding the scope of discovery and to have a better grasp of the case to gauge its length and complexity.

proceed with the administration and the respondent maintains that the case was not properly commenced (for example, not commenced properly as to a specific party who claims they are a non-signatory to the arbitration agreement and should not be required to participate), then these issues shall be referred to the arbitrators for their early determination once appointed.[29] There is case law in the United States holding that an arbitral institution in fulfilling its administrative role is not required to conduct a searching analysis to determine whether or not a party is a signatory to an arbitration agreement.[30] If the filing party presents a plausible argument that satisfies the ICDR prima facie, then the ICDR can exercise its administrative mandate and commence the case, leaving any remaining issues for the arbitrators once appointed. The ICDR has discretion to interpret its own rules and can initially decide if the filing party has complied with Article 2 giving it the authority to commence the matter over the objections of a party.[31]

Once any jurisdictional issues presented are resolved or held over for the arbitrators, the case will be initiated usually within a period of 48 hours. The ICDR prepares an initiation letter officially commencing the arbitration which is sent with the applicable rules to all parties. The file is created in the ICDR's proprietary electronic case management system and the case is deemed commenced on the date the demand was received by the ICDR.[32] The case is then assigned to one of the ICDR's regional teams, based upon the place of arbitration, language, type of dispute, along with a consideration of the team's current caseloads. The initiation letter will contain the date of commencement and instruct the respondent that they will have 30 days in which to prepare its Statement of Defense which will respond to the claimant's claims and assert counter-claims or set-offs if any.[33] The parties must also include by the date the Statement

[29] *See* IAR Article 15, reflecting the principle of *kompetenz-kompetenz*, the ability of the arbitral tribunal to rule on its jurisdiction and the existence, scope and validity of the arbitration agreement.

[30] This precise issue was the subject of one case where the Court of Appeals for the Seventh Circuit—in a case where damages were sought against the AAA—held "that no rule or principle required the AAA to make a searching analysis of the claim's merits prior to placing it on the docket—scheduling the matter if you will—the AAA's role was analogous to that of a court clerk placing the matter on the schedule for the arbitrator to hear." International Medical Group, Inc., v. American Arbitration Ass'n, Inc., 312 F. 3d 833 (7th Cir. 2002).

[31] *See* IAR Article 36, where the ICDR shall interpret and apply all other Rules not relating to the arbitrator's powers and duties.

[32] *See* IAR Article 2, (2).

[33] *See* IAR Article 3.

of Defense is due any objections to the jurisdiction of the tribunal or to the arbitrability of a claim or counterclaim.[34] The initiation letter will include the date of the administrative conference call which is the next step, and the agenda for the call in which the ICDR brings the parties together at the earliest possible time to discuss all of the important procedural issues and options for the ICDR's arbitral process.[35]

The administrative conference call is an important tool for the ICDR as its international administrative system emphasizes the importance of communicating with the parties (as often as needed) to explore all possible efficiencies at this early stage of the process. It also serves to address any potential problems, respond to any questions and ensure that all parties have adequate notice of the arbitral proceedings. There are several items on the agenda for this call listed as follows.

- Introduction of staff who will be involved in the management of the file.
- Means of communication between the ICDR and the parties. The possibility of submitting this dispute to mediation.
- The number of arbitrators.
- The method of appointment of the arbitrators.
- The parties' views on the qualifications of the arbitrator(s) to be proposed.
- The handling of extension requests.
- The scheduling of the arbitration including the dates for the expected exchange of documents and submissions as well as the hearings.
- The possibility of utilizing a documents only process.
- Any other relevant issues that the parties wish to bring to the attention of the ICDR at this early stage.

The possibility of mediation is suggested in all ICDR cases. A further discussion of the ICDR's mediation services and options will follow. If mediation is not an option, the ICDR will discuss other issues that may need to be clarified absent the agreement of the parties and will move on to discuss the appointment of the arbitrators which is addressed

[34] *See* IAR Article 15 (3), if the claimant is objecting to the arbitrability of the counterclaim it will be expected in the response to the counterclaim.

[35] The administrative conference call is usually scheduled within 14 days of the date of the initiation letter.

in Article 6 of the IAR. The parties are free to agree on the method for the appointment and the number of arbitrators for their particular case.[36]

IV. Appointing the Arbitrators

One method used to appoint international arbitrators is the party-appointed method. The parties may each designate their own arbitrator and then those two arbitrators may designate the presiding arbitrator, the president of the tribunal. At the request of any party or on its own initiative, the ICDR may appoint nationals of a country other than that of any of the parties.[37] For example, if one side is a Brazilian national and the other side is a French national, the presiding arbitrator will be selected from the ICDR's international panel excluding arbitrators who are either Brazilian or French nationals. If within 45 days from the date of the commencement of the arbitration, the parties have not mutually agreed on a procedure for appointing the arbitrators, or have not designated their arbitrators by following their agreed upon procedure from the clause, the ICDR, at the written request of any party, shall complete the appointment process.[38]

In the event of multiparty cases the ICDR applies IAR Article 6 (5). The issue of the selection of arbitrators in multiparty cases came to the forefront with the holding of the well known Dutco case where the Cour de Cassation set aside an ICC interim award. In that award the tribunal had rejected the objections of the two respondents in the underlying arbitration, who each were seeking the appointment of their own respective arbitrator. The tribunal rejected their argument against the proper composition of the panel. The Cour de Cassation by contrast considered the appointment process to be contrary to public policy stating that the "equality of the parties in the appointment of arbitrators is

[36] Again we see the ICDR's approach to encourage party autonomy and agreement as to the number of arbitrators. Whether in the arbitration clause (as suggested by the ICDR in their model clause) or by agreement after the case has been commenced the parties are encouraged to decide the issue. If the parties cannot reach agreement the ICDR after consulting with the parties will be guided by Article 5. It provides that one arbitrator shall be appointed, unless the ICDR determines "in its discretion that three arbitrators are appropriate because of the large size, complexity or other circumstances of the case." *See* IAR Article 5.

[37] *See* IAR Article 6 (4).

[38] *See* IAR Article 6 (3) which includes an administrative pause should the parties be conducting settlement discussions as the ICDR requires a written request to complete the appointment process.

a matter of public policy which can be waived only after the disputes has arisen."[39] To avoid any potential for mischief absent the agreement of the parties the ICDR will appoint the entire tribunal. In reality this hardly happens as the ICDR consistent with its preference for party autonomy will at the conclusion of the administrative conference call encourage the parties to agree to the selection of the arbitrators in a multiparty case. If they fail to agree in the end the ICDR will unilaterally complete the appointment process. Typically the parties do tend to agree on the appointment mechanism.

Consolidation and joinder are also issues that arise in multiparty arbitrations. The ICDR's administrative policy on consolidation and joinder is to initiate the arbitration as filed by the filing party even though separate contracts may be involved, thereby providing parties with an opportunity to proceed jointly to the extent they mutually agree. Experience has shown that even where separate contracts are involved, parties often voluntarily participate in a multiparty arbitration to dispose of all common claims in a single arbitration. Should one or more parties object to such a procedure, the cases will be separated and processed individually unless a court orders otherwise. Separately instituted cases may be consolidated whenever all parties mutually agree or consolidation is ordered by the courts. The IAR do not contain a specific article regarding consolidation as one can find in the AAA's Construction Rules but the issue may be brought before the arbitrators once appointed for their determination.[40]

Another important ICDR feature is its institutional preference to use the list method as its default method of appointment. Absent the agreement of the parties, the ICDR employs the use of a list when called upon to complete the appointment process. The ICDR will consider all of the qualifications requested by the parties including a specific nationality, type of expertise or experience in a particular industry or fluency in a particular language and together with its own views from its review of the case create a balanced list of potential arbitrators for selection by the parties.

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[39] Stefan Kröll, Dutco Revisited? Balancing Party Autonomy and Equality of the Parties in the Appointment Process in Multiparty Cases, ITA Blog, 15 Oct 2010.

[40] *See* R-7 of the Construction Industry Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Construction Disputes), Rules Amended and Effective October 1, 2009.

I C D R International Centre for Dispute Resolution

Example of the list

• Jose Martinez	1
• John Smith	X
• Ricardo Suarez	X
• **Antonio San Martin**	**3**
• James Jones	X
• **Linda Cruz**	**4**
• Charles Brown	X
• Ramon Gonzales	X
• **Francisco Jimenez**	**2**
• George Webber	5

Jose Martinez	X
John Smith	1
Ricardo Suarez	4
Antonio San Martin	**3**
James Jones	X
Linda Cruz	**2**
Charles Brown	6
Ramon Gonzales	X
Francisco Jimenez	**5**
George Webber	X

The list of names will be transmitted along with their corresponding curriculum vitae which provide the arbitrator's professional work and ADR experience, as well as education, publications, affiliations, language capabilities and rate of compensation. Parties are asked not to exchange these lists and are allowed to object to anyone listed without providing any reasons. The parties must rank the remaining arbitrators with number 1 reflecting their first choice down to their last acceptable arbitrator remaining on the list. Once the parties return their lists to the ICDR, the arbitrators with the lowest combined rankings are invited to serve and once they clear the conflicts stage their appointments are confirmed by the ICDR.

From the ICDR's perspective, the list method has a number of advantages over the party-appointed method. For instance, during the listing process there is less of a potential for mischief as parties do not engage in any ex parte conversations with the arbitrators that may be appointed, conversations which later may be used to establish the foundation for possible bias or evident partiality during an action to vacate an arbitral award.[41] While it is true that all party-appointed

[41] It is worth noting that the majority of arbitration awards are complied with voluntarily yet a losing party seeking to vacate an award in the United States may seek to establish evident partiality on the part of an arbitrator. *See* note 47 *infra*.

arbitrators have to be impartial and independent pursuant to the ICDR's IAR Article 7, arguably there may be an inherent flaw in the party-appointed system that occurs during the ex parte interview conducted to select the arbitrator. In some cases, less experienced arbitrators may not appropriately control the interview process and fail to establish strict parameters regarding the permissible scope of acceptable questions. They may fail to counter a parties' possible spoken or unspoken expectation or belief that their appointed arbitrator at a bare minimum will ensure that the other two arbitrators understand their parties' position which may conflict with the independence requirement and the need to not be predisposed to a parties' position.[42] Some arbitrators may have the mistaken belief that they have an obligation to the party that appointed them which will impede their ability to be impartial and independent.

In one article, a noted scholar discussed two ICC studies observing that in over 95% of the dissenting opinions the authors were party-appointed arbitrators.[43] This troubling statistic may suggest that a disproportionate number of party-appointed arbitrators lack impartiality or independence in arriving at their final decision. In another article this trend was further confirmed by a review of dissenting opinions in the International Centre for Settlement of Investment Disputes (ICSID) investor-treaty arbitration awards where another noted scholar examined 150 awards and found that nearly all of the 34 dissenting opinions were issued by the arbitrators appointed by the party that lost the case.[44] These findings support the trend to move away from the direct appointment by a party method towards appointments being made by the institutions either directly or from their panels using the list method thereby creating an important buffer between the arbitrators and the parties removing the potential for the aforementioned problems.

The list method has a number of added benefits including the fact that if the arbitrators are selected from the ICDR's roster they have been vetted and their qualifications scrutinized in advance by a number of ICDR advisors. They have also gone through the ICDR's international

[42] For a review of the impartiality and independence requirement of the arbitrators and the permissible scope of communications between the arbitrators and the parties. *See* IAR Article 7.

[43] Jan Paulsson, *Are Unilateral Appointments Defensible?*, Kluwer Arbitration Blog, 02 April 2009.

[44] Albert Jan van den Berg, *Dissents and Sensibility*, Global Arbitration Review, 28 February 2011.

training programs highlighting "best practices" in a mock complex international arbitration and the application of the ICDR's rules and its Guidelines for Arbitrators Concerning Exchanges of Information (discussed below) along with its administrative system and policies. A lack of such training may lead to procedural errors regarding the application of the ICDR's framework and perhaps other failures such as the improper completion of the clearing of conflicts phase or failing to comply with the ICDR's expectations regarding time deadlines and the managing of the arbitration. Finally as the ICDR (or for that matter any other administrative institution) has little or no control over the party-appointed arbitrators by virtue of their not being on the institution's lists, these arbitrators do not have an expectation of future appointments and are less concerned about the institution's policies but may have a greater motivation to establish the track record of an arbitrator that has as their primary consideration the position of the party that appointed them.

The party-appointed method can be used effectively with safeguards in place but the list method in the final analysis has added security as it removes the ex parte contact between the parties and the arbitrators and any confusion over their role or responsibilities towards the party that selected them which can be a significant advantage in an international arbitration especially during enforcement proceedings. It is sine qua non that the list method is only as good as the quality of the members who comprise that list. Recognizing the need for these exceptional international arbitrators, the ICDR has established a demanding set of qualifications for potential arbitrators seeking admission to its international panel. Openings on the panel are limited depending on the ICDR's caseload needs which may in turn drive the needs for a particular nationality, expertise or linguistic capability for that particular year. Applicants undergo a two tiered review process that has resulted in a panel of eminently qualified international dispute resolution specialists.[45]

V. Clearing Conflicts and Challenges

The ICDR's IAR Article 7 requires that all arbitrators be impartial and independent. Prior to accepting an appointment, the arbitrator must disclose to the administrator any circumstances likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence. These disclosures should be made when arbitrators are invited to serve

[45] *See* note 16, *supra*.

and that responsibility is continuing throughout the entire arbitration should new circumstances arise that may give rise to such doubts. An arbitrator must be impartial, essentially not predisposed nor favoring a party or their position and must be independent without any financial interest or the possibility of financial gain from either of the parties.

The ICDR plays an important role in ensuring that conflicts are dealt with at this stage in a thorough manner. This reduces the potential for challenges later on which could lead to delay or problems for the award.[46] The ICDR does not apply the IBA's Guidelines on Conflicts of Interest in International Arbitration as there are a number of scenarios where these Guidelines do not establish a duty to disclose and would not be consistent with the ICDR policy of broad disclosure which requires that all disclosures be made sufficient to providing the parties in every instance with the ***option*** to waive them if they wish to proceed with the arbitrator. Once conflicts are cleared, the arbitrator signs the Oath of Office and is officially appointed to the case.[47]

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[46] Having the ICDR focus a great deal of attention on clearing conflicts at this early stage is important to avoid potential problems later on when undisclosed relationships can create havoc and cost the parties time and money. It is the ICDR's preference to start the arbitration with a panel that has cleared all conflicts providing the parties with the utmost confidence in their ultimate decision makers. This emphasis on a broad check of all conflicts and disclosures keeps the number of challenges down that the ICDR has to handle throughout the year. The ICDR has seen an average of 60 challenges per year. In 2010, the ICDR handled 63 challenges with 34 reaffirmations and 29 removals. Challenges are conducted pursuant to Articles 8 and 9 of the IAR. A party may challenge an arbitrator "whenever circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence". The challenge must be raised within fifteen days of being notified of his/her appointment or learning of the circumstances giving rise to the challenge and if the parties agree, the arbitrator shall withdraw. The arbitrator may also decide to withdraw. If the parties fail to agree and the arbitrator does not withdraw the ICDR pursuant to IAR Article 9 shall make the final determination. The ICDR does not provide reasons as these challenges are part of its administrative mandate to ensure that the arbitrators are appointed. Providing the reasons for its administrative decisions would only add to the time and costs and perhaps open the door to having to provide reasons for other administrative determinations such as the number of arbitrators or the place of the arbitration without any arguable benefit. This would be inconstant with the goals of international ADR. If the arbitrator has to be replaced IAR Articles 10 and 11 provide the procedural steps to follow. The IAR do provide for a truncated panel should the need arise, see IAR Article 11.

[47] The ICDR maintains that the parties must always have the choice to object to a disclosure made by the arbitrator as it is the parties' process. The IBA Guidelines color coding system of disclosures provides scenarios where disclosures that the ICDR believes should be made are not required. For example under the orange list the disclosures are triggered for various potential conflicts if they took place within three years only. Under the green list a disclosure is not required. For example pursuant to section 4.2.1 of the IBA

VI. The Preparatory Conference

Upon completing the appointment of the arbitrators, the case manager will schedule a preparatory conference usually done telephonically with the parties and the arbitrators for the earliest possible date, to place the matter in the hands of the decision makers. Prior to the preparatory conference the case manager will contact the arbitrators to brief them on the particulars of the case including what has transpired prior to their appointments and to alert them of any issues of arbitrability or procedural determinations (for example the ICDR's decision as to the place of the arbitration) they may need to resolve early on and ensure they have copies of all of the filing submissions made to date.[48]

The ICDR provides the arbitrators with a sample preparatory conference call checklist that they can use and modify as they deem appropriate. The preparatory conference is an important step in the ICDR system. This is the first opportunity to bring the parties (counsel along with their clients) together with the ICDR and the arbitrators. In addition to the goal of organizing the framework and schedule for the entire arbitration process and hearings and dealing with any preliminary issues this conference provides an excellent opportunity to address and manage the expectations of the parties who may be from different legal cultures or unfamiliar with an international arbitration. ICDR arbitrators will establish the foundation for effective case management and discuss the possibility of all efficiencies especially as to how they pertain to the exchange of information and the application of the ICDR's Guidelines for Arbitrators Concerning Exchanges of Information discussed below. The checklist below covers a number of suggested issues that the arbitrators may need to discuss for their particular matter.

Preparatory Conference Checklist [Suggested]

- Explain the purpose and goals of the preparatory conference.
- Opening Statements (Statements of Claims and Issues).

Guidelines establish that if the arbitrator's law firm has acted against one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator there is no need for a disclosure. For further analysis and discussion regarding disclosures and evident partiality, *see* AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes, revised and effective March 1, 2004. See also *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968); *Schmitz v. Zilveti*, 20 F.3d 1043 (9th Cir. 1994); *Positive Software v. New Century Mortgage Corp.*, 476 F.3d 278 (5th Cir. 2007).

[48] *See* IAR Article 16 (2).

- Have each party make a brief opening statement outlining the issues in dispute and associated claims.
- Preliminary Matters (if any).
- Schedule the Hearing.
- Establish the date(s) for the evidentiary hearing—schedule consecutive days as much as possible advise the parties of the daily schedule that will be followed during the evidentiary hearing. For example, the day(s) will begin at 9:00 a.m. and go until 5:00 p.m. with no more than one hour for lunch and breaks limited to ten minutes.
- Specifications of Claims & Counterclaims.
- Establish a date by which the parties must specify and quantify (monetary amounts) their respective claims and counterclaims or amend their respective claims or counterclaims.
- Related Entities.
- Establish a date by which the parties must provide the identities of any affiliated, related or successor persons or entities connected with the case. (This is for the purpose of allowing arbitrators to determine whether they have any conflicts.)
- Exchange of Information—explain that the tribunal will be applying the ICDR's Guidelines for the Exchange of Information.
- Resolve any exchange of information or document production issues and establish a method and schedule for such exchanges and production. (Include reports from experts.)
- Exchange & Filing of Exhibits.
- Establish a date by which the parties are to exchange copies of (or, when appropriate, make available for inspection) all exhibits to be offered at the hearing —include all reports, summaries, diagrams and charts to be used direct that all exhibits be pre-marked for identification—direct or strongly suggest, the parties submit a consolidated and comprehensive set of joint exhibits - direct that the appropriate number of exhibits be made.
- Witnesses & Experts.
- Establish a schedule for the exchange of witness lists and amendments thereto—direct that lists contain the full name of each witness, titles if applicable, and a short summary of anticipated testimony—if experts are used, C.V.'s of each should be exchanged.

- Miscellaneous Issues: stipulation of uncontested facts; filing of pre-hearing briefs; stenographic record/court reporter; use of interpreters; any other issues the parties wish to raise.
- Form of Award: request advice from the parties as to their positions on the form of the award they would like to see—Standard award—Findings of fact and conclusions of law.

Following the preparatory conference call, the tribunal will issue a procedural order, which will include the calendar for the arbitration and all established dates for the hearings along with any other determinations ranging from the exchange of documents, additional submissions to the form of the award. The arbitration is now fully in motion and the ICDR monitors the implementation of each step of the arbitral process along the way until the award is rendered and the case is closed.

The IAR have a number of additional provisions that parties should consider when selecting the ICDR as their administrator. Regarding the place of arbitration, absent the agreement of the parties the ICDR may initially determine the place of arbitration, subject to the final decision of the tribunal within 60 days after its constitution. The ICDR will as it does throughout the process encourage the parties to agree but if they do not, it will consider various elements in making its initial determination. Factors to be considered include the logistical convenience of the parties, the language and applicable law of the contract, political neutrality and the intervention of state courts during the arbitral process, the legal framework at the potential place of arbitration and whether they are parties to one of the enforcement treaties along with costs and other case specific factors. The ICDR will balance those factors with the wishes of the parties while protecting the international currency of the award in its determination.[49]

As to the language of the arbitration, absent the agreement of the parties the IAR provides that language of the arbitration shall be that of the documents containing the arbitration clause subject to the power of the tribunal to determine otherwise.[50]

For the conduct of the arbitration 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. This provides the tribunal with the flexibility it needs for an international case. It may

[49] *See* IAR Article 13.
[50] *See* IAR Article 14.

consider the impact of common law and civil traditions depending upon the needs of the particular case and the application of the ICDR's Guidelines for Arbitrators Concerning Exchanges of Information. The tribunal, is required to conduct the proceedings with a view to expediting the resolution of the dispute and may in its discretion direct the order of proof, bifurcate proceedings, (deciding liability before damages) exclude cumulative or irrelevant testimony or other evidence, and direct the parties to focus their presentations.[51]

The parties shall have the burden of proving the facts relied on to support its claim or defense. At any time during the proceedings the tribunal may order the parties to produce other documents, exhibits or other evidence it deems necessary. The tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered by any party.[52]

Hearings are private unless the parties agree otherwise. Evidence of witnesses may be presented in the form of written statements signed by them. The IAR provides for the periods of time required for advance notice of hearings, admissibility of evidence and discusses privileges which are impacted by the ICDR Guidelines.[53]

The fact that the hearings are private should not be confused with the ICDR's policy on confidentiality. On July 1, 2003, the ICDR revised its IAR to allow for the publication of redacted arbitration awards. The ICDR will select a number of awards that will be edited to conceal the names of the parties and other identifying details. These awards will be made public in an effort to advance the study of international commercial arbitration.[54] In addition during the 2003 revision the ICDR added a new section for international mediation. These international mediation rules reflect the ICDR's international mediation experience, as it is one of the

[51] *See* IAR Article 16. Although to a large extent the common law – civil law differences in international arbitration are not as broad today where we have seen a movement towards the harmonization of these traditions, see Pierre Karrer, *The Civil Law and Common Law Divide, An International Arbitrator Tells It Like He Sees It*, Dispute Resolution Journal, Vol. 63, # 1 (February-April 2008).

[52] *See* IAR Article 19.

[53] *See* IAR Article 20. The ICDR Guidelines for Arbitrators Concerning Exchanges of Information can be found on the ICDR's website at www.ICDR.org and do contain a provision on privileges.

[54] *See* IAR Article 27 (8). The ICDR maintains a policy of confidentiality that pertains to the arbitrators and the administrators, see IAR Article 34.

world's few arbitral institutions that consistently administer international mediations each year.[55]

The tribunal shall not decide as amiable *compositeur* or *ex aequo et bono* and the IAR expressly exclude an award of punitive damages unless it is for one of the listed exceptions pursuant to the IAR.[56] Pursuant to the IAR the tribunal has the power to award attorney's fees.[57]

VII. Emergency Arbitrator Procedure

The ICDR on May 1, 2006 revised its IAR to provide the parties' access to an emergency arbitrator at the time an arbitration is filed.[58] This provision was groundbreaking when announced and today a number of institutions have adopted similar provisions and others are considering its application. Parties in the past were left with a void when they were trying to submit their entire dispute to ADR and, more importantly, hoping to stay out of each other's courts. Prior to the passage of this mechanism parties in need of provisional or conservatory measures would either have to wait for the appointment of the arbitrators which can typically take 30-60 days or seek these emergency measures of protection directly from the courts.[59] The IAR provides that this mechanism is available in cases where the contract with the arbitration agreement was signed after May 1, 2006. Parties in need of emergency relief prior to the appointment of the panel will notify the ICDR and all other parties in writing of the nature of the relief sought and the reasons why it is needed on an emergency basis. The ICDR did not follow the UNCITRAL Model Law 2006 revision to allow interim relief on an ex parte basis. The ICDR took the position that by engaging in ex parte conversations with a party requesting emergency relief it would have a negative impact on its ability to be seen as an impartial and independent administrator by the party against whom the relief was sought. The ICDR will appoint a single emergency arbitrator from its list of international emergency arbitrators. The prospective arbitrator will clear conflicts as

[55] *See* the ICDR's International Mediation Rules.

[56] *See* IAR Article 28.

[57] *See* IAR Article 31, discussed in one U.S. case, see F. Hoffman-La Roche v Qiagen Gaithersburg, Inc., 730 F Supp. 2d 318 (S.D.N.Y. 2010).

[58] *See* Ben H. Sheppard and John M. Townsend, *Holding the Fort Until the Arbitrators Are Appointed: The New ICDR International Emergency Rule*, Dispute Resolution Journal, vol. 61, no. 2 (May-July 2006).

[59] *See* IAR Article 21.

all ICDR arbitrators are required to do so and any challenges are determined by the ICDR with these steps being completed in 24–48 hours. The emergency arbitrator has a number of the same powers as the tribunal including the power to determine their jurisdiction, issues of arbitrability and the conduct of the hearings. The ICDR expects a reasoned interim award or order within 14 days from initiation.[60] Once the emergency arbitrator renders a determination, absent any requests to modify or vacate for good cause shown, he/she are *functus officio* at the moment the tribunal is constituted.[61] The tribunal can modify or vacate the emergency arbitrator's interim award or order. They can also take notice of a parties' failure to comply with the interim award or order which aside from the possibility of being enforced provides a further incentive for the parties to comply voluntarily.

The ICDR recognizes that this process is not suitable for all cases. The fact that notice is required and that in some jurisdictions arbitrators do not have the authority to grant interim relief nor would the local courts enforce those awards requires the parties to analyze whether invoking Article 37 makes sense. Parties can still request interim relief from a judicial authority directly without fear of waiving the right to arbitrate.[62] Article 37 in the right circumstances provides the parties with the opportunity to remain within the arbitral regime for all phases of their case. It is not for use in all cases but when appropriate will result in an incredibly fast and efficient way to obtain interim relief in an international arbitration.

The ICDR as of this writing has successfully administered 20 Article 37 cases. Information on the first 4 cases filed can be found on the ICDR's website.[63] These Article 37 cases move at a frantic pace with the majority having their arbitrators appointed in one business day and the longest was 5 business days where the ICDR went through the disclosure and challenge procedure for the first two emergency arbitrators and finally clearing the third for the case. The nationalities of the emergency arbitrators have varied extensively.[64] The cases usually have a preparatory conference call by the second or third business day followed

[60] *See* IAR Article 37.

[61] *See* IAR Article 37(6).

[62] *See* IAR Article 37(8).

[63] Guillaume Lemenez, Paul Quigley, The *ICDR Emergency Arbitrator Procedure in Action, Part 1,Part 2,* on the ICDR's web site www.ICDR.org.

[64] The ICDR has appointed Article 37 emergency arbitrators from Belgium, Brazil, Canada, Republic of Korea, Republic of Singapore, United Kingdom and the United States.

by a scheduling order. The conduct of the arbitration is based on written submissions along with a telephonic hearing and in those cases that resulted in an award the reasoning was included. The average time frame from filing to the award was approximately 15 business days and parties have to date complied with these decisions voluntarily.[65]

VIII. The ICDR's Guidelines for Arbitrators Concerning Exchanges of Information

In recent years broad discovery requests which are not typically accepted international practice and it is worth noting that the word "discovery" does not appear in the ICDR's IAR, have increased costs and caused delays. In response to the 'discovery' abuse problems or "fishing expeditions", the ICDR has promulgated a set of Guidelines for Arbitrators Concerning Exchanges of Information, (Guidelines) which reflect the institution's policy and expectations for the cases administered pursuant to its rules that these abuses must be curtailed and eventually stopped. 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. The arbitrators are advised against accepting overly broad discovery requests that conflict with the Guidelines. These Guidelines are required to be applied by all arbitrators serving on ICDR cases and the parties are advised of this during various phases of an ICDR arbitration. The following chart highlights the criteria established for document exchange requests.

[65] This statistic is impacted by the fact that parties in a number of the cases agreed to extensions or the case was withdrawn.

International Centre for Dispute Resolution

ICDR Guidelines for Arbitrators Concerning Exchanges of Information

Binding	• Applies to International Cases commenced after May 31, 2008
Document Production	• All document requests must be "relevant and material"
E-discovery limitations	• e-docs produced in most convenient form • Requests must be "narrowly focused"
Depositions and other Discovery Tools	• Generally not appropriate for international arbitration
Attorney-client privilege	• Most protective privilege rule
Arbitration Tribunal Responsibility	• Manage with a view to maintain efficiency and economy of process and avoid unnecessary delay
Arbitration Tribunal Authority	• Tribunal maintains authority to manage case effectively and efficiently

In reference to the ICDR fees its administrative fee schedule can be found in the IAR. Responding to the feedback from its users the ICDR offers a number of payment options including its standard fee schedule and a flexible fee schedule where the initial filing fees are lower but may result in higher total fees. The ICDR also includes a refund schedule where parties that reach an early resolution of their dispute perhaps pursuant to an ICDR mediation can obtain a full refund of their filing fees if the case is settled or withdrawn within 5 calendar days of filing and a 50% refund of the filing fee if settled or withdrawn 30 calendar days of filing. The refund schedule reflects the ICDR policy to incorporate an incentive for its users to resolve these cases as quickly as possible.[66]

[66] For assistance with the ICDR administrative fees or any questions regarding its fee structures or refund schedule, see the *International Case Filing Fee Schedule* on the ICDR's website at www.ICDR.org or contact the ICDR's Conflict-Management Team. *See* note 7, *supra*.

IX. Other Rules Administered by the ICDR

The ICDR also administers international cases pursuant to the AAA's Commercial Arbitration Rules.[67] The commercial Rules have a U.S. domestic arbitration focus but are routinely used by international parties with ICDR administration. Unless the parties or the AAA determines otherwise, the Expedited Procedures shall apply in any case in which no disclosed claim or counterclaim exceeds $75,000 and in cases of at least $500,000 the Procedures for Large, Complex Commercial Disputes shall apply. There are a number of differences between the Commercial Rules and the IAR as referenced in the following chart but the Commercial Rules can and are applied in international cases as agreed to by the parties. The ICDR will advise the parties that they will incorporate its Institutional Commercial Arbitration Supplementary Procedures to require a reasoned award and to comply with the enforcement treaties.[68]

I C D R International Centre for Dispute Resolution •Rules Comparison

ICDR International Arbitration Rules	AAA Commercial Arbitration Rules
• International Arbitration Focus	• Domestic Commercial Focus
• Tribunal can reconsider ICDR decision regarding place of arbitration decision, see Art. 13.	• AAA decision regarding place of arbitration is final, see R-10.
• Opt–Out Emergency Interim Relief Procedures, see Art. 37.	• Opt-in Emergency Interim Relief Procedure, see O-1.
• Arbitrator may award attorney's fees, see Art. 31.	• The power to award attorney's fees not explicitly authorized, see R-43 (d).
• Guidelines Concerning Exchanges of Information applies to all cases administered by ICDR after May 31, 2008.	• Guidelines do not apply unless parties agree – broader discovery options available especially in the LCCP, see L-3 and L-4.
• No time of award provided – prompt standard, see Art. 27 (1).	• Award done within 30 Days from close of hearings, see R-41.
• Provides for reasoned award , see Art. 27 (2).	• Open question for tribunal to consider, see R-42.
• Remedy Scope - International standards - amiable compositeur not permitted without express agreement, see Art. 28 (3).	• Remedy Scope – any remedy or relief that the arbitrator deems just and equitable, see R-43.
• Punitive damages excluded, see Art. 28 (5)	• No reference to punitive damages.

[67] *See* note 19, *supra*, stating the number of ICDR administered cases where the clause references the Commercial Rules.

[68] The ICDR will apply unless the parties object the International Commercial Arbitration Supplementary Procedures, Amended and in Effect April 1, 1999. This version is scheduled to be revised.

The ICDR also administers cases pursuant to the Construction Industry Arbitration Rules and Mediation Procedures.[69] These Rules which were revised in 2009 are primarily designed for domestic construction cases but can be applied by the agreement of the parties in an international case. The ICDR will suggest to the parties that they incorporate certain international practice provisions when selecting these Rules in their arbitration agreement and will require a reasoned award to comply with the enforcement treaties.

I C D R International Centre for Dispute Resolution •Rules Comparison

ICDR International Arbitration Rules	AAA Construction Arbitration Rules
• International Arbitration Focus	• Domestic Construction Focus
• Tribunal can reconsider ICDR decision regarding place of arbitration decision, see Art. 13.	• Tribunal can reconsider AAA locale decision – Closest to site criteria, see R-12.
• Opt–Out Emergency Interim Relief Procedures, see Art. 37.	• No Emergency Interim Relief Procedure
• No Consolidation or Joinder Procedure – No Inspection or Investigation Procedure	• Consolidation or Joinder Procedure Provided – Inspection or Investigation Procedure Provided, see R-7.
• Guidelines Concerning Exchanges of Information applies to all cases administered by ICDR after May 31, 2008	• Guidelines do not apply unless parties agree – No discovery pursuant to Fast Track, see F-8 and F-9, broader discovery allowed LCCP, see L-4 and L-5.
• No time of award provided – prompt standard, see Art. 27 (1).	• Award done within 30 Days from close of hearings, see R-43.
• Provides for reasoned award, see Art. 27 (2).	• Open question for tribunal to consider, see R-44.
• Remedy Scope - International standards - amiable compositeur not permitted without express agreement, see Art. 28 (3). Power to avoid attorney's fees, see Art. 31.	• Remedy Scope – any remedy or relief that the arbitrator deems just and equitable, Attorney's fees not explicitly authorized. See R-45.
• Punitive damages excluded, see Art. 28 (5).	• No reference to punitive damages

Another set of Rules administered by the ICDR especially in international construction disputes are the UNCITRAL (United Nations Commission on International Trade Law) Arbitration Rules. In international construction contracts parties may reference provisions from the FIDIC (The International Federation of Consulting Engineers) Contracts Guide. FIDIC provides for the use of the UNCITRAL Rules and each year the ICDR provides administrative services pursuant to the UNCITRAL Rules. The ICDR in conjunction with these Rules will also

[69] *See* note 19, *supra,* stating the number of ICDR administered cases where the clause references the Construction Rules.

suggest to the parties that they incorporate certain construction practice provisions along with a reference to the ICDR's administrative and appointing role as the UNCITRAL Rules are designed for an ad hoc commercial arbitration process. UNCITRAL in 2010 revised these Rules and the ICDR is administering this new version.

The ICDR is also the official administrator for all arbitration cases pursuant to the arbitration rules of the Inter-American Commercial Arbitration Commission (IACAC). The IACAC established an alliance with its national section in the United States the ICDR to administer all IACAC cases under the auspices of the IACAC's Director General. IACAC maintains a permanent desk at the ICDR and cases pursuant to its rules are administered in accordance with its policies and arbitrator appointments are made from its lists. Administrative services are available in English, Spanish and Portuguese.[70]

X. International Mediation

With increases in time and costs international mediation continues to gain in popularity and interest. The ICDR is a proponent of the use of mediation, offering mediation in all its cases while maintaining the aforementioned refund schedule as an added incentive for the parties to consider mediating their international matters. Parties can agree to mediate in their arbitration agreement by referencing mediation as a condition precedent to the arbitration.[71] The ICDR incorporated international mediation rules to its IAR in 2003 and they contain the modern provisions that are needed for a cross-border mediation providing the framework for the mediation from initiation to a settlement.

One of the often heard objections to mediation is that it is used to delay the commencement of the arbitration process. Parties have a number of options to counter any possible delays including specifying strict time limits for the mediation to occur or opting for a concurrent mediation. In a concurrent mediation the arbitration and the mediation

[70] The Rules of the IACAC can be found on the ICDR's website at www.ICDR.org. The IACAC Rules of Procedure are referenced in the Inter-American Convention on International Commercial Arbitration, the Panama Convention in its Article 3 as the default Rules and administrator where parties who are nationals from countries that are signatories to the treaty have entered into an arbitration agreement but have not designated a set of Rules. *See* note 21, *supra.*

[71] *See* note 9 *supra*, regarding a number of clauses that can be used for ICDR mediations.

proceed on a parallel track so the arbitration is not delayed. As the mediator can be appointed quickly and the mediation scheduled shortly thereafter it is possible to complete the mediation before the arbitrators in the parallel arbitration are appointed. It is an understatement to say that a successful mediation is a win-win for all the parties. It is a tremendous savings of time and money and as the parties agree to the settlement they often are able to preserve valuable business relationships.[72] Moreover the dispute is resolved and even in those cases where the parties do not reach the full settlement of all disputed issues the mediator can encourage a settlement of some of the issues and claims which will be of value in the subsequent arbitration where fewer claims result again in a savings of time and money.

The ICDR has found that parties at the commencement of the arbitration may not have a sufficient grasp of the other side's case. Consequently parties may be reluctant to agree to mediate or perhaps they are apprehensive of being seen as having a weak case. Recognizing this the ICDR has adopted the policy of not only offering mediation at the early stages of the case but also to offer mediation again after the arbitrators are appointed before the hearings. At this stage the parties may be more amenable to trying mediation and they do not have any concerns about appearing weak as the offer is made by the ICDR to all parties. The ICDR also encourages its arbitrators to alert the case administrators of any cases that they consider suitable for mediation where they immediately offer mediation again.

In further pursuit of ICDR's continuing effort to promote credible mediation and, in response to users and the international mediation communities, the ICDR/AAA became a founding institution of the International Mediation Institute (IMI).[73] IMI's purpose is to generate enhanced confidence in mediators and to improve the understanding of international mediation processes among businesses and other disputants by encouraging high standards of training and certifying mediator's qualifications worldwide. IMI will aid users to find suitable, competent mediators quickly and easily and will certify registered mediators using independent assessors and testing to ensure the accuracy and proficiency of all mediators placed on the IMI roster. IMI will additionally strive to have its certification accepted as a global mediator competency standard

[72] For further reading on the Mediation Concurrent Clause, see Steve Andersen, ICDR Offers Concurrent Mediation/Arbitration Clause, Dispute Resolution Journal, vol. 63, no. 4 (November 2008-January 2009),

[73] *See* the IMI website at www.imimediation.org.

and will contribute to the further development of the mediator's professional standards in the field.[74]

XI. Conflict Management Efficiencies

Arbitrations do not occur in a vacuum. They exist because the parties have agreed to an arbitration agreement. This agreement reflects the will of the parties and as we continue to see the growth of international trade where attention to all efficiencies is needed to compete, parties are revising their arbitration agreements to focus on these efficiencies.

The ICDR as illustrated offers a range of services and options to achieve greater conflict management efficiencies.[75] Parties knowing the ICDR system and the types of disputes they are likely to face from experience or from past similar cross-border transactions may consider some of the following drafting options to add to the ICDR model clause to maximize efficiencies.

It must be recognized that the best way to maximize these efficiencies has to be with their inclusion in the arbitration clause itself. If the clause lacks provisions such as those suggested below, a problem may arise when one side seeks these efficiencies and the other side objects. At that point the institution and the arbitrators concerned with due process and equality find these issues to be problematic. If these efficiencies are in the clause, which reflects the negotiated agreement of the parties, then the clause will be applied in its entirety and these problems can be avoided.

- Parties may wish to include ICDR mediation as part of their ADR agreement whether a condition precedent or concurrently with the mediation.

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[74] Luis Martinez and Thomas Ventrone. *The ICDR's Mediation Practice, Contemporary Issues in International Arbitration and Mediation:* The Fordham Papers 2010, to be published by Martinus Nijhoff Publishers in 2011.

[75] It starts with the ICDR's model arbitration clause, *"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."*

The parties should consider adding*:*

"The number of arbitrators shall be (one or three)";

"The place of arbitration shall be [city, (province or state), country]";

"The language(s) of the arbitration shall be ___."

- Parties may opt for a sole arbitrator and to waiving in-person hearings thereby agreeing to have their dispute decided on the documents alone or perhaps telephonic hearing.
- Parties may wish to explore the various expedited procedures available through the AAA Rules or by reducing the time frames pursuant to the IAR.
- Parties may wish to further limit the document exchange perhaps going beyond the ICDR's Guidelines or the International Bar Association's Rules on the Taking of Evidence in International Arbitration.
- Parties may wish to waive any access to e-discovery at all.
- Parties may wish to adopt a procedure where each side drafts their version of the award and the arbitrators are empowered to select only one version as the final ICDR award, "last best offer or baseball arbitration".
- Parties may wish to have the ICDR make the arbitrator appointments without a list.
- Parties may wish to consider modifications depending upon the transaction of the underlying dispute, for example if it is an international construction dispute incorporate additional ADR mechanisms such as a consolidation provision.

The list is not exhaustive and variations for these ADR efficiencies are extensive. Factor in the additional variations that may be specific to an industry or type of contract and more options arise. In the end the ICDR conflict management team welcomes the opportunity to be considered a resource in examining these clauses and is available to discuss these and other drafting options as needed.[76]

[76] *See* notes 7 and 9 *supra.*