

THE ICDR REVISES ITS INTERNATIONAL DISPUTE RESOLUTION PROCEDURES

MAY 2021 – The International Centre for Dispute Resolution (“ICDR”)—the international division of the American Arbitration Association (“AAA”)—recently amended its International Dispute Resolution Procedures, effective March 1, 2021 (the “2021 Rules”). The ICDR has explained that the amendments “address[] some of the dramatic changes in hearing dynamics due to the pandemic,” “promote greater efficiency and economy,” and “place an increased emphasis on arbitrators’ ethical obligations.”¹

Many of the revisions codify existing ICDR practices, however, rather than reflect a significant change in procedures. For example, the 2021 Rules now expressly refer to the International Administrative Review Council as the decision making authority for the ICDR and mandate that arbitrators act in accordance with *The Code of Ethics for Arbitrators in Commercial Disputes*.² But, both of these were features of ICDR arbitration before enactment of the revised rules.³ Other revisions provide standards for managing issues that commonly arise in ICDR arbitrations, such as with respect to third party funding, tribunal secretaries, and early disposition.⁴ While such matters were routinely addressed within the scope of the prior version of the rules (the “2014 Rules”), the 2021 Rules now provide clearer guidance for arbitrators, parties, and the ICDR.⁵

Beyond these more subtle changes, however, some aspects of the 2021 Rules revision reflect important modifications to ICDR practice. We highlight below some of these key initiatives.⁶

¹ ICDR, *NEW! ICDR 2021 International Rules Amendments*, available [here](#). The revised rules are available [here](#).

² See 2021 Rules, Arts. 5, 14(1).

³ The Administrative Review Council was introduced in 2018 and was “created to act as the decision making authority for certain administrative issues arising on cases under the various rules.” See ICDR, *ICDR Administrative Review Council (Council)*. Further, the ICDR’s Arbitrator’s Oath, which pre-dates the 2021 Rules, requires arbitrators to confirm that they will decide the matter in accordance with *The Code of Ethics for Arbitrators in Commercial Disputes*, which has been in effect since 2004. See M. Gusy & J. Hosking, *A Guide to the ICDR International Arbitration Rules* ¶ 13.17 (Oxford, 2d ed. 2019).

⁴ See 2021 Rules, Arts. 14(7), 17, 23 41.

⁵ See, e.g., Gusy & Hosking, *supra* note 3, at ¶ 20.26 (explaining that a tribunal’s authority to make early determinations on specific issues has “long been a feature of ICDR arbitrations”).

⁶ A more detailed explanation of the [2021 ICDR Rules Revisions](#) is available on the ICDR’s website.



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Mediation

Under Article 6 (formerly Article 5) of the 2021 Rules, “parties shall mediate their dispute ... concurrently with the arbitration,” subject to the parties’ agreement otherwise or any party’s right to opt out of mediation. This marks a change from the 2014 Rules’ approach, which provided only that the ICDR “may invite the parties to mediate.”⁷ At the time of the 2014 Rules revisions, the ICDR considered, but ultimately rejected, including a default mediation provision, similar to that appearing in the revised 2021 Rules.⁸ Nonetheless, this change brings the ICDR Rules in line with other AAA arbitration rules, and reflects the ICDR’s on-going commitment to promote efficient dispute resolution. The reverse presumption on mediation, i.e. requiring a party to opt out, is not replicated in the rules of any of the other leading institutions.⁹

Joinder and Consolidation

The 2021 Rules expand the scope of when joinder and consolidation are permitted. Under revised Article 8(1) (formerly Article 7(1)), an additional party may now be joined after the tribunal’s constitution if the tribunal “determines that joinder ... is appropriate, and the additional party consents to such joinder.” Under the former version of the rules, joinder was only permitted after constitution of the tribunal if all parties (including the additional party) agreed.¹⁰ Additionally, under revised Article 9(1) (formerly Article 8(1)), consolidation is now permitted, where, among other things, “the arbitrations involve the same or related parties.” Under the former version of the rules, an identity of the “same parties” was required.¹¹

Third-Party Disclosures

Article 14 (formerly Article 13) includes a new provision that expressly empowers the tribunal to order, upon party application or on its own initiative, disclosure of third-party interests in the arbitration. Specifically, Article 14(7) permits the tribunal to order disclosure of whether any non-party is funding the arbitration or has an “economic interest in the outcome of the arbitration.” The tribunal may also order disclosure of the third party’s identity and other details of its involvement or interest.

While the new provision is included in the Article addressing arbitrators’ impartiality and independence, suggesting that disclosure will enable arbitrators to make more fulsome disclosures, its effect is unlikely to be so limited. Third party interests may, for example, also be relevant to document disclosure, security for costs and the parties’ initial disclosure of related entities.

⁷ 2014 Rules, Art. 5.

⁸ Gusy & Hosking, supra note 3, at ¶ 5.03.

⁹ Gusy & Hosking, supra note 3, at ¶ 5.04.

¹⁰ 2014 Rules, Art. 7(1).

¹¹ 2014 Rules, Art. 8(1).

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Technology and Hearings

Several revisions demonstrate the ICDR's response to the technological realities of international arbitration today, which have become more pronounced during the COVID-19 pandemic and the increase in use of remote hearings. For example, Article 22 (formerly Article 20) directs the tribunal and parties to consider how "technology, including video, audio, or other electronic means" may be used to increase efficiency in the arbitration. Likewise, Article 26 (formerly Article 23) expressly provides that the hearing, or a portion thereof, "may be held by video, audio, or other electronic means," where the parties agree or the tribunal otherwise determines it "appropriate."

The 2014 Rules included more broadly worded guidance on technological issues, including a general direction to consider whether technology could promote efficiency and arbitrator discretion to order that witnesses could be examined by means that did not require their physical presence.¹² The 2021 Rules build on that general guidance¹³ and also expressly address issues that have arisen during the pandemic, including the tribunal's authority to order a remote hearing over the objection of one or more parties.

Other additions addressing the technological realities of a virtual world include new provisions (i) in Article 22(3) directing the tribunal to discuss cybersecurity, privacy, and data protection issues with the parties at the preliminary conference and (ii) in Article 32(4) permitting orders and awards to be signed electronically.

Early Disposition

The 2021 Rules introduce a new Article 23, expressly authorizing early disposition of issues in advance of the merits hearing. Specifically, Article 23(1) establishes a two-step process for seeking such relief. First, a party must request leave from the tribunal to apply for early disposition of "any issue presented by a claim or counterclaim." The tribunal may grant the application where it: (i) has a "reasonable possibility of succeeding"; (ii) will "dispose of, or narrow, one or more issues in the case"; and (iii) is likely to "be more efficient or economical." Second, where the tribunal grants the requested leave, it will afford the parties the right to be heard and a fair opportunity to present their cases on the issue and then render a decision in either an order or award.

As noted, early resolution of specific claims or issues was already a common practice under the 2014 Rules, but the new Article 23 provides clearer guidance on the procedure and reinforces the ICDR's commitment to promoting efficiency.

¹² See 2014 Rules, Arts. 20(2), 23(5).

¹³ See Gusy & Hosking, *supra* note 3, at ¶ 23.13 (explaining that, under Article 23(5) of the 2014 Rules, tribunals were empowered to "order examination by videoconference, Web-based streaming, or other electronic means").

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Deposits

Where one party fails to pay its share of the advance on costs, the ICDR has always invited the other party to make the missing payment in order to avoid suspension or termination of the proceedings.¹⁴ Under revised Article 39(4) (formerly Article 36), a party that makes such missing payment is now expressly permitted to request that a separate award be issued during the arbitration for recovery of the advance on costs (with interest). The 2014 Rules were unclear whether the tribunal had authority to issue a partial award of this nature.¹⁶

Publication of Awards

Under revised Article 40(4), the ICDR may publish “selected awards, orders, decisions, and rulings that have been edited to conceal the names of the parties and other identifying details.” The ICDR will not publish such information, however, where a party objects in writing within six months from the date of the award. The ICDR had this authority under the 2014 Rules as well, but the requirements for an objection in writing and within six months are new in the 2021 Rules.¹⁷ The revision reflects the ICDR’s long-standing efforts to increase transparency into the arbitral process and application of the rules.¹⁸

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¹⁴ See 2021 Rules, Art. 39(4)-(5).

¹⁵ 2014 Rules, Art. 36(5).

¹⁶ See Gusy & Hosking, *supra* note 3, at ¶ 36.08 (suggesting that reimbursement for the advance on costs could be included in a final award but noting that the ICDR Rules did not address whether such reimbursement could also be ordered pursuant to an interim partial award).

¹⁷ See 2014 Rules, Art. 30(3).

¹⁸ See Gusy & Hosking, *supra* note 3, at ¶ 30.18 (discussing the ICDR’s project for publication of redacted awards).

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