

International Arbitration and Litigation Team

To: Our Clients and Friends

May 2014

International Centre for Dispute Resolution ("ICDR") Draft Procedures and Rules

On 1 June 2014 the new 'International Dispute Resolution Procedures (Including Mediation and Arbitration Rules)' ("the Rules") are due to come into effect. The Rules are applicable where parties have agreed to arbitrate under the American Arbitration Association ("AAA") 'International Arbitration Rules' or ICDR (the international division of the AAA).

The revised Rules are designed to provide a complete dispute resolution framework for disputing parties, their counsel, arbitrators and mediators. They have been designed to best reflect international practices through increased efficiency, greater certainty and reduced cost.

Features of the revised Rules include:

- Enhanced case management powers for the Administrator and arbitral tribunal.
- Encouragement of (parallel) mediation.
- Joinder of additional parties and consolidation of multiple proceedings in appropriate cases.

Another significant new development to the Rules is the introduction of 'Expedited Procedures' (Article E1- E10). These procedures are for cases where no disclosed claim or counterclaim exceeds USD \$250,000 (excluding interest and costs) or where parties are able to agree they should apply.

Features of the Expedited Procedures include:

- Comprehensive filing requirements and timetabling for presenting complete and detailed submissions.
- Expedited arbitrator appointment from a pool of experienced arbitrators, with party input, followed by an early preparatory conference call with the arbitrator, requiring parties' participation.
- In proceedings decided on the documents only (cases up to \$100,000, unless otherwise agreed), present submissions within 60 days of the date of the procedural order.
- Where an oral hearing is to be held, the hearing should be within 60 days of the date of the procedural order.
- An Award is to be rendered within 30 days from close of hearing or receipt of final statements.

Some key features of the Rules, illustrating the focus on efficiency and economy (subject to whatever modifications parties adopt in writing) are summarised from [pages 4 - 7](#).

Should you require further detail on the Rules, information on dispute resolution clauses and/or International Arbitration more generally, please speak to your Bryan Cave contact, a member of our [International Arbitration and Litigation Team](#) or the authors of this bulletin:

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Some of the key features of the Rules, illustrating the focus on efficiency and economy

Commencing the Arbitration

Notice of Arbitration, Answer and Counterclaim

The arbitration is deemed to commence on the date the Administrator receives and acknowledges the written 'Notice of Arbitration' (Article 10). This can be submitted online and must be accompanied by the appropriate filing fee, which is dependent on, amongst other things, the size of the claim (Article 2).

The Respondent is required to answer in writing within 30 days of commencement of arbitration. Failure by the Respondent to submit an Answer will not preclude the arbitration from proceeding (Article 3).

Any party may amend or supplement its claim, counterclaim, or defense unless the arbitral tribunal (once constituted) considers it inappropriate to allow such an amendment or supplement because of the party's delay in making it, prejudice to the other parties or any other circumstances (Article 9).

Administrative conference and Mediation

The Administrator may conduct an administrative conference before the arbitral tribunal is constituted to address issues such as arbitrator selection, mediating the dispute, process of efficiencies and any other administrative matters (Article 4).

The Administrator has discretion to invite the parties to mediate following the time for submission for an Answer. Parties can agree to mediate at any stage after an Answer has been submitted. Any mediation will usually proceed concurrently with the arbitration with a separately appointed mediator (Article 5).

Emergency measures of protection

Where there is written notice to the arbitral tribunal for emergency relief, the Administrator can appoint an emergency arbitrator (appointment subject to Article 13). The emergency arbitrator has the power to order or award any interim or conservancy measures deemed necessary, including injunctive relief and measures for the protection or conservation of property (Article 6).

Joinder and Consolidation

No additional party can be joined after the appointment of any arbitrator, unless all parties, including the additional party agree. A party wishing to join an additional party to the arbitration must submit to the Administrator a Notice of Arbitration against the additional party. Any joinder shall be subject to the provisions of Article 12 and 19 (Article 7).

A party can request the consolidation of two or more pending arbitrations administered by the AAA or the ICDR (Article 8). In these circumstances the Administrator can appoint a consolidation arbitrator. Consolidation may be ordered where the parties have expressly agreed to consolidate, or where all of the claims and counterclaims and setoffs in the arbitrations are made under the same arbitration agreement. The consolidation arbitrator will ultimately decide (taking into account the considerations set out at Article 8(3)) whether or not to consolidate proceedings. The decision as to consolidation shall be rendered within 15 days of the date for final submission on consolidation. Where proceedings are consolidated, the consolidation arbitrator or the administrator appoints the members of the arbitral tribunal.

The Tribunal

Appointment of Arbitrators

If within 45 days after the commencement of the arbitration, all parties have not agreed on a procedure for appointing/selecting the arbitrator(s), the Administrator, at the request of any party, can appoint the arbitrator(s). If the parties have not selected an arbitrator(s) and have not agreed upon any other method of appointment, the Administrator has discretion to appoint the arbitrator(s) using the ICDR list method. This involves the Administrator simultaneously sending out a list of names for the parties to consider. The parties are encouraged to agree to an arbitrator(s) from the submitted list and thereafter advise the Administrator. In the event of no agreement between the parties, the Administrator has the power to appoint an arbitrator(s) without the submission of additional lists (Article 12).

Impartiality and Independence

Arbitrators must be impartial and independent in order to act in accordance with the terms of the Administrator's Notice of Appointment and must disclose any circumstances that may give rise to doubts as to their impartiality. The requirement to disclose is ongoing and there is an onus on parties to raise any justifiable doubts in this context. A party who fails to disclose any doubts constitutes their waiver of a right to challenge an arbitrator based on those circumstances. (Article 13). Notably, a party who knows of any non-compliance with any provision or requirement of the Rules or the arbitration agreement, and proceeds with the arbitration without promptly stating an objection in writing, waives any subsequent right to object (Article 28).

Challenge of an Arbitrator

In order for a party to challenge an arbitrator's impartiality and/or independence, a party must send written notice of the challenge to the Administrator (not the arbitral tribunal) within 15 days of appointment, or within 15 days of the circumstances giving rise to the challenge becoming known to the challenging party (Article 14).

Replacement of an Arbitrator

If a substitute arbitrator is required for whatever reason, their appointment must be in accordance with Article 12, unless the parties otherwise agree. Upon appointment of a substitute arbitrator,

the arbitral tribunal shall determine at its sole discretion whether all or part of the case shall be repeated. If an arbitrator on a three-person arbitral tribunal fails to participate in the arbitration for reasons other than those identified in Article 15(1), the two other arbitrators have the power in their sole discretion to continue the arbitration and to make any decision, ruling, order or award, notwithstanding the failure of the third arbitrator to participate (Article 15).

Other Case Management Powers

Interim measures

At the request of any party, the arbitral tribunal may order or award any interim or conservatory measures deemed necessary. An application for emergency relief prior to the constitution of the tribunal may be made as provided for in Article 6. A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate (Article 24).

Conduct of proceedings

Subject to the Rules, the arbitral 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. The tribunal shall conduct the proceedings with a view to expediting the resolution of the dispute. The parties shall make every effort to avoid unnecessary delay and expense in the arbitration. The arbitral tribunal may allocate costs, draw inferences and take such additional steps as are necessary to protect the efficiency and integrity of the arbitration (Article 20). For instance, the arbitral tribunal may proceed irrespective of whether a party fails to submit an Answer in accordance with Article 3 or if a party fails to appear at a hearing without showing sufficient cause for such failure. The tribunal may make an award on the evidence before it (Article 26).

Exchange of Information

The arbitral tribunal shall manage the exchange of information among the parties with a view to maintaining efficiency and economy. The tribunal and the parties should avoid unnecessary delay and expense. The tribunal retains final authority on the appropriate level of exchange for each case. Requests for documents maintained in electronic form should be narrowly focused and structured to make searching for them as economical as possible. Any disputes about pre-hearing exchanges of information require the requesting party to justify to the tribunal the time and expense that the request may involve (Article 21).

Hearing

At least 15 days before the hearing, each party shall give the tribunal and the other parties the names and addresses of any witnesses it intends to present. The tribunal determines the manner in which witnesses are examined and who shall be present during witness examination (Article 23).

The Award / Settlement

Time, form and effect of Award

Awards shall be made in writing, by the arbitral tribunal and shall be final and binding on all parties. The tribunal shall make every effort to deliberate and prepare the award as quickly as possible after the hearing. Unless otherwise agreed by the parties, specified by law or determined by the Administrator, the final award shall be made no later than 60 days from the date of the closing of the hearing. The parties shall (having irrevocably waived right of appeal) carry out any such award without delay (Article 30).

Applicable laws and remedies

Unless otherwise agreed, the parties expressly waive and forego any right to punitive, exemplary or similar damages unless any applicable law(s) requires that compensatory damages be increased in a specified manner. This provision shall not apply to an award of arbitration costs to a party to compensate for misconduct in the arbitration (Article 31).

Settlement and costs

If requested by all parties, the arbitral tribunal may record the a settlement in the form of a consent award on agreed terms (Article 32).

The tribunal may apportion such costs among the parties if it determines that such apportionment is reasonable, taking into account the circumstances of the case (Article 34).

The full version of the Rules can be accessed [here](#).

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