



## The 2021 ICDR® International Dispute Resolution Procedures

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The International Centre for Dispute Resolution® (ICDR) of the American Arbitration Association® (AAA®) has completed a comprehensive year-long review of the *ICDR Dispute Resolution Procedures* (including the Mediation and Arbitration Rules) and issued a revised set of rules, effective March 1, 2021. The arbitration rules were last revised in 2014 and 2021 marks the first revision of the mediation rules since 2008. These revised rules are the culmination of the combined efforts of the ICDR management and administrative teams and an ICDR Committee comprised of arbitration and mediation practitioners from across the globe.<sup>1</sup> Together, they reviewed and recommended a variety of additions and revisions designed to meet the ever-changing dispute resolution landscape, including the rise of third-party funding, the duty to discuss cybersecurity, privacy and data protection in both mediation and arbitration proceedings, the delegation of arbitrability, the enactment of the Singapore Convention, and the omnipresent specter of COVID-19 with the concomitant use of video communications. The ICDR also sought feedback and comments from the ICDR Publications Committee and the users of the ICDR Rules who attended the ICDR Americas Conference.

The following are among the changes effected by the revisions.

### The new Arbitration Rules

- reconfirm an arbitrator's obligation to be independent and impartial and to perform the duties of an arbitrator with adherence not only to the ICDR Rules and the terms of the Notice of Appointment provided by the Administrator but also *The Code of Ethics for Arbitrators in Commercial Disputes*;
- promote efficiency and economy by embracing the consideration of early disposition of issues, by presumptive incorporation of mediation, by expressly providing for the use of video, and by raising the ceiling amount for expedited arbitration procedures;
- expand the scope of the rules for consolidation and joinder;
- address third-party funding disclosure obligations and the use of tribunal secretaries; two issues that have recently come to the forefront in international arbitration;
- call for greater transparency by directing that, with party approval, the ICDR publish redacted awards; and
- authorize the tribunal to make a separate award for recovery of the payment, plus interest, in favor of a party paying the deposit of a non-paying party.

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<sup>1</sup> Members of the Committee included Chair Ann Ryan Robertson (USA), Alan Crain (USA), Beata Gessel (Poland), Reza Mohtashami (England), Lucia Ojeda Cardenas (Mexico), Anke Sessler (Germany), John Townsend (USA) and Christine Kang (China). The ICDR management team was composed of Eric Tuchmann, Steve Andersen, Yanett Quiroz, Luis Martinez, Thomas Ventrone, Michael Lee, and Miroslava Schieholtz.



## The new Mediation Rules

- furnish detailed guidance regarding mediation procedure;
- emphasize party control and involvement together with institutional support for finding and appointing a mediator;
- highlight the parties' and the mediator's need to consider the appropriate cybersecurity, privacy and data of protection levels needed for their case; and
- address enforcement of mediated settlements pursuant to the Singapore Convention.

## A Brief History of the ICDR International Arbitration and Mediation Rules

**1986** – the AAA created specialized international arbitration rules with the *“Supplement for International Commercial Arbitration”* added as an annex to the AAA Commercial Rules.

**1991** – the AAA introduced its *“International Arbitration Rules,”* closely modeled on the UNCITRAL Arbitration Rules.

**1998** – the ICDR was created and entrusted with the administration of all international arbitrations. At the same time, the new ICDR Rules initiated the use of an organizational hearing (now recognized as a global best practice) to ensure effective management of the proceedings and granting the tribunal explicit authority to limit or exclude cumulative or repetitive evidence.

**2003** – the ICDR combined its International Arbitration Rules with its newly created International Mediation Rules into a single publication: the *“International Dispute Resolution Procedures”* while adding a provision allowing the ICDR to publish awards under certain conditions. The ICDR International Mediation Rules were adapted from the 2003 version of the AAA Commercial Mediation Rules.

**2006** – the ICDR was the first major arbitral institution to provide emergency relief before the formation of the tribunal; the *“emergency arbitrator”*.

**2008** – the ICDR updated its International Mediation Rules consistent with the 2007 changes made in the AAA Commercial Mediation Rules by adding more detail concerning the filing of a mediation case, appointment of a mediator, and the duties and responsibilities of the mediator.

**2014** – the ICDR developed further innovations including its arbitration rules on consolidation, joinder and e-disclosure, creation of a consolidation arbitrator; and the new concept of expedited arbitration based on the amount in controversy. There were no substantive changes made to the international mediation rules. The previous Rules did not discuss the AAA's time-honored method of arbitrator selection, the List Method, while the 2014 Rules provided detail on the AAA's distinctive List Method. Other additions included procedures to avoid delay and expense; expansion of the arbitrator's powers and the parties' obligations; arbitrator disclosure; impartiality and independence of arbitrators; conduct of party representatives; exchange of information; exclusion of US litigation procedures; privilege and timing of the award.



## The 2021 Arbitration Rules – Significant Developments

### 1. International Administrative Review Council – Article 5

Article 5 is amended to clarify that the International Administrative Review Council (IARC) may act as the decision making authority for the Administrator for the purpose of determining (a) arbitrator challenges, (b) the continuing service of an arbitrator, (c) disputes regarding the number of arbitrators, (d) the place of arbitration, and (e) whether the administrative requirements to initiate or file an arbitration have been met. This new rule was created to give understanding and transparency to how IARC may resolve these types of administrative issues during the initial stages of a case.

### 2. Joinder – Article 8 (former Article 7)

Article 8(1) builds on former Article 7.1 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. The change results in an expansion of the rule's application.

### 3. Consolidation – Article 9 (former Article 8)

Article 9(1) retains 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 standards for permitting consolidation remain unchanged but the ability to consolidate is now enlarged to permit consolidation when arbitrations involve “related” parties; as opposed to the more limiting “same” parties, as 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).

### 4. Impartiality and Independence of the Arbitrators – Article 14 (former Article 13)

Article 14(1) imposes additional obligations on arbitrators. Those obligations include (a) to maintain standards of impartiality and independence, (b) to know and act in accordance with the ICDR Rules and the terms of the Notice of Appointment provided by the Administrator, and (c) to act in accordance with *The Code of Ethics for Arbitrators in Commercial Disputes*.

### 5. Third Party Funding – Article 14 (former Article 13)

Article 14(7) is a new language in the Article “Impartiality and Independence of Arbitrator” and addresses the issue of third-party funding and undisclosed economic interests. On the application of a party or on its own initiative after consulting with the parties, the tribunal may require the parties (a) 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, (b) to identify the person or entity concerned, and (c) 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.



## 6. Arbitral Tribunal Secretary – Article 17 and Article 41 (former Article 38)

A new Article 17 clarifies that a tribunal may appoint a tribunal secretary with the consent of both parties and in accordance with any guidelines that the ICDR may offer. Article 41 extends exclusion of liability to tribunal secretaries.

## 7. Arbitral Jurisdiction – Article 21 (former Article 19)

As there is potential controversy regarding whether reference to arbitration rules constitutes a clear 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).

## 8. Conduct of Proceedings – Article 22 (former Article 20)

Important changes were made to this rule. The preparatory conference was renamed “procedural hearing,” thereby emphasizing the importance of this meeting to both advocates and users. The procedural hearing will include a variety of critical procedural issues to be discussed for inclusion in the first procedural order.

## 9. Cybersecurity, Privacy and Data Protection – Article 22

The AAA-ICDR® has an on-going commitment to the security and privacy of customer and case information. Rule language was added to Article 22 on “Conduct of Proceedings” requiring the tribunal to discuss cybersecurity, privacy and data protection with the parties in order to provide an appropriate level of security and compliance in connection with the case. The ICDR sends helpful resources to the parties in every case a *AAA-ICDR Best Practices Guide* and *AAA-ICDR Cybersecurity Checklist*.

## 10. Early Disposition – Article 23

Recognizing the need to promote efficiency in arbitration, new Article 23 specifically permits early disposition of issues. A party seeking early disposition of an issue must first request leave to file an application for early disposition of the issue. If the tribunal determines (a) that the application has a reasonable possibility of succeeding, (b) that it will dispose of, or narrow, one or more issues in the case, and (c) that consideration of the application is likely to be more efficient or economical than leaving the issue to be determined with the merits, the tribunal is to allow the application to be filed. Importantly, Article 23(2) enshrines the right of both parties to be heard on the issue of whether leave to file the application should be granted and if leave is granted, whether early disposition should be granted. Article 23(3) empowers the arbitral tribunal to make an order or award in connection with the application. If an award, the tribunal is to provide reasoning for the award. This rule was thoroughly analyzed to accommodate and balance practice styles amongst practitioners in jurisdictions and legal systems around the world.



## 11. Use of Video, Audio or Other Electronic Means – Article 22 (former Article 20) Article 26 (former Article 23)

Articles 22 and 26 each acknowledge the use of video, audio or other electronic means (collectively, Video) for conducting preliminary matters and final hearings. As a corollary, Article 22(3) encourages the parties and tribunal to consider at the preliminary conference what rules and procedures are needed to ensure data protection and security. 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 the witnesses' physical presence.

## 12. Witness Statements – Article 26 (former Article 23)

Another simple change promoting efficiency was made in paragraph 4 to provide that witness statements "should" be used as opposed to "may" be used. This change promotes the more common international practice of utilizing witness statements to capture direct testimony.

## 13. Electronic Signatures – Article 32 (former Article 29)

New Article 32(4) is designed to meet the challenge imposed by the world-wide COVID-19 restrictions. Article 32(4) permits a tribunal to electronically sign an order or an award unless (a) the applicable law requires a physical signature, (b) the parties agree that a physical signature is necessary, or (c) the arbitral tribunal or Administrator determines that a physical signature is appropriate.

## 14. Deposits – Article 39 (former Article 36)

Should a party fail to pay a required fee or deposit, Article 39(3) states that the failure will result in a withdrawal of the party's claim or counterclaim. The party, however, will be entitled to defend its claim or counterclaim. New Article 39(4) 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, Article 39(5) provides that the arbitral tribunal may order suspension or termination of the proceedings. If the tribunal has not been appointed, the Administrator may suspend or terminate the proceeding.

## 15. Confidentiality – Article 40 (formerly in Article 30.3 Time, Form and Effect of Award)

Article 40(4) addresses the publication of awards by providing that unless a party has objected in writing to publication within 6 months from the date of the award, the ICDR is permitted to publish selected awards, orders, decisions, and rulings, edited to conceal the names of the parties and other identifying details. This language was previously found in the "Time, Form and Effect of the Award" section, but the Committee determined that this language was better placed under the "Confidentiality" Article.



## 16. International Expedited Procedures: Article E-5

The 2014 Arbitration Rules introduced expedited procedures that were applicable where no disclosed claim or counterclaim exceeded USD \$250,000. That amount has been increased to USD \$500,000.

## 17. International Expedited Procedures: Article E-9

Like Articles 22 and 27, Article E-9 acknowledges that the hearing may be held by Video.

## Additional Changes to the Arbitration Rules

### 1. Notice of Arbitration – Article 2

In keeping with the rise in mediation as a dispute resolution technique and the ICDR's commitment to the use of mediation, Article 2(3)(g) is amended to require a party to state in the Notice of Arbitration whether the party is willing to mediate the dispute prior to or concurrently with the arbitration. Previously, a party simply was required to state if the party had any interest in mediating the dispute.

### 2. Answer and Counterclaim – Article 3

Article 3(1) now reflects that the 30 days for the filing of a counterclaim begins to run from the date the Administrator confirms receipt of the Notice of Arbitration. Article 3(4) requires the respondent to make the statement required of the claimant in Article 2(3)(g): whether the party is willing to mediate the dispute prior to or concurrently with arbitration.

### 3. "Emergency Measures of Protection" – Article 7 (former Article 6)

Article 7.1 delineates what a party seeking emergency relief must allege in its application and includes the requirement that the applicant must state what injury or prejudice the party will suffer if relief is not provided. It further provides that the application must include payment of any applicable fees. Article 7(3) now specifically states that the emergency arbitrator has the jurisdiction to rule on the emergency arbitrator's jurisdiction.

### 4. Appointment of Arbitrators – Article 13 (former Article 12)

Article 13(4) reflects that the Administrator when making an appointment, may either make a direct appointment or submit a list of potential arbitrators to the parties.

### 5. Challenge of an Arbitrator– Article 15 (former Article 14)

Article 15(1) expands on the previous Article by providing a mechanism for challenging an arbitrator for failing to perform the arbitrator's duties.



## 6. Replacement of an Arbitrator – Article 16 (former Article 15)

The previous version of Article 16(3) [(Article 15(3))] did not empower the parties to object to two arbitrators continuing the arbitration if the third arbitrator failed to participate. Under new Article 16(3), the parties can agree that the arbitration shall not continue with two arbitrators.

## 7. Failure of Witness to Appear – Article 26 (former Article 23)

Article 26(5) addresses the failure of a witness to appear without a valid excuse whose presence has been requested. In that instance, the tribunal may make such order, as it deems appropriate, including reducing the weight to be given the witness' statement or disregarding the statement.

## 8. Costs of Arbitration – Article 37 (former Article 34)

Article 37 specifically adds the definition of "costs" to include applicable taxes related to arbitrator compensation and for any costs related to tribunal assistance.

## The 2021 International Mediation Rules – Significant Developments

The ICDR recognizes mediation as a viable and important alternative dispute resolution mechanisms. The creation and previous changes to the ICDR International Mediation Rules have largely followed content and timing of the AAA Commercial Mediation Rules. The 2021 revisions represent the first time the ICDR has made significant substantive changes to its International Mediation Rules. In recognition of that importance, the ICDR has designed a comprehensive set of international mediation rules.

### 1. Use of Video, Audio or Other Electronic Means – Rule M-1 and Rule M-9

Mediation Rules 1 and 9 recognize that all or part of a mediation may be conducted via Video.

### 2. Appointment of the Mediator – Rule M-4

Mediation Rule 4 reframes language focusing on the importance of party involvement and the obligation of the ICDR to assist the parties in finding an agreeable mediator. If the parties are unable to agree on a mediator and no other method of appointment has been provided for in the parties' agreement, the ICDR will send to each party a list of mediators from the ICDR's Panel of Mediators. The parties are encouraged to agree to a mediator on the list and absent agreement, each party is to strike and rank the mediators. The ICDR shall appoint a mutually acceptable mediator from the list based on the parties' designated preferences. If the appointment cannot be made from the list, the ICDR retains the authority to make the appointment from among the Panel of Mediators without the submission of additional lists.



### 3. Duties and Responsibilities of the Mediator – Rule M-8

This Rule previously has 6 enumerated paragraphs not only detailing the duties of the mediator, but also how the mediation proceedings might be conducted. For clarity, a majority of Rule M-8 was moved to the new “Mediation Proceedings Rule” (Rule M-9) which focuses on managing and organizing the mediation. The remainder of the original rule setting forth the duties and responsibilities of the mediator was retained in Rule M-8.

### 4. Mediation Proceedings – Rule M-9

In addition to recognizing the appropriateness of Video, new Rule M-9 adopts best mediation practices by setting forth a comprehensive outline regarding how the mediation is to proceed. Those procedures include (a) the possibility of conducting a preliminary conference with the parties for the purpose of organizing the mediation; (b) permitting all or part of the mediation to be conducted via Video; (c) the parties exchanging all documents pertinent to the relief being requested; and (d) an exchange of memoranda on the issues, the underlying interests and the history of the parties’ negotiations.

Any information a party wishes to remain confidential is to be sent in a separate communication with the mediator. The mediator may conduct separate or *ex parte* meetings and other communications with the parties and/or their representatives before, during and after any scheduled mediation conference and the communications may be conducted in person, in writing, or via Video. The mediator may make oral or written recommendations for settlement privately or, if the parties agree, to all parties jointly. If a complete settlement of all issues is not achieved during the scheduled mediation, the mediator may continue to communicate with the parties in an effort to facilitate a complete settlement. Another important newly added procedural consideration is for the mediator and parties to address the appropriate level of protection for cybersecurity, privacy, and data protection for the case.

### 5. Responsibilities of the Parties – Rule M-10 (former Rule 8)

Mediation Rule 10 reinforces that it is the responsibility of each party to have present at the mediation a representative with the authority to commit to the execution of a settlement agreement.

### 6. Enforcement of Mediated Settlement Agreement – Rule M-14 (former Rule 12)

New Mediation Rule 14(e) is designed to assist the parties in enforcing settlement agreements pursuant to the Singapore Convention or other applicable law. In accordance with Article 4 (b) of the Singapore Convention, the parties may ask the mediator to sign the settlement agreement, request a document signed by the mediator indicating that the mediation was carried out, or request the ICDR to issue an attestation that the settlement was reached in the course of a mediation in order to assist with enforcement of the settlement agreement.