

A GUIDE TO THE ICDR INTERNATIONAL ARBITRATION RULES

MARTIN F GUSY

Gusy Van der Zandt LLP, New York

JAMES M HOSKING

Chaffetz Lindsey LLP, New York

FRANZ T SCHWARZ

Wilmer Cutler Pickering Hale and Dorr LLP, London

OXFORD
UNIVERSITY PRESS

CONTENTS

<i>Table of Cases</i>	xxi
<i>Table of Treaties and Legislation</i>	xxvii
<i>List of Abbreviations</i>	xxxvii
1. Article 1—Introduction to ICDR arbitration	1
<i>I. Introduction to ICDR arbitration</i>	1.01
A. The American Arbitration Association (AAA)— An historic foundation	1.04
1. The AAA's history	1.04
2. The AAA's case management approach	1.06
3. Principal AAA arbitration and mediation procedures	1.14
4. AAA early dispute resolution options	1.20
5. The AAA's arbitration policy initiatives	1.21
6. The AAA's educational activities	1.24
B. The International Centre for Dispute Resolution (ICDR)— The AAA's division focused on international disputes	1.29
1. The ICDR's history	1.29
2. The ICDR's case management approach	1.33
3. ICDR New York headquarters and overseas locations	1.34
4. International cooperative agreements	1.40
5. Scope of the ICDR's services	1.44
6. ICDR Guidelines for Arbitrators Concerning Exchanges of Information	1.48
C. Statistics on AAA and ICDR arbitration	1.51
1. AAA arbitration	1.51
2. ICDR arbitration	1.53
D. History of the ICDR Rules	1.59
1. The 1993 revision	1.61
2. The 1996/1997 revision	1.62
3. Introduction of the International Dispute Resolution Procedures in 2003	1.64
4. Addition of Article 37 in 2006	1.66
5. Additional changes to the Fee Schedule	1.67

<i>II. Textual commentary</i>	1.69
A. Scope of application of the ICDR Rules (Article 1(1))	1.70
1. Institutional arbitration (Article 1(1))	1.70
2. ‘Where parties have agreed in writing to arbitrate disputes’ (Article 1(1))	1.73
3. ‘[U]nder these International Arbitration Rules’ (Article 1(1))	1.75
4. ‘[O]r have provided for arbitration of an international dispute by the International Centre for Dispute Resolution or the American Arbitration Association without designating particular rules’ (Article 1(1))	1.77
5. ‘[S]ubject to whatever modifications the parties may adopt in writing’ (Article 1(1))	1.91
B. ICDR Rules to apply except for mandatory rules of law (Article 1(2))	1.93
1. ‘These rules govern the arbitration’ (Article 1(2))	1.93
2. ‘[L]aw applicable to the arbitration from which the parties cannot derogate’ (Article 1(2))	1.95
C. Duties and responsibilities of the administrator and other parties involved (Article 1(3))	1.98
1. Emergency relief	1.102
2. Administrative conference	1.103
3. <i>Ex parte</i> communication and arbitrator selection, disclosure, and challenge procedure	1.107
4. Preliminary hearing, evidence, and party submissions	1.112
5. Award	1.113
 2. Article 2—Notice of arbitration and statement of claim	 31
I. Introduction	2.01
II. Textual commentary	2.07
A. Party definitions and commencement of a case (Article 2(1) and (2))	2.07
B. Content requirements (Article 2(3))	2.18
1. ‘[D]emand that the dispute be referred to arbitration’ (Article 2(3)(a))	2.18
2. Names, addresses, and telephone numbers of the parties (Article 2(3)(b))	2.19
3. Reference to ‘the arbitration clause or agreement that is invoked’, ‘any contract out of or in relation to which the dispute arises’, and ‘a description of the claim and an indication of the facts supporting it’ (Article 2(3)(c), (d), and (e))	2.22
4. Relief or remedy sought, amount claimed (Article 2(3)(f)), and relevance for ICDR administrative fees	2.28
5. Optional contents (Article 2(3)(g))	2.30

C. Administrator's acknowledgement of commencement (Article 2(4))	2.34
D. Deficient claim filing fee	2.37
E. ICDR Fee Schedules	2.40
1. The Standard Fee Schedule	2.43
2. The Flexible Fee Schedule	2.47
3. Non-payment of administrative fees and abeyance	2.53
3. Article 3—Statement of defence and counterclaim	45
I. <i>Introduction</i>	3.01
II. <i>Textual commentary</i>	3.03
A. Contents of the statement of defence and joinder of third parties (Article 3(1))	3.03
B. Counterclaims (Article 3(2))	3.08
C. Additional content requirements (Article 3(3))	3.11
D. Thirty-day time limits and extensions (Article 3(4))	3.12
4. Article 4—Amendments to claims	49
I. <i>Introduction</i>	4.01
II. <i>Textual commentary</i>	4.05
A. Amendment and supplement of claims, counterclaims, or defences	4.05
B. Tribunal's acceptance and denial of amendments and supplements to claims, counterclaims, or defences	4.09
C. Impact on fees	4.13
5. Article 5—Number of arbitrators	55
I. <i>Introduction</i>	5.01
II. <i>Textual commentary</i>	5.02
A. Party autonomy ('if the parties have not agreed')	5.02
B. Institutional appointment	5.09
1. Preference for three-member tribunal	5.09
2. Default of a sole arbitrator	5.16
6. Article 6—Appointment of arbitrators	65
I. <i>Introduction</i>	6.01
II. <i>Textual commentary</i>	6.04

A. Party autonomy and the constitution of the tribunal (Article 6(1) and (2))	6.04
B. The limits on party autonomy to select arbitrators	6.16
C. Default procedure for institutional arbitrator appointments (Article 6(3))	6.22
D. Selecting ‘suitable’ candidates (Article 6(4))	6.27
E. Constituting the tribunal in multi-party arbitrations (Article 6(5))	6.31
7. Article 7—Impartiality and independence of arbitrators	81
I. <i>Introduction</i>	7.01
II. <i>Textual commentary</i>	7.05
A. Impartiality and independence (Article 7(1))	7.05
1. The application of impartiality and independence under the ICDR Rules (‘[a]rbitrators acting under these Rules shall be impartial and independent’)	7.10
2. Nationality of the arbitrator	7.17
3. Disclosure	7.19
B. <i>Ex parte</i> communications (Article 7(2))	7.37
C. Availability and qualifications	7.41
8. Article 8—Challenge of arbitrators (Articles 8 and 9)	103
I. <i>Introduction</i>	8.01
II. <i>Textual commentary</i>	8.09
A. Challenging an arbitrator (Article 8(1))	8.09
1. When to challenge an arbitrator	8.09
2. The substantive standard for challenging an arbitrator	8.14
3. The procedure to challenge an arbitrator	8.22
B. A ‘reasoned’ challenge (Article 8(2))	8.25
C. Notification of the challenge and voluntary or agreed withdrawal (Article 8(3))	8.26
1. Notification of the challenge	8.26
2. Agreed or voluntary withdrawal	8.30
9. Article 9—Challenge of arbitrators (Articles 8 and 9)	117
I. <i>Introduction</i>	9.01
II. <i>Textual commentary</i>	9.03
A. No reasoned decisions on challenges	9.03
B. Challenging arbitrators pursuant to national law	9.06

10. Article 10—Replacement of an arbitrator (Articles 10 and 11)	121
<i>I. Introduction</i>	10.01
<i>II. Textual commentary</i>	10.04
11. Article 11—Replacement of an arbitrator (Articles 10 and 11)	127
<i>I. Introduction</i>	11.01
<i>II. Textual commentary</i>	11.02
A. The authority of a truncated tribunal to render an award (Article 11(1))	11.02
B. Repeating previous hearings (Article 11(2))	11.08
12. Article 12—Representation	133
<i>I. Introduction</i>	12.01
<i>II. Textual commentary</i>	12.02
13. Article 13—Place of arbitration	137
<i>I. Introduction</i>	13.01
<i>II. Textual commentary</i>	13.03
A. The ‘place’ of arbitration (Article 13(1))	13.03
1. Importance of the place (or ‘seat’) of the arbitration	13.03
2. Determination of the place of arbitration	13.08
B. Location of hearings and procedural acts (Article 13(2))	13.14
14. Article 14—Language	147
<i>I. Introduction</i>	14.01
<i>II. Textual commentary</i>	14.02
A. Default rule provides predictability and efficiency	14.02
B. In-built discretion and input by the parties provides flexibility	14.03
15. Article 15—Pleas as to jurisdiction	151
<i>I. Introduction</i>	15.01
<i>II. Textual commentary</i>	15.04
A. Competence-competence (Article 15(1))	15.04
B. Separability (Article 15(2))	15.15

C. Timely objection (Article 15(3))	15.25
16. Article 16—Conduct of the arbitration	167
I. <i>Introduction</i>	16.01
II. <i>Textual commentary</i>	16.02
A. The tribunal's discretion to conduct the proceedings (Article 16(1))	16.02
1. The tribunal's discretion and the parties' agreement on procedural matters	16.02
2. Limits imposed by due process	16.10
B. Duty of expedition (Article 16(2))	16.14
C. Evidence (Article 16(3))	16.17
D. Notification of information to the other parties (Article 16(4))	16.24
17. Article 17—Further written statements	179
I. <i>Introduction</i>	17.01
II. <i>Textual commentary</i>	17.02
A. Additional written statements (Article 17(1))	17.02
B. Time limits (Article 17(2))	17.08
18. Article 18—Notices	185
I. <i>Introduction</i>	18.01
II. <i>Textual commentary</i>	18.03
A. Method of communication (Article 18(1))	18.03
B. Calculating time periods (Article 18(2))	18.05
19. Article 19—Evidence	189
I. <i>Introduction</i>	19.01
II. <i>Textual commentary</i>	19.03
A. Burden of proof (Article 19(1))	19.03
B. Exchange of information and document production (Article 19(2) and (3))	19.08
20. Article 20—Hearings	195
I. <i>Introduction</i>	20.01
II. <i>Textual commentary</i>	20.04

A. Logistics for hearing (Article 20(1))	20.04
B. Witness testimony (Article 20(2)–(5))	20.06
C. Evidence and privilege issues (Article 20(6))	20.12
21. Article 21—Interim measures of protection	203
I. <i>Introduction</i>	21.01
II. <i>Textual commentary</i>	21.04
A. Power to order interim measures (Article 21(1))	21.04
B. Form of interim measures and security (Article 21(2))	21.06
C. Application to court not incompatible (Article 21(3))	21.08
D. Costs associated with application for interim measures (Article 21(4))	21.09
22. Article 22—Experts	209
I. <i>Introduction</i>	22.01
II. <i>Textual commentary</i>	22.02
A. Appointment of the expert (Article 22(1))	22.02
B. Provision of information to the expert (Article 22(2))	22.04
C. Opportunity to comment on and question the expert report (Article 22(3) and (4))	22.05
23. Article 23—Default	215
I. <i>Introduction</i>	23.01
II. <i>Textual commentary</i>	23.03
A. Failure to file a statement of defence or appear at hearing (Article 23(1) and (2))	23.03
B. Failure to produce evidence or take any other step (Article 23(3))	23.06
24. Article 24—Closure of hearing	221
I. <i>Introduction</i>	24.01
II. <i>Textual commentary</i>	24.02
25. Article 25—Waiver of rules	225
I. <i>Introduction</i>	25.01
II. <i>Textual commentary</i>	25.04

26. Article 26—Awards, decisions, and rulings	229
I. <i>Introduction</i>	26.01
II. <i>Textual commentary</i>	26.02
A. Awards to be made by majority and failure to sign (Article 26(1))	26.02
B. Presiding arbitrator may make procedural rulings (Article 26(2))	26.07
27. Article 27—Form and effect of the award	235
I. <i>Introduction</i>	27.01
II. <i>Textual commentary</i>	27.03
A. Award is final and binding (Article 27(1))	27.03
B. Award must be reasoned (Article 27(2))	27.06
C. Award must state date and place made and be communicated to parties (Article 27(3) and (5))	27.07
D. Award is confidential, but redacted award may be published (Article 27(4) and (8))	27.09
E. Award may be registered (Article 27(6))	27.12
F. Tribunal may make interim awards (Article 27(7))	27.14
28. Article 28—Applicable laws and remedies	245
I. <i>Introduction</i>	28.01
II. <i>Textual commentary</i>	28.03
A. Parties' choice of law to be given effect (Article 28(1))	28.03
B. Tribunal to apply contract terms and usages of the trade (Article 28(2))	28.06
C. Tribunal may act as an <i>amiable compositeur</i> (Article 28(3))	28.09
D. Currency, interest, punitive damages (Article 28(4) and (5))	28.10
29. Article 29—Settlement or other reasons for termination	255
I. <i>Introduction</i>	29.01
II. <i>Textual commentary</i>	29.03
A. Termination upon settlement (Article 29(1))	29.03
B. Termination where continuation unnecessary or impossible (Article 29(2))	29.08

30. Article 30—Interpretation or correction of the award	261
<i>I. Introduction</i>	30.01
<i>II. Textual commentary</i>	30.08
A. Request to interpret, correct, or make an additional award (Article 30(1))	30.08
1. Interpretation	30.10
2. Correction	30.11
3. Additional award	30.12
B. Tribunal may grant request where justified (Article 30(2))	30.13
31. Article 31—Costs	269
<i>I. Introduction</i>	31.01
<i>II. Textual commentary</i>	31.03
A. Tribunal's power to fix the costs of arbitration	31.03
B. Tribunal may apportion costs	31.07
C. Components of the costs of arbitration	31.09
D. Logistics for making award of the costs of arbitration	31.15
32. Article 32—Compensation of arbitrators	277
<i>I. Introduction</i>	32.01
<i>II. Textual commentary</i>	32.03
33. Article 33—Deposit of costs	281
<i>I. Introduction</i>	33.01
<i>II. Textual commentary</i>	33.03
A. Deposits as an advance on costs (Article 33(1) and (2))	33.03
B. Default on payment (Article 33(3))	33.06
C. Accounting and return of deposit (Article 33(4))	33.08
34. Article 34—Confidentiality	287
<i>I. Introduction</i>	34.01
<i>II. Textual commentary</i>	34.03
35. Article 35—Exclusion of liability	291
<i>I. Introduction</i>	35.01
<i>II. Textual commentary</i>	35.02

36. Article 36—Interpretation of rules	295
<i>I. Introduction</i>	36.01
<i>II. Textual commentary</i>	36.02
 37. Article 37—Emergency measures of protection	 299
<i>I. Introduction</i>	37.01
<i>II. Textual commentary</i>	37.11
A. Applicability (Article 37(1))	37.11
B. Application for emergency relief (Article 37(2) and (3))	37.12
C. The emergency arbitrator’s powers (Article 37(4) and (5))	37.18
D. Tribunal may reconsider once constituted (Article 37(6))	37.23
E. Costs and security for costs (Article 37(7) and (9))	37.24
F. Party may seek judicial emergency relief (Article 37(8))	37.26
 Appendix 1: ICDR International Dispute Resolution Procedures (Including Mediation and Arbitration Rules)	 315
Appendix 2: International Case Filing Administrative Fee Schedules	331
Appendix 3: ICDR Guidelines for Arbitrators Concerning Exchanges of Information	335
Appendix 4: AAA Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex, Commercial Disputes)	337
Appendix 5: International Commercial Arbitration Supplementary Procedures	355
Appendix 6: 1976 United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules	357
Appendix 7: 2010 UNCITRAL Arbitration Rules	369
Appendix 8: AAA Procedures for Cases Under the UNCITRAL Arbitration Rules	385
Appendix 9: List of AAA Rules Available on the AAA’s Website	389
 <i>Index</i>	 393