



# ICDR® Resource Guide for International Conflict Management Strategies

## International Arbitration and Mediation Clauses, the ICDR's Model Clauses, and ICDR Contacts

### Section 1

#### International Arbitration and Mediation Clauses

Every year, millions of business contracts provide for mediation and arbitration as ways of resolving disputes. A large number of these contracts provide for administration by the American Arbitration Association's (AAA®) international division, the **International Centre for Dispute Resolution (ICDR)**, a not-for-profit international organization offering a broad range of conflict management services globally.

The ICDR, established in 1996, administers hundreds of international cases each year. Service and cultural sensitivity form the cornerstone of its international administrative system due to its multilingual staff of administrators divided into regionally specialized teams. With over 85 years of conflict management experience and reliability derived from its role as the international division of the AAA, the world's largest provider of alternative dispute resolution (ADR) services, the ICDR offers:

- modern international dispute resolution procedures,
- a highly experienced and trained panel of international arbitrators comprised of nationals from all over the world,
- state-of-the-art administrative technology, and
- a global network of cooperative agreements.

International transactions have experienced exponential growth in numbers and complexity. Too often, discussion regarding the dispute resolution clause of the contract is left until the close of negotiation. The best practice is to consider the matter of problem solving and dispute resolution early in the negotiation, thereby providing a positive environment for further negotiation and avoiding the undue pressure of a closing deadline. Arbitration and mediation does not happen by accident. It is the parties' process to draft and use the arbitration clause to control any possible future disputes, avoid procedural surprises should disputes arise and enhance predictability.

Each and every commercial relationship is unique. Experienced international business managers are always well advised to seek appropriate guidance when drafting their ADR clauses. Arbitration, mediation and other alternatives to litigation are most frequently accessed by reference to a "future disputes" clause in a commercial contract.



The following “model” dispute resolution clauses, accompanied by short commentary, are intended to assist contracting parties in drafting ADR clauses. Parties with questions regarding the drafting of an International Centre for Dispute Resolution (ICDR) clause can contact the appropriate ICDR staff, as listed in Section 2 for assistance in reviewing their clause or to design their ADR Policy.

#### DID YOU KNOW

**The ICDR has promulgated a set of guidelines to limit the time and costs of international arbitrations.** *The ICDR's Guidelines Concerning Information Exchange*, found on the ICDR website, makes it clear to arbitrators serving on ICDR cases that they have the authority, the responsibility and, in certain jurisdictions, the mandatory duty to manage arbitration proceedings to achieve the goal of providing a simpler, less expensive and more expeditious resolution process. The ICDR as a matter of policy has strived to avoid costly abusive discovery processes and purposely omitted the word *discovery* from its International Arbitration Rules.

#### ICDR Arbitration And Mediation Clauses

Listed here are some examples of arbitration and mediation clauses that can be copied directly and inserted into the contracts. As mentioned, there are many variations that can be agreed to by the parties. The ICDR conflict management team below can be contacted for additional information and/or to review and discuss your clause as needed.

##### 1. The ICDR Arbitration Model 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 (or) American Arbitration Association in accordance with its International Arbitration Rules.

The parties may wish to consider adding:\*\*

- (a) The number of arbitrators shall be (one or three);
- (b) The place of arbitration shall be [city, (province or state), country]; or
- (c) The language(s) of the arbitration shall be \_\_\_\_\_.

*\* The model arbitration clause above will guide the parties through all the major aspects of international arbitration. Incorporating by reference a modern set of arbitral procedures that meet the expectations of the parties in international arbitration proceedings, the short-form clause serves as an excellent starting point for the drafter, with additional language added only as necessary to address particular needs of the contract. The ICDR will administer the international case when the clause references either the ICDR or the AAA; parties are free to designate either, but the increasing trend is to designate the ICDR.*



*\*\* While an arbitration clause can be extensively detailed, the ICDR encourages the parties to reach, at a minimum, agreement regarding the number of arbitrators and the place and language of the arbitration. These decisions should reflect the will of the parties and have important implications regarding the entire process. Special attention should be given to the selection of the place for the arbitration, as enforcement of international awards may be impacted if they are rendered in nations that are not parties to either the New York or Panama Conventions. The place or “seat” of the arbitration also may impact the award with differing standards for enforceability, and local arbitration laws and the role of the local judiciary may have a procedural impact.*

## 2. The Standard ICDR Mediation Clause

If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation in accordance with the International Mediation Rules of the International Centre for Dispute Resolution before resorting to arbitration, litigation, or some other dispute resolution procedure

For the benefit of parties drafting commercial contracts who wish to include an express obligation to seek resolution of disputes by mediation prior to arbitration, the ICDR offers the following model Mediation before Arbitration “step” clause.

## 3. The ICDR Mediation before Arbitration Clause\*

In the event of any controversy or claim arising out of or relating to this contract, the parties hereto shall endeavor to settle the dispute by **mediation** pursuant to the International Mediation Rules of the International Centre for Dispute Resolution. If a settlement is not reached during the mediation within a period of 60 days, any unresolved controversy or claim arising out of or relating to this contract shall be determined by arbitration administered by the International Centre for Dispute Resolution (or) American Arbitration Association in accordance with its International Arbitration Rules.

The parties may wish to consider adding:

- (a) The number of arbitrators shall be (one or three);
- (b) The place of arbitration shall be [city, (province or state), country]; or
- (c) The language(s) of the arbitration shall be \_\_\_\_\_.

*\* Parties may wish to consider greater specificity regarding the conditions precedent to the arbitration or drafting a clause that provides for the mediation to be conducted concurrently with the arbitration as the following sample clause illustrates.*



#### DID YOU KNOW

**The ICDR routinely administers international cases in many languages.** Not only have the rules been translated into various languages, but the model clauses have been as well and can be found on the ICDR's website at [www.icdr.org](http://www.icdr.org). ICDR administrative teams are fluent in over a dozen languages and its international panel of arbitrators possesses global linguistic capabilities and cultural sensitivities.

#### 4. The ICDR Concurrent Mediation and 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. Once the demand for arbitration is initiated, the parties agree to attempt to settle any controversy or claim arising out of or relating to this contract, or a breach thereof, by mediation administered by the International Centre for Dispute Resolution under its International Mediation Rules at the request of either party. Mediation may proceed concurrently with arbitration and shall not be a condition precedent to any stage of the arbitration process.

The parties may wish to consider adding:

- (a) The number of arbitrators shall be (one or three);
- (b) The place of arbitration shall be [city, (province or state), country]; or
- (c) The language(s) of the arbitration shall be \_\_\_\_\_.

#### 5. The ICDR Arbitration Model Clause for Expedited Cases\*

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 (or) American Arbitration Association in accordance with its International Arbitration Rules.

The number of arbitrators shall be one and shall be appointed by the ICDR/AAA. The ICDR/AAA may consider any qualifications presented by the parties.

The arbitration will take place on Documents Only.

The Parties agree that consistent with the expedited nature of arbitration, pre-hearing information exchange shall be limited to the reasonable production of relevant, non-privileged documents, carried out expeditiously. Any disputes regarding the pre-hearing information exchange shall be resolved by the arbitrator who shall consider the ICDR's Guidelines Concerning Information Exchange and any other relevant factors in making a determination.



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

The language(s) of the arbitration shall be \_\_\_\_\_.

The suggestions made are not exhaustive, and there are numerous other options parties may wish to consider. For example, parties may wish to waive any access at all to e-discovery or adopt a procedure where each side drafts its version of the award and the arbitrators are empowered to select only one version as the final ICDR award.

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

Parties may wish to explore the various expedited procedures available through the AAA Rules or by reducing the time frames pursuant to the ICDR's International Arbitration Rules.

*\* Parties may wish to adopt this clause or any variation of this clause for cases where the amount in controversy will not exceed \$500,000.00 USD.*

Additional issues and clause language may be added to the sample clauses mentioned. These provisions are optional and the ICDR conflict management team can provide additional insights regarding their implementation and suggestions pertaining to any conflict management system parties may be designing.

### **Applicable Law\***

"The law governing the arbitral proceedings shall be the law of \_\_\_\_\_."

*\* This provision should not be confused with the applicable substantive law of the contract, which may be included in a separate clause, the "governing law clause." Although the lex arbitri is typically derived from the seat of the arbitration, parties may wish to designate a different applicable law in the arbitration clause.*

### **Procedures to Follow, Hearings on Documents Only**

"The parties hereby agree to forego any in-person hearings and the arbitration shall take place based on the submission of documents only."

### **Time Limits for Award**

"The award shall be rendered within [9] months of the commencement of the arbitration, unless such time limit is extended by the arbitrator."



## Information Gathering, Document Exchange, Limits on Discovery

“Consistent with the expedited nature of arbitration, pre-hearing information exchange shall be limited to the reasonable production of relevant, non-privileged documents explicitly referred to by a party for the purpose of supporting relevant facts presented in its case, carried out expeditiously.”

## ICDR’s Guidelines Concerning Information Exchange

“The Parties have agreed to apply the ICDR’s Guidelines Concerning Information Exchange; these Guidelines shall govern the taking of evidence, except to the extent that any specific provision of them may be found to be in conflict with any mandatory provision of law determined to be applicable to the case by the mutual agreement of the parties or by the Arbitral Tribunal.”

## IBA Rules of Evidence

“The Parties have agreed to apply the IBA Rules of Evidence, the Rules shall govern the taking of evidence, except to the extent that any specific provision of them may be found to be in conflict with any mandatory provision of law determined to be applicable to the case by the mutual agreement of the parties or by the Arbitral Tribunal.”

## Number of Arbitrators, Method of Appointment and Nationality

“The number of arbitrators shall be one or three.”

“The arbitrator’s shall be appointed by the ICDR’s list method.”

“The nationality of the arbitrators shall be .”\*

*\* Parties are free to agree to the nationality of the arbitrators. The parties may agree to the party-appointed method for selecting their arbitrators. The parties may also agree to a particular level of expertise, for example:*

“The parties have agreed that any proposed arbitrator must be experienced in the field of \_\_\_\_\_. The ICDR as the appointing authority will finally determine what level of experience is deemed to be in compliance with the level of expertise requested by the parties.”

This provision allows the parties to request a level of expertise with the addendum that allows the ICDR to complete the appointment process so that the parties’ wishes to have an arbitrator with a level of expertise in a particular field is not later used by a recalcitrant party to delay or sabotage the appointment of the arbitrators and the arbitration process. The parties may require the arbitrators to possess certain language skills or perhaps a tripartite panel where one arbitrator is an attorney, the second an engineer and the third a contractor.



#### DID YOU KNOW

**The ICDR Arbitration Rules provide the parties with access to an emergency arbitrator once the case is filed.** Parties in need of interim relief at the initiation of the case will have to wait until the arbitrators are appointed, which may take a few months. The ICDR revised its Rules to provide parties with access to an emergency arbitrator appointed within 48 hours of filing to consider the request for emergency relief; see article 37 of the ICDR's International Arbitration Rules for the complete provision of the ICDR's emergency arbitrator.

The ICDR can administer cases under its own International Dispute Resolution Procedures, various AAA Rules and the UNCITRAL Arbitration Rules. Following are samples of a number of arbitration clauses for international transactions.

#### The ICDR's Administration of the UNCITRAL Arbitration Rules Clause

"Any dispute, controversy, or claim arising out of or relating to this contract, or the breach, termination, or invalidity thereof, shall be settled by arbitration under the UNCITRAL Arbitration Rules in effect on the date of this contract. The appointing authority shall be the International Centre for Dispute Resolution. The case shall be administered by the International Centre for Dispute Resolution under its Procedures for Cases under the UNCITRAL Arbitration Rules."

The parties may wish to consider adding:

- (a) The number of arbitrators shall be (one or three);
- (b) The place of arbitration shall be [city, (province or state), country]; or
- (c) The language(s) of the arbitration shall be \_\_\_\_\_.

The choice of the proper arbitration clause is an important one. Improper wording or structure may result in a "pathological" clause where the parties' intentions to resolve their dispute by resorting to ADR may be met by delay, additional costs and frustrated altogether. These examples are included to simplify the process of selecting the arbitration clause but the drafter must consider that these issues require careful analysis of all relevant factors. For example, as mentioned, selecting the place of arbitration is an important decision. It implies generally a choice of the applicable procedural law, which in turn affects questions of arbitrability, procedure, court intervention and enforcement. In specifying the place of arbitration, parties should further consider (1) the convenience of the location (e.g., availability of witnesses, local counsel, transportation, hotels, meeting facilities, court reporters, etc.); (2) the available pool of qualified arbitrators within the geographical area; and (3) the applicable procedural and substantive law. Drafters are invited to again consider the ICDR's business development staff as a resource for any questions regarding the drafting of their arbitration clause.



## Section 2

The ICDR's Conflict-Management Team is available to respond to any inquiries regarding the ICDR's administrative system and the drafting of the ICDR arbitration and mediation clauses. In addition, on-site presentations are available to law firms, corporations, state and state-owned entities, NGOs and others to discuss the development of conflict-management policies and strategies. Topics covered can include arbitration and mediation clause design for all international contracts, ADR needs and trends in particular industries or regions and employee dispute-resolution programs. The team can demonstrate how the ICDR system can be utilized to resolve older, pending litigations or arbitrations and illustrate the ICDR's international ADR capabilities and cost- savings techniques. The ICDR also organizes regional arbitration conferences and may be contacted to cooperate or participate on ADR education related conferences and seminars.

Our team has been organized based on regional expertise and responsibilities and can provide international ADR updates from their respective regions. Inquiries should be directed to the appropriate staff below.

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## Global Network of Cooperative Agreements

The ICDR currently has a network of cooperative agreements throughout the world. These agreements provide the ICDR with local partners who work with the ICDR to promote arbitration and mediation. In addition, these agreements provide for the sharing of facilities and administrative infrastructure if needed along with local ADR expertise. The ICDR works with its cooperative network by the mutual exchange and updating of important international and regional ADR developments and trends. These agreements, combined with the ICDR's regional teams and experience, form the cornerstone of the ICDR system and provide it with an international character and presence for the administration of its international cases.

## International ADR Alliances with the ICDR

### American Chambers of Commerce of Latin America (AMCHAMs)

The ICDR has a cooperative agreement with all of the AMCHAMs to conduct joint programs in Latin America, coordinating efforts to develop the arbitration culture in the region. Through educational initiatives, all aspects of ADR—from training arbitrators to drafting arbitration agreements—are promoted.

### Mediation and Arbitration Commission of the Mexico City National Chamber of Commerce (CANACO)

The ICDR forged a partnership with CANACO through its Mediation and Arbitration Center in concert with the creation of the North American Free Trade Agreement (NAFTA). The agreement promotes the use of the ICDR for international matters and of CANACO for domestic cases in Mexico. In addition, the ICDR and CANACO have collaborated on numerous educational programs, development activities, Rule changes and administrative projects. In 2006, the ICDR opened an office in Mexico City, with hearing space available for ICDR international arbitrations and mediations.

### Inter-American Commercial Arbitration Commission (IACAC)

Established in 1934 by the member states of the Pan American Union—the forerunner of the Organization of American States (OAS)—and the AAA, IACAC is comprised of a network of arbitration institutions throughout the Americas, including Spain and Portugal. The IACAC Rules of Procedure are referenced in the Inter-American Convention on International Commercial Arbitration (aka The Panama Convention) in its Article 3 as the default Rules where parties have entered into an arbitration agreement but have not designated a set of Rules. IACAC cases are administered by its member in the United States, the ICDR.

### Bahrain Chamber for Dispute Resolution (BCDR-AAA)

In January 2010, the ICDR, in partnership with the Kingdom of Bahrain, launched the Bahrain Chamber for Dispute Resolution (BCDR-AAA), a new international arbitration and mediation centre in Bahrain. BCDR-AAA, benefiting from unprecedented training in case management, technology and finance systems from ICDR and AAA staff, offers arbitration and mediation services under a variety of Rules, including ICDR International Arbitration Rules, UNCITRAL Rules and its own Rules. Parties choosing Bahrain as a site for their hearings will find legislation creating a unique arbitration “free zone” and state-of-the-art hearing facilities.



## ICDR-Singapore

The ICDR's Asian Centre in Singapore is a cooperative venture with the Singapore International Arbitration Centre (SIAC). ICDR's Asian caseload has been growing in recent years, and Singapore is an excellent location for its Asian operations. ICDR Singapore is conveniently located in the state-of-the-art Maxwell Chambers. The Centre offers administrative services pursuant to its International Dispute Resolution Procedures and holds educational and training program for arbitrators, in-house counsel and practitioners from Asia.

## Section 3

### ICDR Arbitrator and Mediator Panels

The ICDR stresses the importance of the arbitral tribunal in the management of the case and in its authority to make an expert decision in the award. To this end, the ICDR puts extraordinary care into the selection and management of its arbitrators and mediator panels.

- ICDR arbitration and mediation panels are sculpted through years of extensive annual reviews. Existing and potential candidates are evaluated by criteria including international expertise, reputation, demonstrated ability to manage the process, user preferences, caseload needs and diversity.
- The ICDR provides ongoing educational and administrative support, including detailed instruction on advanced case management practices within the ICDR case management system.

### ICDR Arbitrator List Selection

The ICDR list appointment method is the default method employed when the parties have not agreed to the method of appointment or have in fact selected the list method in their agreement. While parties may use the party-appointed selection process in ICDR cases, list appointment eliminates the need for any ex-parte contact between parties and arbitrators, in turn reinforcing the tribunal's independence and impartiality. Any inferred connection between any member of the arbitration tribunal and any of the parties is removed.

ICDR list appointment proceeds as follows. After consultation with the parties as to desired arbitrator qualifications, the ICDR sends an identical list of names along with Curriculum Vitae to the parties. Parties strike unacceptable arbitrators, rank the remaining arbitrators in order of preference and return the list to the ICDR. The ICDR then appoints the presiding arbitrator or tribunal from the closest mutual preference of the parties.



#### DID YOU KNOW

**The ICDR promotes mediation throughout the course of its arbitration cases.** Once a case is filed with the ICDR, a case manager will contact the parties to discuss any administrative issues and challenges that they may face and will explore any other ADR options including mediation with the aim of assisting the parties in settling the case at an early stage. Mediation may also be suggested later on in the process or scheduled to run concurrently. The ICDR uniquely offers a refund schedule that provides parties with a 50% refund of their filing fees if the case is settled within 30 calendar days of the filing. That typically is enough time for a mediation to take place and with its added benefits of preserving valuable business relationships and reducing time and costs, mediation should always be considered as part of the dispute resolution process.

#### DID YOU KNOW

**The ICDR administrative system follows an orderly path but is flexible and can be customized to reflect the parties' agreement.** Extremely concerned with costs, the ICDR can develop an administrative process that is streamlined, with a sole arbitrator and based on documents only. In addition, the ICDR offers a multitude of mediation services—and to encourage a settlement, the ICDR uniquely offers a refund of its administrative fees if the parties reach an agreement at an early stage. (See the ICDR Dispute Resolution Procedures Refund Schedule.)

#### Here is how an ICDR case typically unfolds:

- Case is filed; ICDR reviews filing requirements; case is initiated.
- ICDR conducts an administrative conference call with all Parties; all ADR alternatives are explored and administrative issues clarified.
- Mediator or arbitrator selection process is completed with the parties' input.
- Preliminary hearing with parties and arbitrators conducted for scheduling, to clarify procedural issues and to identify substantive issues for the arbitration; arbitrators prepare a procedural order.
- Hearings scheduled; deposits requested; all invoices reviewed; ICDR monitors costs.
- Parties engage in the process of information gathering and document exchange.
- Evidentiary hearings take place. n Post-hearing submissions take place.
- Award is prepared and submitted to the parties.
- Case is closed; unused deposits refunded; client survey forms transmitted.
- Parties should note that this is only one example of the administrative process and that it can be customized by agreement in their arbitration clause to meet their particular needs. The ICDR conflict management team is available to meet to discuss these options and others as well.



## [www.ICDR.org](http://www.ICDR.org)

The ICDR website includes the following information and more:

- *The International Dispute Resolution Procedures (Including Mediation and Arbitration Rules)* in English, Arabic, Chinese, French, German, Italian, Portuguese, Spanish
- ICDR Fee Schedules
- *ICDR Guide to Drafting International Dispute Resolution Clauses* in English, Chinese, French, Italian, Portuguese, Spanish
- *ICDR Guidelines for Arbitrators Concerning Exchanges of Information* in English, Arabic, Chinese, French, German, Italian, Portuguese, Spanish
- Filing and managing an ICDR case by phone, mail, fax, and online
- ICDR Young and International (ICDR Y&I)
- Safe Harbor Program
- Energy Arbitrators List
- Application information to the ICDR Arbitrator or Mediator Panel
- Conferences

## Useful Links

**The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention):**

[www.newyorkconvention.org](http://www.newyorkconvention.org)

**Inter-American Convention on International Commercial Arbitration (The Panama Convention):**

[http://www.oas.org/dil/CIDIPI\\_convention\\_arbitration.htm](http://www.oas.org/dil/CIDIPI_convention_arbitration.htm)

**International Mediation Institute:** <https://www.imimmediation.org/>