

PART I

ARTICLES ON ICDR ARBITRATION PRACTICE

CHAPTER 1

A GUIDE TO ICDR CASE MANAGEMENT

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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.² 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 AAA is a not-for-profit organization with offices throughout the U.S.³ The AAA has a long history and experience in the field of alternative dispute resolution, providing services to individuals and organizations who wish to resolve conflicts out of court.

The AAA's role in the dispute resolution process is to administer cases, from filing to closing. The AAA provides administrative services in

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¹ The global leader in conflict management since 1926, the AAA-ICDR 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 2020 over 470,000 cases were filed with the AAA-ICDR in a full range of matters including commercial, construction, labor, employment, insurance, international and claims program disputes. The AAA-ICDR has promulgated rules and procedures for international, commercial, construction, employment, labor, and many other kinds of disputes. It also has developed a roster of impartial expert arbitrators and mediators located throughout the United States and in countries throughout the world and administers its international cases through the ICDR, its international division.

² Prior to the establishment of the ICDR, international cases filed with the AAA were administered by its network of regional offices in the United States and had established a foreign division as early as 1927 which was concerned with all matters of international law and international trade involved in or related to commercial disputes.

³ The AAA-ICDR has 28 offices in the U.S. and an office in Singapore (*see*, <https://www.adr.org/OfficeLocations>).

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the U.S., as well as abroad through its international division, the ICDR. The AAA's and ICDR's administrative services include assisting in the appointment of mediators and arbitrators, setting hearings, and providing users with information on dispute resolution options, including settlement through mediation. Ultimately, the AAA-ICDR aims to move cases through arbitration or mediation in a fair and impartial manner until completion.

The ICDR as the global component of the American Arbitration Association provides conflict-management services through its case counsel comprised of multilingual attorneys licensed from various jurisdictions. Additionally, the ICDR draws upon its international panel of hundreds of independent arbitrators and mediators leveraging its network of global cooperative agreements⁴ for additional support as may be needed, forming the ICDR's international administrative system that provides a flexible, party-centered process for a broad range of industries and business sectors.

The ICDR employs a team approach to case administration consisting of directors and executives where their knowledge of local culture, different legal traditions and linguistic capabilities are important components of the administrative regime.⁵ This framework provides a level of procedural predictability under the ICDR system and creates in its users an expectation that the ICDR will provide all available administrative options for 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 they prevailed or not. One important factor to consider is that arbitrators do make decisions in favor of one party over another.⁶ The ICDR, a not-for-profit administrative institution strives to meet the expectations of parties participating in its

⁴ Currently 87 agreements in 54 countries.

⁵ The ICDR administrative teams are located in our New York, Houston, Miami and Singapore. For the contacts of the ICDR's Conflict Management team, *please see* the ICDR's Resource Guide at https://icdr.org/about_icdr.

⁶ According to a 2018 study of AAA-ICDR business-to-business (B2B) commercial awards, AAA-ICDR arbitrators made decisions clearly in favor of one party in over 94.5% of the cases. Only 5.5% of awards fell in the midrange category. (*See* the table and the Corporate Counsel Business Journal study located at: <https://go.adr.org/split-the-baby>). 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); Ana Carolina Weber, Carmine A. Pascuzzo S.; Guilherme de Siqueira Pastor, and Ricardo Dalmaso Marques, *Challenging the "Splitting the Baby" Myth in International Arbitration*, 18(6) J. INT'L ARB. 719–734 (2014).

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mediations and arbitration, 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.⁷

Meeting expectations was not made any easier during the last two years with the onset of the COVID-19 pandemic. Faced with global lockdowns and a transition to working remotely, the AAA-ICDR strived for greater efficiencies with the increased incorporation of virtual hearings and a customized approach to conflict management during this challenging period. The effects of the pandemic and its impact on international arbitration will be felt for some time to come and the AAA-ICDR has incorporated the lessons learned as part of its administrative systems necessitated by the demands of its international and domestic caseloads, which continues to be the largest in the world.⁸

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.⁹ The

⁷ The AAA-ICDR's shared mission statement is as follows; The American Arbitration Association is dedicated to fair, effective, efficient and economical methods of dispute resolution through education, technology, and solutions-oriented service. Its shared vision is as follows; The American Arbitration Association will continue to be the global leader in conflict management—built on integrity, committed to innovation, and embracing the highest standards of client service achievable in every action. The AAA-ICDR's official mission statement and vision statement are based on three core values: integrity, conflict management, and service. The AAA-ICDR has long held its mediators and arbitrators to strict codes of ethics and model standards of conduct to ensure fairness and impartiality in conflict management. To further ensure the AAA-ICDR's integrity, however, the Association also developed Standards of Ethics and Business Conduct for its staff, as well as a general Statement of Ethical Principles to expand on its core values as an organization, (for additional information visit: <https://www.adr.org/MissionPrinciples>).

⁸ The ICDR administered 685 new international arbitration cases in 2021 with parties from over 99 countries and has administered over 18000 cases since it was established in 1996. As of February 2020, the American Arbitration Association administered more than six million cases since its establishment in 1926.

⁹ For an extensive review on the ICDR's rules and administrative processes, see Martin F. Gusy and James F. Hosking, *A Guide to the ICDR International Arbitration Rules*, Second Edition, Oxford University Press, 2019. Also see, Horacio A. Grigera Naón and Paul E. Mason, *International Commercial Arbitration Practice: 21st Century Perspectives, 2010–*

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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.¹⁰ Unfortunately, it is not uncommon for an arbitration agreement to be copied at the last minute from a formbook 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.¹¹ If time is of the essence parties should opt for the security of the ICDR’s model clause¹² or other options from its clause drafting guide or by using the AAA-ICDR’s online arbitration clause building application tool, “ClauseBuilder®”.¹³

2021, *ICDR Chapter 43*, Luis Martinez and Thomas Ventrone, LexisNexis Matthew Bender, 2010–2021.

¹⁰ The ICDR’s Executive Team can assist the parties in exploring various options for their dispute resolution agreement and can be contacted to review customized clauses to maximize predictability and avoid surprises. The ICDR can provide insights regarding the formulation of corporate ADR strategies and can provide overviews of the ICDR’s administrative system. For assistance, ICDR regional contact information can be found at the ICDR’s website at <https://www.icdr.org/icdroffices>.

¹¹ 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. *Exxon Neftegas Ltd. v. Worleyparsons Ltd.*, No. 654405/2013, 2014 WL 9873313 (N.Y. Sup. Ct. July 16, 2014) (ordering that “[i]f the AAA is unwilling or unable for any reason to administer the arbitration under the ICC Rules, the reference to the ICC Rules in the arbitration clause in the Engineering Agreement is severed and the parties shall arbitrate pursuant to arbitration rules designated by the AAA in accordance with its procedures.”).

¹² The following ICDR “Model” arbitration clause is intended to assist contracting parties in drafting their 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 following to the model clause:

- 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]; and
- The language of the arbitration shall be.

¹³ 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. The AAA-ICDR has also developed the ClauseBuilder® (www.clausebuilder.org) online tool, a simple, self-guided process to assist individuals and organizations in developing clear and effective arbitration and mediation agreements. This

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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.¹⁴

Moreover, with the volume of arbitral institutions throughout the world today there are a number of unqualified administrators establishing institutions that have entered the market expecting to be successful from the outset without considering the full scope and responsibilities that administrative institutions 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 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. Another factor to consider is that an arbitral institution may not have the technology in place that is needed to administer today's international and domestic arbitrations with electronic platforms for the users as well as the arbitrators and administrators, which are essential especially for operating remotely.¹⁵ One important

application will guide the user through all of the elements they should consider in drafting their international ADR provision with a series of interactive questions culminating with a proposed arbitration provision based on the responses given. Moreover, the user is provided with an overview of the essential elements that should be considered for an international arbitration or mediation clause.

¹⁴ 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 a discussion of the advantages and disadvantages of ad hoc arbitration, see Nigel Blackaby, Constantine Partasides, Alan Redfern, and Martin Hunter, *Redfern and Hunter on International Arbitration*, Oxford (6th ed. 2015), 1.143 to 1.145.

¹⁵ The AAA-ICDR, the largest ADR provider in the world, has invested in both protecting the data of our clients as well as building the capabilities to administer and resolve technology related disputes, See the AAA-ICDR's technology section, visit, <https://www.adr.org/TechnologyServices>.

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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 and lead to a backlash against the future development of their arbitral culture and not having arbitrations seated in that jurisdiction. 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.¹⁶ International business managers recognize that there is an institutional difference when they place their confidence in the AAA-ICDR 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.¹⁷

I. The International Centre for Dispute Resolution, (ICDR)

The ICDR officially opened in New York City on June 1, 1996 implementing a case administrative system with an international focus that incorporated cultural sensitivity as it was expected that international parties would come from many different countries and 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 applying the provisions of its international arbitration rules (IAR) can manage these cultural issues thereby moving the matter forward, saving time and ultimately avoiding increased costs.¹⁸

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

¹⁶ 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, <https://www.adr.org/consumer>.

¹⁷ *See The ICDR International Arbitration Reporter*, Volumes 1 through 5, edited by Luis Martinez, available on the ICDR's website at <https://icdr.org/icdrreports>.

¹⁸ 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). For additional perspectives on the impact of culture in international commercial arbitration, *see*, John M. Barkett & Jan Paulsson, *The Myth of Culture Clash in International Commercial Arbitration*, 5 *FIU L. Rev.* 1 (2009).

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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.¹⁹

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, completing the appointment of qualified arbitrators, monitoring and controlling costs, understanding cultural sensitivities, resolving procedural impasses, properly interpreting and applying its rules with the complete oversight of its administrative process and the rendering of an ICDR Award.²⁰

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.²¹ If the parties have selected a specific set of rules in their arbitration clause, they will be applied.²² 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.²³

¹⁹ In addition, the parties may not derogate from any mandatory provisions of the law applicable to the arbitration, *see* Article 1, (2) of the IAR.

²⁰ The ICDR IAR authorizes ICDR administration as the institution's role is referenced throughout the rules and is required for the rendering of an Award issued under its auspices, *See* IAR Article 1, (3).

²¹ In 2003, the ICDR's International Arbitration Rules were renamed the "International Dispute Resolution Procedures" upon incorporating international mediation rules.

²² For example, in 2021 the ICDR administered 306 cases pursuant to the AAA's Commercial Arbitration Rules and Mediation Procedures, 41 cases pursuant to the AAA's Construction Industry Arbitration Rules and Mediation Procedures, three cases pursuant to the ICDR's Procedures for Cases under the UNCITRAL Arbitration Rules and 149 cases under the ICDR's International Dispute Resolution Procedures.

²³ The UNCITRAL (The United National Commission on International Trade Law) Model Law's definition of an international arbitration has been incorporated by the ICDR for the purpose of determining whether a case is international. An arbitration may be deemed international and administered by the ICDR if the parties to an arbitration agreement have:

- their places of business in different countries;
- the place where a substantial part of the obligations of their commercial relationship to be performed is situated outside the country of any party;
- the place with which the subject-matter of the dispute is most closely connected is situated outside the country of any party;

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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.²⁴

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 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.²⁵

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.²⁶ The claimant has

-
- the place of arbitration is situated outside the country of any party; or
 - one party with more than one place of business (including parent and/or subsidiary) is situated outside the country of any party.

²⁴ 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 168 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.

²⁵ The current International Dispute Resolution Procedures Amended and Effective March 1, 2021 and the current ICDR Fee Schedule Amended and Effective October 1, 2017. For further reading on the ICDR's International Arbitration Dispute Resolution Procedures 2021 revision, see Ann Ryan Robertson and Alan R. Crain, *The 2021 ICDR International Dispute Resolution Procedures*, available at https://go.adr.org/rs/294-SFS-516/images/AAA343_International_Dispute_Resolution_Procedures.pdf.

²⁶ 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 U.S. and Canada +1 877-495-4185
Fax number 877-304-8457
Fax number outside the US: 212-484-4178
Email box: casefiling@adr.org.

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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. The AAA-ICDR offers fast, convenient online claim filing and case management through its WebFile® service. In addition to filing claims, parties to ICDR cases can manage all aspects of their cases securely, from the filing of additional claims or counterclaims on existing cases to case-related financial functions. Parties may upload, download and view case documents and create case-specific tasks. The AAA-ICDR's WebFile® provides the parties with full access to manage their case electronically with full remote access and all data entered and documents uploaded are immediately available to the ICDR case staff as well as to the arbitrator(s), mediator(s) and all other parties on the case, where appropriate with assigned viewing permissions.²⁷ Cases may also be filed by mail or facsimile with the claimant starting the process by submitting a completed Notice of Arbitration form to comply with Article 2 of the IAR and the appropriate filing fee.²⁸ The Notice of Arbitration must be sent simultaneously to the respondent in compliance with Article 2 and Article 11 of the IAR.²⁹

Article 2 states that the Notice of Arbitration shall contain the following:

- a. a demand that the dispute be referred to arbitration;
- b. the names, addresses, telephone numbers, fax numbers, and email addresses of the parties and, if known, of their representatives;
- c. a copy of the entire arbitration clause or agreement being invoked, and, where claims are made under more than one arbitration agreement, a copy of the arbitration agreement under which each claim is made;
- d. a reference to any contract out of or in relation to which the dispute arises;
- e. a description of the claim and of the facts supporting it;
- f. the relief or remedy sought and any amount claimed; and

²⁷ For information on how to file and manage your case online, *see* the AAA-ICDR website at <https://www.adr.org/Support>.

²⁸ The Notice of Arbitration form as well as the Arbitration Answering Statement and Counterclaim along with other forms, the link to the AAA-ICDR's WebFile, the Fee Schedule and the ICDR's IAR (available in various languages) can be found on the ICDR's website at www.ICDR.org under Rules, Forms & Fees. Once the case is entered into the electronic case system, it is assigned to one of the ICDR's administrative teams, where factors such as the place of arbitration, language, type of dispute and the team's current caseloads are considered in making the assignment.

²⁹ *See* IAR Article 2 (1). It is important to also review Article 11 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.

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- g. optionally, proposals, consistent with any prior agreement between or among the parties, as to the means of designating the arbitrators, the number of arbitrators, the place of arbitration, the language of the arbitration, and whether the party filing the Notice of Arbitration is willing to mediate the dispute prior to or concurrently with 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 jurisdiction to administer the case.³⁰ 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 are not met, the case cannot be properly commenced. The ICDR will contact the claimant to obtain the required information.³¹ If the additional information received does not satisfy the respondent's objections and they maintain that the case was not properly commenced, the issues will be referred to the ICDR's Administrative Review Council (Council) which was created to act as the decision making authority for certain administrative issues arising on cases under the

³⁰ Jurisdiction which largely is referencing administrative jurisdiction should not be confused with arbitrability as arbitrability relates to whether claims raised are prohibited by law from being resolved by arbitration irrespective of the jurisdiction of the institution or the arbitrators. If, for example, the dispute concerns marriage rights or torts that are generally not arbitrable, the case may be initiated and these issues of arbitrability will be left to be determined by the arbitrators. *See* IAR Article 21.

³¹ For example, the Statement of Claim is referenced in Article 2 (3), (e) and there is no requirement regarding the amount of detail that is required for this initial pleading. In a number of cases the ICDR has received submissions that provided a few details of the claim along with their completed Notice of Arbitration form addressing the elements that are required as part of Article 2 (3) (a) to (g). The amount of detail is really a question of strategy for the filing party and the ICDR does not take a firm position as to the contents of the Statement of Claim pursuant to Article 2. In other cases, filing parties opt to include Statement of Claims with detail and specificity providing the arbitrators with a better understanding of their position at the outset. The providing of more information at this early stage is useful for the arbitrators if called upon to make some early determinations especially when the case is being administered pursuant to the ICDR's expedited procedures, which calls for detailed submissions, (*see* IAR Article E-2). If the ICDR determines that the Demand for Arbitration is incomplete or otherwise and does not meet the filing requirements contained in the rules a deficient filing fee may be charged if the filing party fails or is unable to respond to the ICDR's request to correct the deficiency as listed in the ICDR's International Arbitration Fee Schedule.

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various rules administered by the ICDR.³² The Council shall make administrative determinations regarding objections or challenges to the continuing service of an arbitrator; disputes regarding the location of hearings or the place of arbitration; disputes concerning the number of arbitrators that will be appointed to an arbitration; and whether the administrative requirements to initiate or file an arbitration contained in the applicable Rules have been met.³³ The Council will review the case file and the parties' contentions when making its determination as to whether a filing party has met the filing requirements contained in the Rules applied by the ICDR on a prima facie basis. If the Council decides to proceed with the administration and any party continues with their belief that the case was not properly commenced (for example, a respondent who claims it is a non-signatory to the arbitration agreement), then these issues may be referred to the arbitrators for their final determination once appointed.³⁴ 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.³⁵ The ICDR has discretion to interpret its own rules and can initially decide through the Council if the filing party has complied with Article 2 giving it the authority to commence the matter over the objections of a party.³⁶

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, which is sent with the applicable rules to all parties. The electronic file will already have been created and accessible by all parties and the case shall be deemed commenced on the

³² The ICDR's International Administrative Review Council is referenced in Article 5 of the IAR.

³³ For additional information on the ICDR's International Administrative Review Council including its Guidelines and Review Standard *see* <https://icdr.org/council>.

³⁴ *See* I.A.R. Article 21, reflecting the principle of *kompetenz-kompetenz*, the ability of the arbitral tribunal to rule on the question of its own jurisdiction.

³⁵ 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).

³⁶ *See* IAR Article 42, where the ICDR shall interpret and apply all other Rules not relating to the arbitrator’s powers and duties.

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date on which the administrator receives the Notice of Arbitration.³⁷ The initiation letter will contain the date of commencement and instruct the respondent that they will have 30 days in which to prepare its Answer to the claimant’s claims and assert counter-claims or set-offs if any.³⁸ The parties must also include no later than the date of the filing of the Answer as provided in Article 3 any objections to the jurisdiction of the tribunal or to the arbitrability of a claim or counterclaim.³⁹

The ICDR will also include with the initiation letter two additional documents related to cybersecurity. The AAA-ICDR is committed to the security and privacy of customer and case information. To achieve that goal the AAA-ICDR includes its “Best Practices Guide for Maintaining Cybersecurity and Privacy,” which references its policies, procedures and technologies to help protect its data and information systems. The protections that have been implemented apply to all case data and equipment stored and managed on the AAA-ICDR technology infrastructure. Additionally, AAA-ICDR employees routinely participate in online training programs designed to heighten their knowledge of security policies and procedures. The AAA-ICDR has also prepared its Cybersecurity Checklist, which parties and/or their representatives as well as arbitrators may use as a resource, and these issues should be discussed at its first procedural hearing.⁴⁰

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.⁴¹

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

³⁷ See IAR Article 2, (2).

³⁸ See IAR Article 3.

³⁹ See IAR Article 21 (3).

⁴⁰ For a review of the AAA-ICDR’s cybersecurity and these documents along with information on its security programs, visit:

<https://www.adr.org/TechnologyServices/cybersecurity-and-data-protection>.

The cybersecurity, privacy and data protection issues are referenced in the rules and are an important discussion point regarding their impact on the international arbitration, *See* IAR Article 22 (3). For further information on privacy and international arbitration see Kathleen Paisley, *It’s All About the Data: The Impact of the EU General Data Protection Regulation on International Arbitration*, 41 *Fordham Int’l L.J.* 841 (2018), available at:

<https://ir-lawnet-fordham-edu.flis.idm.oclc.org/ilj/vol41/iss4/4>.

⁴¹ The administrative conference call is usually scheduled within 14 days of the date of the initiation letter and is referenced in the rules (*See* IAR Article 4).

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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.
- A review of the arbitration agreement.
- Scheduling the mediation concurrently with the arbitration.
- The number of arbitrators.
- The method of appointment of the arbitrators.
- The parties' views on the qualifications of the arbitrator(s) to be proposed and diversity are discussed.
- 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.
- Process efficiencies such as a documents-only process and virtual hearings
- Any other administrative matters that the parties wish to bring to the attention of the ICDR at this early stage.

As mentioned above, there will be a discussion about using mediation to resolve the dispute. A further discussion of the ICDR's mediation services and options will follow. If the parties decide to opt out of the mediation the administrator will move on to discuss the appointment of the arbitrators. The parties are free to agree on the method for the appointment and the number of arbitrators for their particular case.⁴²

⁴² 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, regarding the number of arbitrators to be appointed, the ICDR shall submit the issue to its International Administrative Review Council, which shall be, guided by the applicable rules and the circumstances of the case. For examples pursuant to Article 12 of the IAR, "one arbitrator shall be appointed, unless the administrator determines in its discretion that three arbitrators are appropriate because of the large size, complexity or other circumstances of the case." Pursuant to the Procedures for Large, Complex Commercial Disputes of the Commercial Arbitration Rules, if a claim or counterclaim exceed one million dollars, three arbitrators shall be appointed, *See* Rule L-2 (a).

IV. Appointing the Arbitrators

There are a number of options available to the parties for appointing the arbitrators for their ICDR international arbitrations. 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. At the request of any party or on its own initiative, the ICDR may appoint or submit a list(s) including nationals of a country other than that of any of the parties.⁴³ For example, if one side is a Brazilian corporation or national and the other side is French, the presiding arbitrator will be selected for appointment or for the list 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 their arbitration agreement, the ICDR shall at the written request of any party, complete the appointment process.⁴⁴

In the event of multiparty cases, the ICDR may appoint all the arbitrators. The issue of the selection of arbitrators in multiparty cases came to the forefront with the holding of the well-known *Dutco* case where France's Cour de Cassation set aside an International Chamber of Commerce (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 a matter of public policy which can be waived only after the disputes has arisen."⁴⁵ To avoid any potential for mischief if there are more than two parties to the arbitration, absent the agreement of the parties the ICDR may appoint all arbitrators.⁴⁶ In reality, this hardly happens, as

⁴³ See IAR Article 13 (4).

⁴⁴ See IAR Article 13 (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.

⁴⁵ Stefan Kröll, *Siemens - Dutco Revisited? Balancing Party Autonomy and Equality of the Parties in the Appointment Process in Multiparty Cases*, ITA Blog, 15 Oct 2010; see also Eric A. Schwartz, *Multi-Party Arbitration and the ICC, In the Wake of Dutco*, 10 J. Int'l Arb. (1993); Gary Born, *International Commercial Arbitration*, Wolters Kluwer (3d ed. 2021), 2810–2815.

⁴⁶ See IAR Article 13 (5).

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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 may then complete the appointment process. Typically, the parties do tend to agree on the appointment mechanism.

Consolidation and joinder are also issues that may arise in multiparty arbitrations. The IAR has included in its IAR provisions for Joinder and Consolidation.⁴⁷ The ICDR provides a party that wishes to join an additional party to the arbitration to complete the Notice of Arbitration and comply with the required filing requirements pursuant to Article 2(3). The additional party shall submit an Answer and will have an opportunity make claims, counterclaims, or assert setoffs in accordance with Article 3. If a party objects to being added to the arbitration or the tribunal's jurisdiction, the tribunal shall have the power to rule on its own jurisdiction without any need to refer such matters to a court.⁴⁸ Article 8 was expanded in the recent revision by permitting joinder after constitution of the tribunal if the tribunal determines that the joinder of an additional party would serve the interests of justice and the additional party consents to be joined.⁴⁹ Consent is important, as the party joined will not have participated in the selection of that Tribunal.

The ICDR introduced its consolidation article as part of its 2014 revision. It is important to recognize especially in the construction sector that consolidated proceedings may eliminate the need for duplicative presentations of claims and conflicting rulings from different panels of arbitrators. The AAA-ICDR's case intake department may initiate the arbitration as filed by the moving party, even though separate contracts may be involved, that may or may not be linked or contain an express consolidation provision, thereby providing parties with an opportunity to

⁴⁷ See for Joinder IAR Article 8 and for Consolidation IAR Article 9.

⁴⁸ For the 2021 revision of the IAR as there is potential controversy in U.S. jurisdictions regarding whether reference to arbitral rules constitutes a clear and unmistakable delegation of the issue of arbitrability to the tribunal, Article 21(1) clarifies and further strengthens the concept that the tribunal has the jurisdiction to determine arbitrability objections without court involvement. The reason for this change is to counteract any doubt about the effect on this rule by the recently adopted Restatement of the U.S. Law of International Commercial and Investor State Arbitration (ALI 2019) (Restatement). The Restatement adopted a position, contrary to the weight of case law, concerning when the incorporation of arbitration rules into an arbitration agreement may constitute the "clear and unmistakable evidence" of an intention to delegate questions of arbitrability to arbitrators, rather than to courts, as required by the Supreme Court in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). See IAR Article 21 and note 27 *supra*.

⁴⁹ See IAR Article 8 (1).

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proceed jointly if they so desire. 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, at the request of a party or on the ICDR's own initiative, a consolidation arbitrator may be appointed.⁵⁰ The consolidation arbitrator will have the power to consolidate two or more arbitrations pending under the IAR other arbitration rules administered by the ICDR. Article 9 is comprehensive referencing the criteria that the consolidation arbitrator will apply, their method of appointment, the circumstances that will be considered in deciding whether to consolidate and the related determination regarding the logistics and impact to the arbitrations, that have been consolidated including, which cases are stayed and which tribunal remains in place.⁵¹

Absent the agreement of the parties upon their procedure for appointing the arbitrators, the ICDR employs the list method as its default method of appointment. 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 will create a balanced list of potential arbitrators for selection by the parties.⁵²

⁵⁰ See IAR Article 9, which provides the ability of a party to request a consolidation arbitrator but further provides that the Administrator on its own initiative may appoint a consolidation arbitrator. The 2014 standards for permitting consolidation remain unchanged but the ability to consolidate was expanded in the recent revision to permit consolidation when arbitrations involve "related" parties; as opposed to the previous limiting "same" parties standard that was required by the prior rule. This expanded scope is intended to allow parties to resolve these types of issues within an arbitration setting without the need to refer to the authority of the applicable court(s).

⁵¹ See IAR Article 9 (1) through (7).

⁵² Below is an example of an ICDR fictitious list with 10 proposed names for a sole arbitrator. In the event of a tri-partite panel, 15 names are used. In the example given, the parties have objected to all but three of the arbitrators. The ICDR will first invite arbitrator San Martin to serve as his numerical spread reflects a better balance of the preferences from both sides followed by Cruz and Jimenez should San Martin not be able to serve.

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Example of the list

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

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The list of names will be transmitted along with their corresponding AAA-ICDR standard 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 selected using the party-appointed method. These ex parte conversations may be used to establish the foundation for possible bias or evident partiality during an

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action to vacate an arbitral award.⁵³ While it is true that all party-appointed arbitrators have to be impartial and independent pursuant to the ICDR's IAR Article 14 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 and impartiality requirement and the need to not be predisposed to a parties' position.⁵⁴ 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.⁵⁵ This troubling statistic may suggest that a disproportionate number of party-appointed arbitrators in cases in which the party that appointed them lost seeks to advocate that parties' position by submitting their dissenting opinion. In another article, a similar 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.⁵⁶ In a more recent study on party-appointed arbitrators conducted 55% of respondents who had sat as arbitrators reported having experienced a party-appointed arbitrator trying

⁵³ It is worth noting that the majority of arbitration awards are complied with voluntarily, for example in investment arbitration the 2008 Queen Mary/Pricewaterhouse Coopers Survey on Corporate Attitudes and Practices in Relation to Investment Arbitration reported that 84% of the international corporate counsel surveyed responded that, in more than 76% of arbitration, the non-prevailing party voluntarily complied with the arbitral award. See, *Queen Mary, University of London & PricewaterhouseCoopers, 2008 Corporate Attitudes: Recognition and Enforcement of Foreign Awards*, p. 6, available at <https://arbitration.qmul.ac.uk/research/2008/>.

⁵⁴ 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 14.

⁵⁵ Jan Paulsson, *Are Unilateral Appointments Defensible?*, Kluwer Arbitration Blog, 02 April 2009.

⁵⁶ Albert Jan van den Berg, *Dissents and Sensibility*, Global Arbitration Review, 28 February 2011.

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to favor the appointing party by some means, and 70% of respondents who acted as counsel recounted situations where they believed a party-appointed arbitrator tried to favor the appointing party.⁵⁷

These findings support the position to move away from the direct appointment by the party appointment method towards appointments being made by the institutions either directly or from their panels using the list method. This creates an important buffer between the arbitrators and the parties removing the potential for the aforementioned problems and the disquieting idea that perhaps one side was more effective than the other in appointing their arbitrator who may be predisposed to their position in the arbitration.

The list method has a number of added benefits starting with the level of expertise that is needed for today's complex international arbitrations. The AAA-ICDR's international panel as well as its Life Sciences, Construction, Energy and Aerospace panels are some examples that reflect the institution's goals to have highly experienced arbitrators available to the parties for these specialized cases. These arbitrators with subject matter expertise from these sectors provide for a savings of time and costs, as they are able to quickly understand the complexity of the case without having to be educated at the outset. That translates to their effective management of the dispute and reasoned awards that reflect their business acumen and judgment in the resolution of the underlying dispute.

Predictability is enhanced by virtue of the level of experience required for these specialized panels and the fact that the arbitrators have been vetted and their qualifications scrutinized in advance by members of the ICDR's advisory committees who are asked to provide feedback regarding the prospective arbitrator's curriculum vitae.⁵⁸ Moreover, once approved all ICDR international arbitrators are required to undertake the ICDR's international arbitrator symposium. This program, which highlights "best practices" in a mock complex international arbitration, uses videos and written vignettes where numerous case related scenarios are presented based on situations taken from real life international arbitrations. ICDR experienced arbitrators along with members of its executive team facilitate the interactive discussions that focus on the application of the ICDR's

⁵⁷ Berwin Leighton Paisner, *International Arbitration Survey: Party Appointed Arbitrators 2* (2017), pp. 5–6, 12, <http://www.bclplaw.com/images/content/1/4/v2/147194/BLP-Arbitration-survey-2017.pdf>.

⁵⁸ For information on how to apply to the ICDR's international panel of arbitrators, *see* https://icdr.org/sites/default/files/document_repository/Application-Information-ICDR-Panel-of-Arbitrators-and-Mediators.pdf.

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rules, administrative policies and how to coordinate with the ICDR during the course of the arbitration adding to predictability pursuant to the ICDR administrative system. 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. If the parties are selecting the ICDR rules and administration, predictability and the advantages of the ICDR system are best served by having ICDR arbitrators selected for the underlying case. Finally, as the ICDR (or for that matter any other administrative institution) has little or no control over the party-appointed arbitrators who are not on their lists, these arbitrators do not have an expectation of future appointments and are less concerned about the institution's policies. They 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 and recognizing the need for these exceptional international arbitrators, the ICDR has established a demanding set of qualifications for potential arbitrators and openings on the panel are limited depending on the ICDR's caseload needs. For example, the international panel is reviewed annually and each year the ICDR may require additional arbitrators that have a particular nationality, expertise or has the ability to arbitrate in a certain language. The AAA-ICDR additionally recruits and invites diverse arbitrators and mediators each year and includes diversity as a default criteria for every list of arbitrators created for the parties. The AAA-ICDR efforts continue to center on actively recruiting highly qualified women as well as racially and ethnically diverse arbitrators and mediators who: serve on the AAA-ICDR's panels domestically and internationally. Focused efforts have led to significant increases in the percentage of female and racially and ethnically diverse members on the AAA-ICDR Roster and in the percentage of diverse panelists appointed to hear AAA-ICDR-administered cases.⁵⁹

⁵⁹ For further information on the AAA-ICDR's diversity initiatives, see <https://icdr.org/diversity>.

V. Clearing Conflicts and Challenges

The ICDR's IAR Article 14 requires that all arbitrators be impartial and independent, to know and act in accordance with the ICDR rules and the terms of the Notice of Appointment provided by the Administrator, which also include the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes. 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 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.⁶⁰

⁶⁰ 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 since implementing its International Administrative Review Council through last year has made determinations on over 225 issues (the COUNCIL administrative determinations regarding a range of issues, *see* note 33 *supra*) in over 200 cases with an average of over 35 submissions that were based on arbitrator challenges. Challenges are to be submitted to the Council pursuant to Article 5 and governed by Article 15 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 ICDR pursuant to the IAR shall notify the Tribunal that a challenge has been received without identifying the party challenging. The ICDR has the option of advising the challenged arbitrator and request additional information relating to the challenge. The challenged arbitrator may also decide to withdraw. If the parties fail to agree and the arbitrator does not withdraw, the Council shall make the final determination and 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 additional challenges and 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 Article 16 provides the guidance on replacing an arbitrator.

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The ICDR does not apply the IBA’s Guidelines on Conflicts of Interest in International Arbitration (2014) 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.⁶¹ A new section regarding third-party funding and undisclosed economic interests was added to Article 14 where a party or the tribunal on its own initiative after consulting with the parties, may require the parties to disclose whether a non-party (such as a third-party funder or an insurer) has undertaken to pay or to contribute to the cost of a party’s participation in the arbitration, to identify the person or entity concerned, and to describe the nature of the undertaking. Similarly, the tribunal may require the parties to disclose a non-party (such as a funder, insurer, parent company, or ultimate beneficial owner) having an economic interest in the outcome of the arbitration and to describe the nature of the interest.⁶²

⁶¹ 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 provide scenarios where disclosures that the ICDR believes should be made are not required. Under the orange list, the disclosures are triggered for various potential conflicts if they took place within three years only. For example, section 3.1.2 of the IBA Guidelines establishes 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 more than three years earlier without the involvement of the arbitrator there is no need for a disclosure. Under the green list a disclosure is not required. 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); *Monster Energy Co. v. City Beverages, LLC*, 940 F.3d 1130, 1138 (9th Cir. 2019), *cert. denied*, 141 S.Ct. 164 (2020) (holding that “before an arbitrator is officially engaged to perform an arbitration, to ensure that the parties’ acceptance of the arbitrator is informed, arbitrators must disclose their ownership interests, if any, in the arbitration organizations with whom they are affiliated in connection with the proposed arbitration, and those organizations’ nontrivial business dealings with the parties to the arbitration.”) (quoting Justice Black’s Court opinion in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 149 (1968): “We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias.”).

⁶² This additional disclosure option was included in the 2021 revision to prevent any potential disclosures that may impact the arbitration from not being considered by the parties or raised early on before the arbitration is further along the process, see IAR Article 14 (7).

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VI. The Procedural Hearing

Upon completing the appointment of the arbitrators, the case manager will schedule a procedural hearing done telephonically or virtually with the parties and the arbitrators for the earliest possible date, to place the matter in the hands of the decision makers. Prior to this hearing 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 an initial determination that may have been made by the Council 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.⁶³

The ICDR provides the arbitrators with a sample procedural hearing checklist that they can use and modify, as they deem appropriate. This procedural hearing 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 throughout the arbitration. The checklist below covers a number of suggested issues that the arbitrators may need to discuss for their particular matter.

Procedural Hearing Checklist [Sample Agenda]⁶⁴

- Explain the purpose and goals of the preparatory conference.
- Confirmation of the parties to the arbitration and their counsel, (addresses, emails, contacts.)
- Confirmation of the arbitral Tribunal.
- Confirmation of the arbitration agreement.
- Confirmation of the governing law and applicable procedural rules.

⁶³ See IAR Article 19 (1).

⁶⁴ The agenda items listed are suggested and the tribunal will have the opportunity to modify the agenda as may be necessary for the particular case. Arbitrators may also consider the Preliminary Hearing procedures included in the AAA's Commercial Arbitration Rules, P-1 through P-2 (page 33).

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- Confirmation of the place of arbitration.
- Have each party make a brief opening statement outlining the issues in dispute and associated claims.
- Preliminary matters, motions and applications (if any).
- Discussion regarding the exchange of information and how time limits will be handled.
- Confirmation of the means of communication.
- Discussion regarding the use of technology, including virtual hearings, (video or audio) or other electronic means that could be used to increase the efficiency and economy of the proceeding.⁶⁵
- Discussion regarding cybersecurity, privacy and data protection to provide for an adequate level of security and compliance in connection with the proceeding.⁶⁶
- Procedural timetable and schedule for the hearing on the merits.
- 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.
- 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 allowing the arbitrators to determine whether they have any conflicts.)
- Discussion regarding the Party submissions and & 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

⁶⁵ See IAR Article 22 (2). Articles 22 and 26 each acknowledge the use of video, audio or other electronic means (collectively, Video) for conducting preliminary matters and final hearings. Article 26 directs that all or a portion of a hearing may be held by video. The parties may agree to video or the tribunal may order video after consultation with the parties, provided video will not compromise the rights of any party to a fair process. The tribunal is also authorized to direct that witnesses be examined through means that do not require their physical presence.

⁶⁶ See IAR Article 22 (3).

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identification, direct or strongly suggest, the parties submit a consolidated and comprehensive set of joint exhibits and direct that the appropriate number of exhibits be made.

- Witnesses & Experts.
- Discussion regarding statements and expert reports. Establish a schedule for the exchange of witness lists and experts and direct that these lists contain the full name of each witness, titles if applicable, and note that written witness statements should be used unless otherwise agreed to by the parties or directed by the tribunal.⁶⁷
- Miscellaneous Issues: filing of pre-hearing briefs; stenographic record/court reporter; use of interpreters; any other issues the parties wish to raise.
- Confirmation that the Award shall be in writing and shall state the reasoning on which the award rests.

Following this procedural hearing, the tribunal will issue a procedural order, which will memorialize the outcome of this hearing and 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 and any other matters that were raised by the parties. 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, which is a determination that will be made by the Council, 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 ask the parties to provide their comments in support of the place of arbitration they are requesting for the Council to consider. Factors to be considered include:

- Location of the parties
- Location of the witnesses and documents
- Location of the site or place or materials
- Consideration of the relative cost to the parties
- Place of performance of the contract

⁶⁷ See IAR Article 26 (4).

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- Law(s) applicable to the contract
- Place of previous court actions
- Necessity of an on-site inspection of the project
- Any other reasonable arguments that might affect this determination

The Council will balance those factors with the wishes of the parties while considering the protection of the award in its determination.⁶⁸

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.⁶⁹

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 consider the impact of common law and civil traditions depending upon the needs of the particular case. 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

⁶⁸ The Council may also consider the legal framework at the requested place of arbitration and whether the desired place of arbitration is in a country that is a party to one of the enforcement treaties. In recent years, we have seen cities around the world vying to be selected as seats for international arbitrations, organizations such as NYIAC, ATLAS and MIAS for example work on promoting New York, Atlanta and Miami respectively as seats for international arbitrations. Globally there are similar initiatives underway as these cases are seen as beneficial for the selected city and have led to an increase in related international arbitration legal services for the local firms based in these cities. Consequently, cities that wish to be selected as seats for these cases work to ensure that they have a developed arbitration culture, supportive laws and judiciary where the awards and agreements to arbitrate are enforced as required by the enforcement treaties. New York for example is often selected as a seat for international arbitrations but has at times been criticized for having international arbitration awards vacated due to the arbitrator's manifest disregard of the law. The Committee on International Commercial Disputes of the New York City Bar Association issued a report, the "Manifest Disregard of Law" Doctrine and International Arbitration in New York. The Committee found that "the manifest disregard doctrine has been applied sparingly, especially so in the context of international awards challenged in New York state and federal courts," and that "no international arbitral award rendered in New York has ever been set aside in the Second Circuit on the ground of manifest disregard." (New York City Bar Report, p. 2). The report is *available at* <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/the-manifest-disregard-of-law-doctrine-and-international-arbitration-in-new-york>.

⁶⁹ See IAR Article 20.

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evidence, and direct the parties to focus their presentations. The tribunal may also consider how technology, including video, audio or other electronic means, could be used to increase the efficiency and economy of the proceedings.⁷⁰

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 or appropriate. The tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered by any party. Unless the parties agree otherwise in writing the tribunal shall apply Article 24 for the exchange of information.⁷¹

The IAR reflect international arbitration practice regarding the exchange of information stating that depositions, interrogatories and requests to admit as developed for use in U.S. court procedures generally are not appropriate procedures for obtaining information in an arbitration under the IAR rules. This article provides the tribunal with the authority to manage the scope of document and electronic document requests and the ability to limit, or avoid U.S. litigation-style discovery practices. ICDR international arbitrators are advised of the importance of this provision during the ICDR's international training symposium stressing the importance of managing the exchange of information between the parties maintaining efficiency and economy. The parties shall exchange all documents upon which they intend to rely and may petition the tribunal to require a party to make available documents that are in that party's possession, that are reasonably believed to exist and to be relevant and material to the outcome of the case. This phase of the arbitration can be costly especially for electronically stored information. The IAR require that these requests should be narrowly focused and structured to make searching for them as

⁷⁰ See IAR Article 22 (1). Providing the tribunal with the flexibility to conduct the arbitration in whatever manner it considers appropriate including for example differences that may arise between the common law and civil law traditions. 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), see also Barkett & Paulsson, *supra* note 18.

⁷¹ This Article 22 (1)–(8) is an important provision as it regulates the procedure by which the parties will conduct the arbitration before the tribunal. It references the scheduling of a procedural hearing where these procedures are discussed including efficiency, economy, the production of documents and provides that the tribunal may allocate costs, draw adverse inferences and take such additional steps as necessary to protect the efficiency and integrity of the arbitration.

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economical as possible. The tribunal should not approve the so-called fishing expeditions.⁷²

The IAR in the 2021 revision included a new article on early disposition where a party may request leave from the tribunal to submit an application for the disposition of any issue presented by any claim or counterclaim. The tribunal may allow it if it determines that the application has a reasonable possibility of succeeding, will dispose of or narrow the issues in the case and is likely to be more efficient or economical than leaving the decision to be determined with the merits. These requests were not prohibited under previous versions of the IAR but are now expressly referenced as an available option to the parties.⁷³

The IAR added a provision in response to a particular challenge imposed by the worldwide COVID-19 restrictions, the difficulty in physically signing orders or awards. Under this revised article, the tribunal is permitted to electronically sign an order or an award unless the applicable law requires a physical signature, or the parties agree otherwise. The arbitral tribunal or the ICDR may also determine that a physical signature is appropriate.⁷⁴

In the 2014 IAR Article 36 stated that should a party fail to pay a required fee or deposit, that failure would result in a withdrawal of the party's claim or counterclaim. This issue of the non-payment of deposits was revisited in the 2021 revision and the Article now includes language that the party who has had their claims or counterclaims withdrawn for non-payment will still be entitled to defend a claim or counterclaim. Additionally, this Article now allows a party that pays the deposit for a party that has failed to pay, to request that the tribunal make a separate award in favor of the paying party for recovery of the payment, plus interest. If more than one party has paid, the tribunal may make an award as to each paying party. In the event no party is willing to pay the deposit for the party that has failed to pay, the arbitral tribunal may order suspension or termination of the proceedings. If the tribunal has not been appointed, the ICDR may suspend or terminate the proceeding.⁷⁵

Regarding confidentiality, the IAR binds the ICDR and the arbitrators to keep confidential all matters relating to the arbitration or the award. This article does not apply to the parties so if there are additional concerns regarding confidentiality the parties may wish to consider a separate confidentiality agreement, or unless they agree otherwise, the tribunal may

⁷² See IAR Article 24 (1) through (10).

⁷³ See IAR Article 23.

⁷⁴ See IAR Article 32 (4).

⁷⁵ See IAR Article 39 (1) through (6).

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make orders concerning the confidentiality of the arbitration or may take measures to protect trade secrets and confidential information. The IAR does provide the ICDR with the ability to make an award public only with the consent of all parties or if they have become public in the course of enforcement or otherwise. The ICDR may also publish selected awards, orders, decisions, and rulings that have been edited to conceal the names of the parties and other identifying details unless a party has objected in writing to publication within six months from the date of the award. The ICDR will advise the parties of their ability to object when the award is transmitted to them upon the completion of the arbitration.⁷⁶

The tribunal shall not decide as amiable *compositeur* or *ex aequo et bono* unless the parties have expressly authorized them to do so and the IAR expressly exclude an award of punitive damages unless any applicable law requires that compensatory damages be increased in a specific manner.⁷⁷ Pursuant to the IAR, the tribunal has the power to fix the costs of the arbitration in the award including the fees and expenses of the arbitrators and the ICDR, legal and other costs incurred by the parties and other costs that may have been incurred during the emergency relief, consolidation or exchange of information phases of the arbitration.⁷⁸

VII. Emergency Arbitrator Procedure

In 2006, the ICDR was the first arbitral institution to introduce emergency arbitration provisions in its IAR and today many arbitration institutions have incorporated similar mechanisms in their own rules. The ICDR also

⁷⁶ See IAR 40 (1) through (4).

⁷⁷ See IAR Article 34.

⁷⁸ See IAR Article 37, 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). See also *Trading v. Tradiverse Corp.*, 20-CV-623 (KMW) (S.D.N.Y. Mar. 25, 2021) (finding that the panel did not exceed its authority in awarding separation charges and attorney’s fees and costs); *Laura v. Pristec AG*, 20-CV-1364 (RA) (S.D.N.Y. Jul. 27, 2020); *Stemcor USA, Inc. v. Maracero, S.A. DE C.V.*, 66 F. Supp. 3d 394, 400-01 (S.D.N.Y. 2014) (refusing to disturb attorney fee award where the parties’ agreement to abide by the ICDR Rules and the arbitrators’ decision to award them was “at least reasonable, and certainly ‘barely colorable.’”); *DigiTelCom, Ltd. v. Tele2 Sverige AB*, 2012 WL 3065345, at *5 (S.D.N.Y. July 25, 2013) (finding that “[t]here is nothing to suggest that the Tribunal’s award [re costs] was even inconsistent with the ICDR rules, much less that it constituted a ‘manifest disregard’ of the law.”).

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handles emergency arbitrations under other sets of rules issued by the AAA such as its Commercial Arbitration Rules, (CAR).⁷⁹

Regarding the procedure itself, the ICDR's IAR regulate emergency arbitrations in its Article 7. Article 7 requires a party seeking emergency relief to set forth in their application a) the nature of the relief sought; b) the reasons for the emergency; c) the reasons why the party is likely to be entitled to the relief; and d) the injury or prejudice if relief is not granted. If the application is filed with the notice of arbitration, it must include payment of the normal initial filing fee corresponding to the case. The ICDR does not charge any additional administrative fees for emergency arbitrations, although applicants should bear in mind that the full deposit for the emergency arbitrator's compensation would be billed to the applicant.

If the requirements of Article 7 are met, the ICDR appoints an emergency arbitrator within one business day of receiving the application. Once the emergency arbitrator is appointed, the parties have one business day from the time any disclosures are circulated to file a challenge. The emergency arbitrator has two business days from appointment to establish a schedule to consider the application, and may immediately schedule a conference call with the parties for this purpose. The emergency arbitrator also has the power to grant any interim, provisional or conservatory measures deemed necessary, in the form of an order or an award. In such an order or award, the emergency arbitrator's decision must be reasoned and may be conditioned on providing appropriate security.⁸⁰

Parties have requested various kinds of relief under the ICDR emergency procedures. In one case, a claimant sought an order to prevent irreparable harm due to respondent's continuing use of the claimant's confidential client's data. The requested relief was granted. In another case, a claimant sought an order to enjoin respondent from disclosing their confidential website information. In this case, the requested relief was denied because the arbitrator did not want to anticipate the decision on the merits and decided to maintain the status quo, pending the tribunal's final decision. In a third case, a claimant sought an order to prevent the removal of drilling equipment pending of the arbitration. The requested relief was granted.

⁷⁹ Since 2006, the ICDR has administered 119 applications for emergency measures of protection. Of those, 85 were filed under the IAR, 32 were filed under the CAR and 2 were filed under the ICDR's Canadian Arbitration Rules. In 53 cases, the emergency relief was granted partially or in full, in 29 cases the relief was denied, in 19 cases the parties settled, and in 17 cases, the request was withdrawn. One case was pending. See L Martinez and R Carlos del Rosal Carmona, *Use of the ICDR's Emergency Arbitration Procedures*, ABA Dispute Resolution Magazine, Vol 28, No 2, April 2022.

⁸⁰ See IAR Article 7 (1) through (8).

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This provision was groundbreaking when announced in 2006 as 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.⁸¹ 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. The emergency arbitrator is required to be impartial and independent and will conduct a conflicts check and make any necessary disclosures. If a challenge is raised it will be submitted to the ICDR's Council for their determination. 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. 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. 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.⁸²

The ICDR recognizes that this process is not suitable for all cases. The fact that notice is required as these emergency arbitrations will not be conducted on an ex parte basis 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 7 makes sense. Parties can still request interim relief from a judicial authority directly without fear of waiving the right to arbitrate.⁸³ The emergency arbitrator mechanism 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 nationalities of the emergency arbitrators have varied extensively.⁸⁴ The cases usually have a preparatory conference call by the second or third

⁸¹ 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).

⁸² See IAR Article 7 (5).

⁸³ See IAR Article 7 (7).

⁸⁴ The ICDR has appointed Article 7 emergency arbitrators for example from Belgium, Brazil, Canada, Republic of Korea, Republic of Singapore, United Kingdom and the United States.

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business day followed by a scheduling order. The conduct of the emergency arbitration may be based on written submissions along with either telephonic or video hearings. The average time frame from filing to the award was approximately 15 business days and parties have largely complied with these decisions voluntarily.⁸⁵

VIII. The ICDR's IAR Compared to AAA's Commercial Arbitration Rules

Each year the ICDR, administers cases pursuant to various sets of the AAA's rules in addition to the IAR. For example, international cases can be and are filed under the AAA's Commercial Arbitration Rules and Mediation Procedures (CAR).⁸⁶ It is important to understand the variations in these Rules in order to make an informed selection as to the suitability of a particular set of rules for the arbitration provision being considered.

The ICDR Arbitration Rules (IAR), based on the UNCITRAL Arbitration Rules, were designed specifically for international disputes and incorporate the latest provisions that are expected in an international arbitration today. The current version underwent a complete revision in 2021, and they provide the arbitrators with the framework and the powers to:

- consider different legal traditions and cultural differences,
- render all necessary procedural determinations to bring the process to its conclusion, and
- issue awards that will be recognized and enforced pursuant to the enforcement treaties.

The ICDR also administers international cases under the AAA's CAR, which have a U.S. domestic arbitration focus but routinely are utilized by international parties. Many of the differences between the CAR and the IAR are consistent with the international focus of the IAR and the domestic one of the CAR.

The IAR provide for extended time frames considering the nature of international cases and the extra time that may be needed for parties located in different countries perhaps dealing with language, legal and cultural

⁸⁵ This statistic is impacted by the fact that parties in a number of the cases agreed to extensions or the case was withdrawn.

⁸⁶ The current version of the Commercial Arbitration Rules and Mediation Procedures which include Procedures for Large complex Commercial Disputes are in effect from September 1, 2022. In 2021, 306 international cases were administered pursuant to the Commercial Arbitration Rules.

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issues. For example, the respondent shall have 30 days to provide the Answer, and the Award shall be issued within 60 days from the date of the closing of the hearing.⁸⁷ The CAR require the Answer within 14 days and the issuance of the Award within 30 days.⁸⁸

Article 34 of the IAR deals with conflicts of law issues as well as the ability to take into account usages of the trade. It expressly instructs the tribunal not to decide as amiable compositeur (i.e., an unbiased third party acting as a conciliator rather than the decision maker) or ex aequo et bono (i.e, acting in equity) unless the parties have by agreement authorized them to do so. This article also provides the tribunal with instruction on how to consider the currency and interest of the Award and expressly excludes the awarding of punitive damages.⁸⁹ There is no equivalent provision in the CAR except for the reference to awarding interest. In fact, the arbitrators may provide equitable relief.⁹⁰

Both the IAR and the CAR provide guidance during the exchange of information phase of the arbitration to limit the time and costs associated with arbitration. The IAR allows the tribunal to manage the scope of document request and to limit or avoid U.S. litigation style discovery practices expressly excluding depositions, interrogatories and requests to admit as generally not being appropriate procedures for obtaining information in an arbitration pursuant to the IAR.⁹¹

Yet middle ground has emerged in both international and domestic arbitration, reflected in both sets of rules. IAR Article 24 and CAR R-23 allow narrow and specific requests for documents that parties reasonably believe to exist that are in the possession of the adverse party with an explanation of how these documents are relevant and material and can be exchanged efficiently and economically.

Additionally, the IAR requires that parties may only depart from the exchange of information standards expressed in the rules by written agreement and in consultation with the tribunal. This provision was included so that there was a record of what transpired during the exchange of information phase should a party later wish to examine what was agreed to beyond the permissible scope as envisioned by the rules. The tribunal also

⁸⁷ See IAR Articles 3 (1) and 33 (1).

⁸⁸ See CAR R-5 (a) and R-47.

⁸⁹ See IAR Article 34 (1) through (5).

⁹⁰ See CAR R-49 (a) through (d).

⁹¹ See IAR Article 24 (10).

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is given the authority to draw adverse inferences and allocate costs for any failure by a party to comply with its exchange of information orders.⁹²

In contrast, pursuant to the Large Complex Commercial Dispute procedures applied in conjunction with the CAR when the claim or counterclaim exceeds \$1,000,000.00, in exceptional cases, upon good cause shown, and at the discretion of the arbitrator, depositions may be ordered.⁹³ The CAR similarly do provide the tribunal with enforcement powers regarding their exchange of information orders to achieve a fair, efficient and economical resolution of the case.⁹⁴

Unless otherwise agreed to by the parties, written witness statements should be used pursuant to the IAR. The tribunal may require any witness to appear and may determine the manner in which witnesses are to be examined. If a witness fails to appear as required without valid excuse as determined by the tribunal, the tribunal may make such order it deems appropriate, which may include reducing the weight to be given to the witness statement or disregarding it completely.⁹⁵ Cross-examination is not referenced in the IAR and the right to cross-examine a witness or expert generally does not exist in the civilian tradition of civil procedure. The CAR have a similar framework but expressly provide for cross-examination.⁹⁶ There are a number of provisions in the IAR that are not found in the CAR. For example, language provisions and a reference to Tribunal Secretaries are not referenced in the CAR.

The IAR includes a provision on privilege whereby the tribunal shall take into account applicable principles of privilege and in situations where the applicable law would lead to different rules, the tribunal should, to the extent possible, apply the same rule to all parties.⁹⁷ The CAR have a provision on privilege but do not provide the tribunal with guidance when its application would lead to different rules.⁹⁸

The IAR require that the reasons upon which the award is based are included, unless the parties have agreed otherwise (which is strongly discouraged by the ICDR). The award must include the place and date for enforcement purposes. A statement of reasons should also accompany any dissent. In addition, if the applicable law requires an award to be filed or

⁹² See IAR Article 24 (2) and (9).

⁹³ See CAR, Procedures for Large, Complex Commercial Disputes, L-3 (f).

⁹⁴ See CAR R-24 (a) through (e).

⁹⁵ See IAR Article 26 (4).

⁹⁶ See CAR R-33 (c).

⁹⁷ See IAR Article 25.

⁹⁸ See CAR R-35 (c).

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registered, the tribunal shall make sure that this is done.⁹⁹ The IAR and the CAR both contain provisions for interpretation and for corrections of clerical, typographical, or computational errors in the award.¹⁰⁰ With the recent revisions to both the IAR and the CAR there are differences between the rules for example Article 21 of the IAR on arbitral jurisdiction was revised adding that jurisdictional issues do not need to be first referred to a court. Additionally, third-party funding, and the confidentiality provisions now referenced in the IAR are not covered in the current CAR.

There are provisions in the CAR that are not found in the IAR. For example, the CAR contain a provision on sanctions where a party who fails to comply with its obligations under these rules may be faced with a sanction ordered by the tribunal.¹⁰¹ There is not an equivalent provision on “sanctions” in the IAR, although Article 20, (7) does allow the tribunal to allocate costs, draw adverse inferences, and take such additional steps as are necessary to protect the efficiency and integrity of the arbitration. The CAR also contain the Large, Complex Case and Preliminary Hearing Procedures.

Provisions Shared by Both Sets of Rules

- Emergency Arbitration (although the CAR reference that that immediate and irreparable loss or damage must be shown)
- Expedited procedures (the threshold for the applicability of expedited procedures under the CAR is \$100,000 where under the IAR it is \$500,000.)
- Mediation (updated in the IAR which also includes a reference to the Singapore Convention)
- Appointment Processes
- Impartiality and Independence – Challenges
- Jurisdiction
- Dispositive Motions (Under the CAR in R-34 and Early Disposition under the IAR in Article 23)

Both the IAR and the CAR have undergone extensive revisions with input from the user communities and arbitration experts, as well as that gleaned from the AAA-ICDR’s 95+ years of experience in the field of administering domestic and international matters to provide tried and tested rules. The IAR contain a number of provisions and language that has been tailored for international arbitrations, but the commercial rules are often used by the parties and are included in the arbitration agreements for international

⁹⁹ See IAR Article 33 (1) through (4).

¹⁰⁰ See IAR Article 36 and CAR R-52.

¹⁰¹ See CAR R-60.

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matters. An understanding of these differences in the rules will be necessary when negotiating your arbitration provision and selecting the appropriate set of rules for your cross-border transaction.

IX. Other Rules Administered by the ICDR

The ICDR also administers cases pursuant to the Construction Industry Arbitration Rules and Mediation Procedures.¹⁰² These Rules which were revised in 2015 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, which is an option that is referenced in the current version.¹⁰³

Another set of Rules administered by the ICDR, which can be used 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 suggest to the parties that they incorporate certain construction practice provisions along with a reference to the ICDR's administrative and appointing authority role as the UNCITRAL Rules are designed for an ad hoc commercial arbitration process.¹⁰⁴

The ICDR may also administer arbitration cases pursuant to the arbitration rules of the Inter-American Commercial Arbitration Commission (IACAC). As the AAA-ICDR is the IACAC national section for the United States the ICDR may administer all IACAC cases filed under its auspices in consultation with the IACAC's Director General. IACAC cases

¹⁰² See note 22, *supra*, stating the number of ICDR administered cases where the clause references the AAA's Construction Industry Arbitration Rules.

¹⁰³ See the AAA's Construction Industry Arbitration Rules, R-47 (c).

¹⁰⁴ United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration and Arbitration Rules (as revised in 2010, with new article 1, paragraph 4, as adopted in 2013).

See, <https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration>.

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are administered in accordance with its rules, policies and arbitrator appointments absent the agreement of the parties are made from its lists.¹⁰⁵

X. International Mediation

The ICDR first added its International Mediation Procedures in 2003 and they were revised in 2021. These international mediation rules reflect the ICDR's international mediation experience, as it consistently administers international mediations each year.¹⁰⁶

The ICDR has always been a proponent of the use of mediation, which was reflected again in the recent revision.

The ICDR's International Mediation Rules had already contained the modern provisions that are needed for a cross-border mediation providing the framework for the mediation from initiation to a settlement. Some of the highlights of the recent revisions include;

- Expressly stating that all or part of a mediation may be conducted via Video;
- Emphasizing the importance of party involvement together with the ICDR's support to assist the parties in finding an agreeable mediator;
- Setting forth a comprehensive outline regarding how the mediation proceedings are to be conducted;
- Stating that the parties' and the mediator's need to consider the appropriate cybersecurity, privacy and data of protection levels needed for their case; and
- Included an innovative provision to address enforcement of mediated settlements pursuant to the Singapore Convention.

¹⁰⁵ 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, known as 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 24 *supra*. The U.S. Federal Courts and the Congress have determined that the Panama Convention takes precedence over the New York Convention; however, courts frequently steer away from the Panama Convention and continue their analysis based on the New York Convention or Federal Arbitration Act (FAA) to resolve enforcement issues. The United States have included a number of reservations made at the time of their ratification, for additional reading *See*, John P. Bowman, "The Panama Convention and its Implementation Under the Federal Arbitration Act," Kluwer law International 2002.

¹⁰⁶ For example, the ICDR administered 105 international mediations in 2020.

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As important as these changes are, an even more significant change according to some, is the revised IAR article that states that “Subject to any agreement of the parties otherwise or the right of any party to elect not to participate in mediation, the parties shall mediate their dispute pursuant to the ICDR’s International Mediation Rules concurrently with the arbitration. This rule requires that the parties participate in a concurrently administered mediation, with an ICDR mediator, unless they have previously participated in a session or they affirmatively opt-out of the process.”¹⁰⁷

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 or not opting out of the concurrent mediation process as envisioned in the rules. In a concurrent mediation, the arbitration and the mediation 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.¹⁰⁸ 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 even if the parties decide to opt out of the mediation at the early stages of the case, where appropriate will offer mediation again after the arbitrators are appointed perhaps 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 mediation will be

¹⁰⁷ See IAR Article 6.

¹⁰⁸ 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).

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offered again. The ICDR working with AAAMediation.orgsm, a division of the AAA-ICDR, helps individuals and organizations find the right mediator for a case. Parties can use the Mediator Search Tool to identify appropriate mediators for their cases and view their online profiles. Customized mediator searches can be conducted by fields of expertise, geographic area, and language.¹⁰⁹

In further pursuit of ICDR's continuing effort to promote credible mediation and, in response to users and the international mediation communities, the AAA-ICDR became a founding institution of the International Mediation Institute (IMI).¹¹⁰ 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.¹¹¹

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.¹¹² 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,

¹⁰⁹ AAA-ICDR mediators can be searched for on the following site at <https://www.aaamediation.org/find-a-mediator>. AAA-ICDR mediators are also bound by the AAA-ABS Model Standards of Conduct for Mediators, which can be found along with the AAA-ICDR policies on Diversity and Inclusion at <https://icdr.org/panels>.

¹¹⁰ See the IMI website at www.imimediation.org.

¹¹¹ Luis Martinez and Thomas Ventrone. *The ICDR's Mediation Practice, Contemporary Issues in International Arbitration and Mediation*: The Fordham Papers 2010, Martinus Nijhoff.

¹¹² It starts with the ICDR's model arbitration clause, see note 12 *supra*.

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the institution and the arbitrators concerned with due process and equality of treatment find these issues to be problematic. While the IAR do address numerous issues that the parties have not specifically referenced in their arbitration agreement many require party agreement after the dispute has arisen and if they do not agree the rules include default mechanisms that may not reflect a fully negotiated arbitration agreement, which is usually the better option.

- 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 a telephonic or video hearing.
- Parties may wish to explore the expedited procedures available through the IAR, which currently are to be applied in cases where the amount in controversy does not exceed \$500,000 and deciding to apply them in cases that involve greater amounts.
- Parties may wish to further limit or narrow the document exchange phase going beyond the stated limitations in the IAR’s Article 24.
- 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 other cost savings options such as the Stream Lined Panel Option.¹¹³

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.¹¹⁴

XII. The ICDR’s International Arbitration Fee Schedule

The ICDR’s International Arbitration Fee Schedule can be found on the ICDR’s web site under the Rules, forms and fees section. Responding

¹¹³ See https://go.adr.org/Streamlined_Panel_Option.html.

¹¹⁴ See note 10 *supra*.

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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 flexible fee schedule does include a three-payment schedule that provides for lower initial filing fee and then spreads subsequent payments out over the course of the arbitration. Total administrative fees will be somewhat higher for cases that proceed to a hearing. Pursuant to this flexible fee schedule, the Proceed Fee must be paid within 90 days of the filing of the notice of arbitration or a counterclaim before the ICDR will proceed with any further administration of the arbitration, including the arbitrator appointment process. 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 five 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.¹¹⁵

¹¹⁵ For assistance with the ICDR administrative fees or any questions regarding its fee structures or refund schedule, *see* ICDR's International Arbitration Fee Schedule at https://icdr.org/rules_forms or contact the ICDR's Conflict-Management Team, *see* note 10, *supra*.

