

A GUIDE TO THE ICDR INTERNATIONAL ARBITRATION RULES

SECOND EDITION

MARTIN F GUSY
K&L Gates LLP, New York

JAMES M HOSKING
Chaffetz Lindsey LLP, New York

OXFORD
UNIVERSITY PRESS

TABLE OF CONTENTS

<i>Table of Cases</i>	xxiii
<i>Table of Treaties and Legislation</i>	xxix
<i>List of Abbreviations</i>	xli

Introduction to ICDR Arbitration

<i>I. Introduction to ICDR arbitration</i>	0.01
A. The American Arbitration Association (AAA)—an historic foundation	0.04
B. The International Centre for Dispute Resolution (ICDR)—the AAA's division focused on international disputes	0.49
C. Statistics on AAA and ICDR arbitration	0.71
D. History of the ICDR Rules	0.82

I COMMENTARY ON THE ICDR INTERNATIONAL RULES

1. Article 1—Scope of these Rules

<i>I. Introduction</i>	1.01
<i>II. Textual commentary</i>	1.03
A. Scope of application of the ICDR Rules (Article 1(1))	1.03
B. ICDR Rules to apply except for mandatory rules of law (Article 1(2))	1.31
C. Duties and responsibilities of the Administrator and other parties involved (Article 1(3))	1.36
D. International Expedited Procedures (Article 1(4))	1.50

2. Article 2—Notice of Arbitration

<i>I. Introduction</i>	2.01
<i>II. Textual commentary</i>	2.08
A. Party definitions and commencement of a case (Article 2(1) and (2))	2.08
B. Content requirements (Article 2(3))	2.19
C. Deficient claim filing fee	2.35
D. Filing fees and ICDR Fee Schedules (Article 2(4))	2.38
E. Administrator's acknowledgement of commencement (Article 2(5))	2.64

3. Article 3—Answer and Counterclaim	
<i>I. Introduction</i>	3.01
<i>II. Textual commentary</i>	3.04
A. Contents of the answer (Article 3(1))	3.04
B. Counterclaims and set-offs (Article 3(2))	3.07
C. Content requirements and filing fees (Article 3(3) and (4))	3.15
D. Thirty-day time limits and extensions (Article 3(5))	3.20
E. Respondent's failure to submit an answer (Article 3(6))	3.22
F. Multiple parties (Article 3(7))	3.23
4. Article 4—Administrative Conference	
<i>I. Introduction</i>	4.01
<i>II. Textual commentary</i>	4.02
5. Article 5—Mediation	
<i>I. Introduction</i>	5.01
<i>II. Textual commentary</i>	5.06
A. ICDR mediation practice	5.06
B. Timing and logistics of mediation	5.14
6. Article 6—Emergency Measures of Protection	
<i>I. Introduction</i>	6.01
A. Scope and purpose	6.01
B. Use of emergency measures	6.04
C. Comparison to other institutions	6.05
D. Case law	6.11
E. Amendments to Article 6	6.18
<i>II. Textual commentary</i>	6.21
A. Application for emergency relief (Article 6(1) and (2))	6.21
B. The emergency arbitrator's powers (Article 6(3) and (4))	6.28
C. Tribunal may reconsider once constituted (Article 6(5))	6.35
D. Costs and security for costs (Article 6(6) and (8))	6.36
E. Party may seek judicial emergency relief (Article 6(7))	6.39
7. Article 7—Joinder	
<i>I. Introduction</i>	7.01
<i>II. Textual commentary</i>	7.07
A. Joining an additional party (Article 7(1))	7.07
B. Content of the request for joinder and filing fee (Article 7(2))	7.19
C. Answer, counterclaims, or set-offs of the joining party (Article 7(3) and (4))	7.23

8. Article 8—Consolidation	
I. <i>Introduction</i>	8.01
II. <i>Textual commentary</i>	8.10
A. Prerequisites for consolidation (Article 8(1))	8.10
B. Appointment of the consolidation arbitrator (Article 8(2))	8.20
C. A consolidation decision based on all relevant circumstances (Article 8(3))	8.23
D. Stay pending consolidation decision (Article 8(4))	8.34
E. Consolidation into first arbitration (Article 8(5))	8.36
F. The right to appoint the tribunal (Article 8(6))	8.37
G. An unreasoned decision within fifteen days (Article 8(7))	8.41
9. Article 9—Amendment or Supplement of Claim, Counterclaim, or Defense	
I. <i>Introduction</i>	9.01
II. <i>Textual commentary</i>	9.06
A. Amendment or supplement of claim, counterclaim, set-off, or defense	9.06
B. Tribunal's acceptance or denial of amendment or supplement to claim, counterclaim, set-off, or defense	9.12
C. Impact on costs and fees	9.15
10. Article 10—Notices	
I. <i>Introduction</i>	10.01
II. <i>Textual commentary</i>	10.04
A. Method of communication (Article 10(1))	10.04
B. Calculating time periods (Article 10(2))	10.06
11. Article 11—Number of Arbitrators	
I. <i>Introduction</i>	11.01
II. <i>Textual commentary</i>	11.04
A. Party autonomy ('if the parties have not agreed')	11.04
B. Institutional appointment	11.09
12. Article 12—Appointment of Arbitrators	
I. <i>Introduction</i>	12.01
II. <i>Textual commentary</i>	12.06
A. Party autonomy and the constitution of the tribunal (Article 12(1) and (2))	12.06
B. Default procedure for institutional arbitrator appointments	12.18
C. Appointment effective upon receipt of signed Notice of Appointment (Article 12(7))	12.37

13. Article 13—Impartiality and Independence of Arbitrator	
I. <i>Introduction</i>	13.01
II. <i>Textual commentary</i>	13.05
A. Impartiality and independence (Article 13(1))	13.05
B. Disclosure	13.20
C. <i>Ex parte</i> communications (Article 13(6))	13.37
14. Article 14—Challenge of an Arbitrator	
I. <i>Introduction</i>	14.01
II. <i>Textual commentary</i>	14.13
A. Challenging an arbitrator (Article 14(1))	14.13
B. Notification of the challenge and voluntary or agreed withdrawal (Article 14(2))	14.31
C. The ICDR will decide challenges where no agreement or voluntary withdrawal (Article 14(3))	14.37
D. The ICDR's residual right to remove an arbitrator (Article 14(4))	14.47
15. Article 15—Replacement of an Arbitrator	
I. <i>Introduction</i>	15.01
II. <i>Textual commentary</i>	15.05
A. Process for replacing an arbitrator (Article 15(1))	15.05
B. Repeating previous hearings (Article 15(2))	15.11
C. The authority of a truncated tribunal to render an award (Article 15(3))	15.18
16. Article 16—Party Representation	
I. <i>Introduction</i>	16.01
II. <i>Textual commentary</i>	16.02
A. Right to party representation	16.02
B. Conduct of party representative	16.08
17. Article 17—Place of Arbitration	
I. <i>Introduction</i>	17.01
II. <i>Textual commentary</i>	17.04
A. The 'place' of the arbitration (Article 17(1))	17.04
B. Location of hearings and procedural acts (Article 17(2))	17.17
18. Article 18—Language of Arbitration	
I. <i>Introduction</i>	18.01
II. <i>Textual commentary</i>	18.02
A. Default rule provides predictability and efficiency	18.02
B. In-built discretion and input by the parties provides flexibility	18.03

19. Article 19—Arbitral Jurisdiction	
I. <i>Introduction</i>	19.01
II. <i>Textual commentary</i>	19.05
A. Competence-competence (Article 19(1))	19.05
B. Separability (Article 19(2))	19.17
C. Timely objection (Article 19(3))	19.26
D. Objections shall be decided by the tribunal (Article 19(4))	19.29
20. Article 20—Conduct of Proceedings	
I. <i>Introduction</i>	20.01
II. <i>Textual commentary</i>	20.04
A. The tribunal's discretion to conduct the proceedings (Article 20(1))	20.04
B. The tribunal's duty of expedition (Article 20(2))	20.16
C. Organization of the proceedings (Article 20(3))	20.20
D. Evidence and exchange of information (Article 20(4)–(6))	20.28
E. The parties' duty to avoid unnecessary delay and expense (Article 20(7))	20.32
21. Article 21—Exchange of Information	
I. <i>Introduction</i>	21.01
II. <i>Textual commentary</i>	21.04
A. The general principles: efficiency, economy, equal treatment, and right to be heard (Article 21(1) and (2))	21.04
B. Exchange of all documents relied on (Article 21(3))	21.10
C. Document production requests (Article 21(4))	21.12
D. Protection of confidentiality (Article 21(5))	21.16
E. Economical production of electronic documents (Article 21(6))	21.18
F. Inspection of relevant premises or objects (Article 21(7))	21.21
G. Justification of the time and expense and allocation of costs (Article 21(8))	21.23
H. Adverse inferences and cost allocation in case of failure to comply (Article 21(9))	21.25
I. Confirmation of exclusion of US litigation procedures (Article 21(10))	21.27
22. Article 22—Privilege	
I. <i>Introduction</i>	22.01
II. <i>Textual commentary</i>	22.04
23. Article 23—Hearing	
I. <i>Introduction</i>	23.01

II. <i>Textual commentary</i>	23.05
A. Notice of hearing (Article 23(1))	23.05
B. Witness testimony (Article 23(2)–(5))	23.08
C. Privacy of hearing (Article 23(6))	23.15
24. Article 24—Interim Measures	
I. <i>Introduction</i>	24.01
II. <i>Textual commentary</i>	24.04
A. Power to order interim or conservatory measures (Article 24(1))	24.04
B. Form of interim measures and security (Article 24(2))	24.09
C. Application to court not incompatible (Article 24(3))	24.11
D. Costs associated with application for interim measures (Article 24(4))	24.13
E. Application for emergency relief prior to constitution of the arbitral tribunal (Article 24(5))	24.14
25. Article 25—Tribunal-Appointed Expert	
I. <i>Introduction</i>	25.01
II. <i>Textual commentary</i>	25.02
A. Appointment of the expert (Article 25(1))	25.02
B. Provision of information to the expert (Article 25(2))	25.04
C. Opportunity to comment on and question the expert report (Article 25(3) and (4))	25.05
26. Article 26—Default	
I. <i>Introduction</i>	26.01
II. <i>Textual commentary</i>	26.03
A. Failure to file Answer or appear at hearing (Article 26(1) and (2))	26.03
B. Failure to produce evidence or take any other step (Article 26(3))	26.08
27. Article 27—Closure of Hearing	
I. <i>Introduction</i>	27.01
II. <i>Textual commentary</i>	27.02
28. Article 28—Waiver	
I. <i>Introduction</i>	28.01
II. <i>Textual commentary</i>	28.04
29. Article 29—Awards, Orders, Decisions, and Rulings	
I. <i>Introduction</i>	29.01
II. <i>Textual commentary</i>	29.02

A. Tribunal may make interim awards, orders, decisions, and rulings (Article 29(1))	29.02
B. Awards, orders, decisions, and rulings to be made by majority (Article 29(2))	29.05
C. Presiding arbitrator may make procedural orders, decisions, and rulings (Article 29(3))	29.09

30. Article 30—Time, Form, and Effect of the Award

I. <i>Introduction</i>	30.01
II. <i>Textual commentary</i>	30.03
A. Making of the award (Article 30(1))	30.03
B. Award must be signed and state date and place made (Article 30(2))	30.12
C. Award is confidential, but redacted award may be published (Article 30(3))	30.16
D. Award must be communicated by the Administrator (Article 30(4))	30.19
E. Award may be registered (Article 30(5))	30.21

31. Article 31—Applicable Laws and Remedies

I. <i>Introduction</i>	31.01
II. <i>Textual commentary</i>	31.04
A. Parties' choice of law to be given effect (Article 31(1))	31.04
B. Tribunal to apply contract terms and usages of the trade (Article 31(2))	31.09
C. Tribunal may act as an <i>amiable compositeur</i> or <i>ex aequo et bono</i> (Article 31(3))	31.12
D. Currency, interest, punitive damages (Article 31(4) and (5))	31.13

32. Article 32—Settlement or Other Reasons for Termination

I. <i>Introduction</i>	32.01
II. <i>Textual commentary</i>	32.03
A. Termination upon settlement (Article 32(1))	32.03
B. Termination where continuation unnecessary or impossible due to non-payment (Article 32(2))	32.09
C. Termination where continuation unnecessary or impossible for any other reason (Article 32(3))	32.12

33. Article 33—Interpretation and Correction of the Award

I. <i>Introduction</i>	33.01
II. <i>Textual commentary</i>	33.09
A. Request to interpret, correct, or make an additional award (Article 33(1))	33.09

B. Tribunal may grant request where justified (Article 33(2))	33.17
C. Tribunal may correct on own initiative (Article 33(3))	33.21
D. Costs (Article 33(4))	33.25
34. Article 34—Costs	
I. <i>Introduction</i>	34.01
II. <i>Textual commentary</i>	34.04
A. Tribunal’s power to fix the costs of arbitration	34.04
B. Tribunal may allocate costs	34.08
C. Components of the costs of arbitration	34.11
D. Logistics for making award of the costs of arbitration	34.19
35. Article 35—Fees and Expenses of Arbitral Tribunal	
I. <i>Introduction</i>	35.01
II. <i>Textual commentary</i>	35.03
A. Compensation for the tribunal (Article 35(1) and (2))	35.03
B. Disputes concerning tribunal compensation (Article 35(3))	35.07
36. Article 36—Deposits	
I. <i>Introduction</i>	36.01
II. <i>Textual commentary</i>	36.04
A. Deposits as an advance on costs (Article 36(1) and (2))	36.04
B. Default on payment (Article 36(3))	36.08
C. Default by Claimant/Counterclaiming Party (Article 36(4))	36.11
D. Accounting and return of deposit (Article 36(5))	36.14
37. Article 37—Confidentiality	
I. <i>Introduction</i>	37.01
II. <i>Textual commentary</i>	37.04
A. Tribunal and ICDR shall not divulge confidential information (Article 37(1))	37.04
B. Tribunal may make orders concerning confidentiality (Article 37(2))	37.08
38. Article 38—Exclusion of Liability	
I. <i>Introduction</i>	38.01
II. <i>Textual commentary</i>	38.03
39. Article 39—Interpretation of Rules	
I. <i>Introduction</i>	39.01
II. <i>Textual commentary</i>	39.03

II COMMENTARY ON THE INTERNATIONAL EXPEDITED RULES

40. Article E-1—Scope of Expedited Procedures	
<i>I. Introduction</i>	40.01
<i>II. Textual commentary</i>	40.06
41. Articles E-2 to E-5—Commencing a Case under the Expedited Procedures	
<i>I. Introduction</i>	41.01
<i>II. Textual commentary</i>	41.04
A. Detailed submission (Article E-2)	41.04
B. Administrative conference (Article E-3)	41.10
C. Objection to the applicability of the Expedited Procedures (Article E-4)	41.11
D. Changes of claim or counterclaim (Article E-5)	41.14
42. Article E-6—Appointment and Qualifications of the Arbitrator	
<i>I. Introduction</i>	42.01
<i>II. Textual commentary</i>	42.03
A. Sole arbitrator	42.03
B. Appointment procedure	42.08
43. Articles E-7 to E-9—The Proceedings under the Expedited Procedures	
<i>I. Introduction</i>	43.01
<i>II. Textual commentary</i>	43.03
A. Procedural conference and order (Article E-7)	43.03
B. Proceedings by written submissions (Article E-8)	43.06
C. Proceedings with an oral hearing (Article E-9)	43.10
44. Article E-10—The Award under the Expedited Procedures	
<i>I. Introduction</i>	44.01
<i>II. Textual commentary</i>	44.02

APPENDICES

1. ICDR International Dispute Resolution Procedures (including Mediation and Arbitration Rules) (effective 1 June 2014)	355
2. International Arbitration Fee Schedule (amended and effective 1 October 2017)	373
3. A Comparison of the 2014 ICDR Rules Versus the 2009 ICDR Rules	377
4. AAA Commercial Arbitration Rules and Mediation Procedures (including Procedures for Large, Complex, Commercial Disputes) (effective 1 October 2013)	393

5. International Commercial Arbitration Supplementary Procedures (amended and effective 1 April 1999)	415
6. ICDR Guidelines for Arbitrators Concerning Exchanges of Information	417
7. Optional Appellate Arbitration Rules (effective 1 November 2013)	419
8. 2010 UNCITRAL Arbitration Rules (with new Article 1, paragraph 4, as adopted in 2013)	425
9. AAA Procedures for Cases under the UNCITRAL Arbitration Rules (effective August 1996)	445
10. List of AAA Rules in Effect and Available on the AAA's Website	449
 <i>Index</i>	 453