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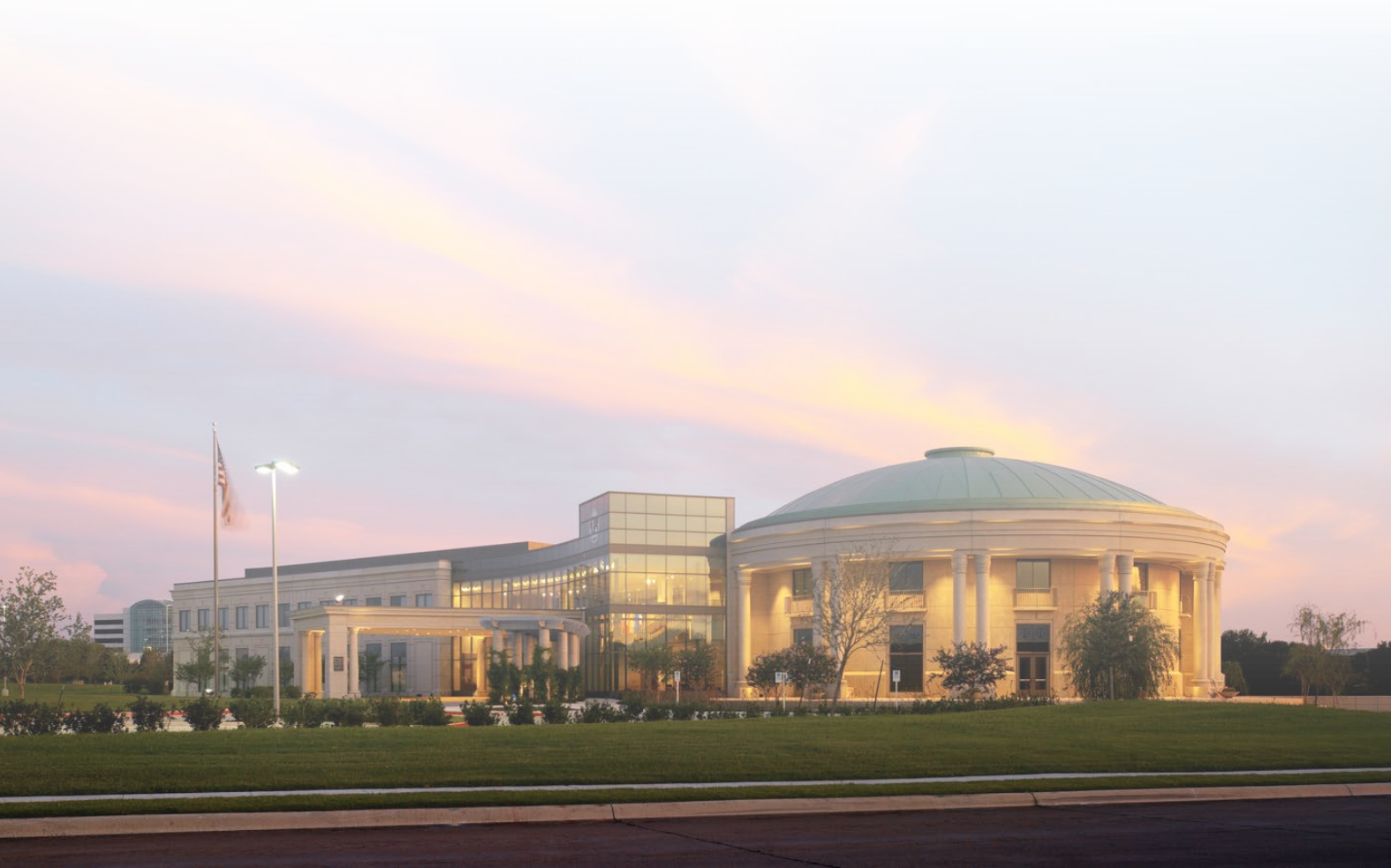

ITA IN REVIEW

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INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION (ICDR) PROCEDURES: A CLOSER LOOK AT SOME OF THE FUNDAMENTAL ARBITRATION RULES

by Ekaterina Long

I. INTRODUCTION

The International Centre for Dispute Resolution (ICDR) is an international arm of the American Arbitration Association (AAA), which helps global businesses resolve their disputes anywhere in the world through arbitration and sometimes through concurrent mediation. The ICDR promulgated 42 International Arbitration Rules that facilitate its role as an administrator of disputes and governs the manner of conducting arbitrations. Additionally, it has promulgated a series of International Mediation Rules and Articles on Expedited Procedures to supplement the Arbitration Rules. Together, these Rules and Procedures lay the foundation of the ICDR dispute resolution process. This Article will only examine some of the fundamental International Arbitration Rules. It will not consider the ICDR Mediation Rules or International Expedited Procedures.

The examination of the International Arbitration Rules aims to familiarize international businesses with the ICDR's process in administering international disputes. It also advocates for the use of the ICDR's dispute resolution services because these Rules provide a well-established and efficient dispute resolution process with effective mechanisms for ensuring the independence and impartiality of its arbitrators in adjudicating disputes.

Before examining the ICDR Arbitration Rules, the Article will briefly discuss the background that prompted its writing.

II. BACKGROUND

The impetus behind this Article was a webinar that the Director of the Institute for Transnational Arbitration (ITA), Thomas (T.L.) Cubbage, and the ITA's Assistant Director, Dr. Darya Shirokova, conducted last February. During the webinar, the ICDR's Vice President, Steve Andersen, elaborated on the way the ICDR administers

international disputes, focusing on some of the most important ICDR Arbitration Rules and providing insights as to the nature of and the rationale behind some of them. This Article will analyze some of these Rules and assess the effectiveness of the ICDR dispute administration process.

III. ANALYSIS

One of the most fundamental prerequisites to resolve a dispute through the ICDR is to establish whether the dispute is international. The ICDR relies on the definition of an international arbitration provided by the United National Commission on International Trade Law (UNCITRAL).[1] There are several ways in which a dispute may be deemed international under this definition. Perhaps one of the most obvious is when "a substantial part of the obligations of [the parties'] commercial relationship to be performed is situated outside the country of any party."[2]

But the query of the ICDR's authority over a dispute does not end there. The ICDR must also have jurisdiction over the dispute before it can administer it. Article 1 provides that the ICDR may have jurisdiction over a dispute so long as the parties' contract expressly states so. The language of Article 1 vesting the ICDR with jurisdiction is broad such that the ICDR Arbitration Rules will apply even if the parties solely state that their dispute will be arbitrated by the ICDR without specifying that the ICDR Arbitration Rules will govern the dispute. The absence of an express requirement to refer to the ICDR Rules as the governing principles allows the parties to avoid any delays and expedites the dispute even in cases where the parties have failed to refer to the Rules in their contract.

Further, Article 21 permits the arbitrator or the tribunal to decide the issue of a dispute's arbitrability, or whether it is subject to an arbitration clause, such that the parties will not be required to address this through a court. Article 21 thus ensures the expeditious administration of disputes both in terms of the amount of time and

[1] International Dispute Resolution Procedures (Including Mediation and Arbitration Rules) (2021), Introduction, at 5.

[2] *Id.*

money the parties would have had to spend in the event they disagreed over a dispute's arbitrability.

This and other preliminary issues—such as arbitrator selection and whether the parties prefer to first attempt mediation—are ordinarily addressed during an administrative conference call. The call occurs no later than 10 days after the filing of a statement of claim. Article 4 specifically deputizes the ICDR to conduct this call to help the parties facilitate any outstanding preliminary issues. Under Article 5, the ICDR may even call upon and act through its International Administrative Review Council to help determine, for instance, any challenges to the appointment of an arbitrator. Articles 4 and 5 simplify the initial phases of an arbitration proceeding and help shepherd the parties towards the substantive legal issues. Additionally, Article 4 provides the parties with an opportunity to resolve the dispute through mediation, resulting in a potentially speedier and economically efficient resolution of the ultimate dispute.

Even if mediation does not lead to the final resolution of the dispute, the presumption of mediation is a salutary mechanism because it stimulates the parties to narrow the disputed issues. Significantly, Article 6 grants any party the right to forego mediation without imposing any specific requirement. This ability to opt in or out of mediation within the arbitration itself provides greater flexibility and control to the parties in attempting to resolve their dispute.

Article 7 also provides the parties with control over the process by enabling them to seek emergency relief even before the constitution of the arbitral tribunal. This ability is not an entitlement, and the party applying for emergency relief will need to meet four requirements before the ICDR as an administrator may grant the request. Specifically, the party needs to show: (1) the nature of the relief sought; (2) the reasons why the emergency relief is necessary before the appointment of the arbitrator; (3) the reasons the party is likely entitled to the relief sought; and (4) what injury or prejudice the party will suffer absent the relief.

These requirements are, however, not as onerous as those that are, for example, set forth in an injunctive relief remedy that the parties may seek in a state court. Article 7 merely requires the moving party to show the "injury or prejudice [it] will suffer if relief is not provided"[3] as opposed to the probable, imminent, and irreparable injury that is required to be shown to the court before it can grant an injunction. It may be argued that the less onerous burden of establishing the need for emergency relief in an ICDR arbitration is prone to abuse. Indeed, the ICDR Arbitration Rules do not expressly impose any obligation on the parties to act in good faith. But the parties' lawyers, whose actions must align with ethical obligations, should be able to steer their clients away from tampering with the ICDR arbitration process. Common sense also dictates that any attempt to tamper with the process will expose the party attempting it to a loss of credibility before a tribunal. This loss could be fatal to the party's advocacy moving forward.

Another important decision a party will be required to make is whether it should join all parties to an arbitration. This decision is best made before the appointment of the tribunal. Article 8 governs the joinder and appears to strongly encourage the parties to ensure they add all potential parties at the outset of the process. If the parties do not do so before the tribunal is appointed, they will have to, *inter alia*, obtain the consent of the party they wish to join. The consent requirement aims to protect the selection of the tribunal. But it may present a challenge given that many companies do not aspire to get embroiled in a legal dispute. Theoretically, however, they may consent to the joinder in the event they determine they could redress their own grievances in the arbitration against the other parties. One way or another, any untimely joinder is certainly going to increase time and costs. Parties should therefore carefully identify all those against whom they have or potentially may have any claims either before the arbitration commences or before the appointment of any arbitrator to avoid delays.

[3] *Id.* art. 7.1.d.

In some cases, however, a delay may be inevitable. Consolidation of several arbitrations may, for instance, be required. If that is the case, Article 9, which governs consolidations, mandates that the collateral decision on consolidation be rendered "within 15 days of the date for final submissions on consolidation."[4] This excludes the time that would be required for appointing a consolidation arbitrator. The request to consolidate two or more arbitrations into a single arbitration may be made by a party or the ICDR. The consolidation is particularly appropriate when "all of the claims and counterclaims in the arbitrations are made under the same arbitration agreement."[5] Even if there are multiple arbitration agreements, consolidation may nonetheless be suitable if the arbitrations implicate the same or related parties and the disputes stem from the same legal relationships.

The ICDR as the administrator will "invite the parties to agree upon a procedure for the appointment of a consolidated arbitrator"[6] in its notice to the parties of its intention to appoint a consolidation arbitrator, giving them 15 days following the notice to agree. Should they fail to agree within this time, Article 9 requires the ICDR to appoint the consolidation arbitrator without their input. The deadline strongly encourages the parties to collaborate on agreeing to a procedure.

Consolidation aside, the parties are also able to agree on a procedure for appointing arbitrators under Article 13. Additionally, this Article permits them to rely on the ICDR list method of appointing arbitrators. The ICDR can send the parties its curated list of arbitrators to consider and encourage them to agree to several of them. If the parties are unable to agree on arbitrators, they will have 15 days during which they will need to "strike names objected to, number the remaining names in order of preference, and return the list to the Administrator."[7] If this procedure fails for any reason, the ICDR will appoint the arbitrators without further input from the parties.

[4] *Id.* art. 9.7.

[5] *Id.* art. 9.1.b.

[6] *Id.* art. 9.2.a.

[7] *Id.* art. 13.2.6.

The ICDR's carte blanche in appointing the arbitrators may facilitate the efficiency of the arbitration if there is no agreement as to the arbitrator, unless a party decides to challenge the appointed arbitrator.

In its challenge, however, the party will need to satisfy the requirements of Article 15 by showing the circumstances "that give rise to justifiable doubts as to the arbitrator's impartiality, or independence, or for failing to perform the arbitrator's duties."[8] This mechanism protects the integrity of the arbitration process unless the term "justifiable doubts" is misinterpreted by the challenger given that the term is not defined in the Rules. Nonetheless, the challenge does not automatically disqualify the arbitrator. The other parties will need to agree to the removal of the challenged arbitrator. Absent such agreement, the ICDR will have the ultimate decision regarding the removal.

In making its decision, the ICDR will be guided by Article 14, which requires arbitrators to be impartial and independent while acting in accordance with the ICDR Arbitration Rules, the terms of the Notice of Appointment, and *The Code of Ethics for Arbitrators in Commercial Disputes*.[9] Article 14 also imposes a disclosure obligation on the arbitrators, which requires them to "disclose any circumstances that may give rise to justifiable doubts as to [their] impartiality or independence and any other relevant facts [they wish] to bring to the attention of the parties."[10] The parties, too, have a disclosure obligation. If they fail in their disclosure obligation, they will be deemed to have waived their right to challenge the arbitrator.

IV. CONCLUSION

Companies conducting business internationally will need to face several important legal considerations before they enter a contract and when they begin anticipating a dispute with their contracting partner. One of the most fundamental

[8] *Id.* art. 15.1.

[9] *Id.* art. 14.1.

[10] *Id.* art. 14.2.

considerations is whether they want to resolve potential disputes through an arbitral or court process. This choice will be based on multiple criteria including, among others, the nature of the disputes that they anticipate may arise and the desire or need to keep the dispute confidential or have greater control over the entire process. This choice will have to be made before they enter a contract if they wish to arbitrate disputes.

In opting for an arbitration, they will have a choice over the alternative dispute resolution administrator. If the ICDR is their choice, they will be using one of the largest private providers of alternative dispute resolution in the world with a developed and efficient dispute resolution process. The parties will need to expressly submit to the ICDR's jurisdiction in their contract.

The other legal considerations the parties may need to face will come into play at the start of the dispute. The timing of certain decisions may be essential to their overall success in favorably resolving the dispute. One of these early decisions may be whether they should join their contracting partner's subsidiary or parent or any other affiliated entity in the arbitration when they file their statement of claim. Whatever the decision they may need to make, the parties are well-advised to begin developing their legal strategy as soon as possible. By the same token, the parties should bear in mind that they will likely need to adjust their strategy as the dispute develops.

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INSTITUTE FOR TRANSNATIONAL ARBITRATION
OF
THE CENTER FOR AMERICAN AND INTERNATIONAL LAW

The Institute for Transnational Arbitration (ITA) provides advanced, continuing education for lawyers, judges and other professionals concerned with transnational arbitration of commercial and investment disputes. Through its programs, scholarly publications and membership activities, ITA has become an important global forum on contemporary issues in the field of transnational arbitration. The Institute's record of educational achievements has been aided by the support of many of the world's leading companies, lawyers and arbitration professionals. Membership in the Institute for Transnational Arbitration is available to corporations, law firms, professional and educational organizations, government agencies and individuals.

I. MISSION

Founded in 1986 as a division of The Center for American and International Law, the Institute was created to promote global adherence to the world's principal arbitration treaties and to educate business executives, government officials and lawyers about arbitration as a means of resolving transnational business disputes.

II. WHY BECOME A MEMBER?

Membership dues are more than compensated both financially and professionally by the benefits of membership. Depending on the level of membership, ITA members may designate multiple representatives on the Institute's Advisory Board, each of whom is invited to attend, without charge, either the annual ITA Workshop in Dallas or the annual Americas Workshop held in a different Latin American city each year. Both events begin with the Workshop and are followed by a Dinner Meeting later that evening and the ITA Forum the following morning - an informal, invitation-only roundtable discussion on current issues in the field. Advisory Board Members also receive a substantial tuition discount at all other ITA programs.

Advisory Board members also have the opportunity to participate in the work of

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III. THE ADVISORY BOARD

The work of the Institute is done primarily through its Advisory Board, and its committees. The current practice committees of the ITA are the Americas Initiative Committee (comprised of Advisory Board members practicing or interested in Latin America) and the Young Arbitrators Initiative Committee (comprised of Advisory Board members under 40 years old). The ITA Advisory Board and its committees meet for business and social activities each June in connection with the annual ITA Workshop. Other committee activities occur in connection with the annual ITA Americas Workshop and throughout the year.

IV. PROGRAMS

The primary public program of the Institute is its annual ITA Workshop, presented each year in June in Dallas in connection with the annual membership meetings. Other annual programs include the ITA Americas Workshop held at different venues in Latin America, the ITA-ASIL Spring Conference, held in Washington, D.C., and the ITA-IEL-ICC Joint Conference on International Energy Arbitration. ITA conferences customarily include a Roundtable for young practitioners and an ITA Forum for candid discussion among peers of current issues and concerns in the field. For a complete calendar of ITA programs, please visit our website at www.cailaw.org/ita.

V. PUBLICATIONS

The Institute for Transnational Arbitration publishes its acclaimed Scoreboard of Adherence to Transnational Arbitration Treaties, a comprehensive, regularly-updated report on the status of every country's adherence to the primary

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