

## INTRODUCTION

*By Grant Hanessian*

The International Centre for Dispute Resolution (ICDR)—the international division of the American Arbitration Association (AAA)—has long been a leader among arbitral institutions in the publication of awards. Created by the AAA in 1996,<sup>1</sup> in 2003 the ICDR added Article 27(8) to the ICDR Rules to provide for publication of redacted awards. The provision stated: “Unless otherwise agreed by the parties, the administrator may publish or otherwise make publicly available selected awards, decisions and rulings that have been edited to conceal the names of the parties and other identifying details or that have been made publicly available in the course of enforcement or otherwise.”

In 2014 revisions to the ICDR Rules, the text of Article 27(8) was moved to Article 30(3), and expanded as follows:

An award may be made public only with the consent of all parties or as required by law, except that the Administrator may publish or otherwise make publicly available selected awards, orders, decisions, and rulings that have become public in the course of enforcement or otherwise and, unless otherwise agreed by the parties, may publish selected awards, orders, decisions, and rulings that have been edited to conceal the names of the parties and other identifying details.

The 2021 revision of the ICDR Rules replaced this provision with Articles 40(3) and (4), which provide:

3. An award may be made public only with the consent of all parties or as required by law, except that the Administrator may publish or otherwise make publicly available selected awards,

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<sup>1</sup> The AAA introduced its first arbitration rules specifically applicable to international cases in 1986 in the form of a “Supplement for International Commercial Arbitration” to the AAA’s Commercial Arbitration Rules and Mediation Procedures (Commercial Rules). In 1991, the AAA introduced its International Arbitration Rules, which were substantially modeled on the United Nations Commission on International Trade Law Arbitration Rules, and these became the basis for the first ICDR Rules, issued in 1996. For historical information on the AAA and the ICDR see Martin F. Gusy and James. M Hosking, *A Guide to the ICDR International Arbitration Rules* (Oxford Press 2019, 2d ed.), 2–13.

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orders, decisions, and rulings that have become public in the course of enforcement or otherwise.

4. The ICDR may also publish selected awards, orders, decisions, and rulings that have been edited to conceal the names of the parties and other identifying details unless a party has objected in writing to publication within 6 months from the date of the award.

In July 2022, the ICDR agreed to make non-confidential ICDR international arbitration awards available through Jus Mundi, which maintains a database of international commercial and investment treaty awards.

It is now widely accepted that publication of arbitration awards, even in redacted form, contributes importantly to the development of international arbitration law and practice and increases the diversity—*e.g.*, regional, generational and gender—of the field. For much of the last century, international arbitration was known as a field confined to a relatively small “club” of specialists. International arbitration is typically private (*i.e.*, the proceedings are closed to the public) and often confidential, absent a party’s legal obligation to report the outcome or a need to enforce or vacate the award or decision in a court that requires public filings. However, increased publication of arbitral awards and decisions—as well as the wide distribution arbitration materials via the internet and student competitions such as the Willem C. Vis International Commercial Arbitration Moot—has helped in redressing information asymmetries among participants, although this of course depends to some extent on the cost of access to publications and the degree to which published decisions are redacted.

Although, as a technical matter, arbitral awards and decisions have no formal precedential value, increased publication appears to be encouraging common solutions to procedural matters, and it would be expected that arbitration practitioners and arbitrators in particular will cite prior decisions concerning applicable arbitration rules (whether or not as formal “precedent”), if awards and decisions are available.

Concerns are sometimes expressed that an arbitrator who knows his or her decision is likely to be published may write it differently than an arbitrator whose sole focus is to address the parties and, perhaps, an enforcing court—and that arbitrators writing for a broader audience may write awards that are longer or more elaborate than necessary to resolve the particular dispute before them. However, others argue that the knowledge that their awards will be published will impose a desirable discipline on arbitrators to articulate clearly the legal and factual bases for their decisions.

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In this second volume, we have selected for publication six ICDR awards issued in 2007 or later. We hope these awards will be of interest to the international arbitration community. The awards involve parties from Canada, China, Dubai, Germany, Kuwait, Switzerland and the United States. The awards deal with issues arising out of consulting agreements, joint-ventures, swap agreements, distribution agreements, the disclosure of confidential intellectual property rights and licensing agreements. Procedural issues considered include sanctions against an obstructive party, summary disposition, emergency relief, interim relief and the admissibility of testimony of a witness who failed to appear for cross-examination.

Three of the awards have been edited to remove identifying information about the parties and arbitrators consistent with Article 27(8) of the ICDR Rules. The other three awards previously have been made public in the course of judicial enforcement proceedings and have not been redacted. As with many other international arbitration rules, the ICDR Rules require that the ICDR and the arbitrators maintain the confidentiality of the proceedings and award but do not preclude a party from unilaterally disclosing the award.

Each award in this volume includes a summary providing the subject matter, nationality of parties, situs of arbitration, applicable law, amount in dispute, arbitration costs and amount of award. Each award also has an abbreviated case number derived from the actual ICDR case number: the first three digits indicate the chronological order in which the case was opened and the last two digits indicate the year it was opened.

Each award is accompanied by a commentary or case note written by a distinguished figure in the field of international arbitration, highlighting matters of particular interest in the award. The book also provides articles on ICDR arbitration practice, including “A Guide to ICDR Case Management” by Luis Manuel Martinez, the ICDR’s Vice President for South & Central America, Europe and the Eastern United States. Other articles address the use of the AAA-ICDR rules in South Korea and the cultural challenges of representing Korean parties, an arbitrator’s role in applying the law, the impact of force majeure and tariffs on contractual relationships, the arbitration of antitrust disputes, the taking of evidence in international commercial arbitration generally and the improvement of the efficiency of expert testimony more specifically.

An appendix contains the ICDR Procedures, the ICDR’s Guide to Drafting Dispute Resolution Clauses and the AAA-ICDR Model Order and Procedures for a Virtual Hearing via Videoconference.

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For continued assistance and encouragement in the creation and development of this book our sincere thanks to Eric P. Tuchmann, Senior Vice President, General Counsel and Corporate Secretary of the AAA, who oversees the ICDR's operations; Luis Martinez; and Thomas Ventrone, Vice President, Office of Case Management.

Special thanks go to Derek Soller, Associate Editor of this volume, as well as Maximillian Pailhès, who greatly assisted with the preparation of the final manuscript.

New York, New York  
April 2023

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