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# International Arbitration Report

**International Arbitration Experts Provide  
Overviews, Analysis Of Updated  
Arbitration Rules**

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# Commentary

## International Arbitration Experts Provide Overviews, Analysis Of Updated Arbitration Rules

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A significant number of arbitral institutions and centers recently released updated versions of their rules. **Mealey's® International Arbitration Report** asked experts on five new sets of rules to review the key changes, the reasons for the amendments and how the updates will impact arbitration in the future.

Mark C. Hilgard of Mayer Brown in Frankfurt, Andrew Aglionby of the of the Chartered Institute of Arbitrators and of the Hong Kong Institute of Arbitrators in Hong Kong, Dr. Veit Öhlberger of DORDA Rechtsanwälte GmbH in Vienna, Olena Perepelynska of INTEGRITES in Kiev and Albert Bates Jr. of Pepper Hamilton in Pittsburgh discuss these important changes.

### Deutsche Institution für Schiedsgerichtsbarkeit (DIS) Arbitration Rules

The Deutsche Institution für Schiedsgerichtsbarkeit (DIS) (The German Arbitration Institute) updated its 1998 rules with new rules that became effective on March 1 and apply to domestic and international parties to arbitration. They apply to any arbitration commenced with the DIS after March 1. Mark C. Hilgard leads the litigation and arbitration practice at Mayer Brown LLP in Germany. He has extensive experience in both national and international litigation and arbitration. In arbitral matters, he sits as arbitrator and represents parties before arbitral tribunals. Hilgard is actively engaged in the German American Lawyers' Association, the German-British Jurists Association and the German Lawyers' Association (DAV) – Working Group for International Legal Transactions.

### Mealey's: What are the key amendments to the DIS Arbitration Rules?

**Hilgard:** The key amendments to the 1998 DIS Rules include the following:

#### Procedural Provisions

**Submission format.** The revised DIS Rules aim to simplify and unify the transmission of submissions. Therefore, all written submissions of the parties and the arbitral tribunal to the DIS shall be sent in electronic form, either by email or on a storage device. However, the request for arbitration as well as counterclaims or extensions of claims and their attachments have to be submitted in paper form in addition to electronic form until the arbitral tribunal has been constituted.

**Deadlines.** The revised DIS Rules set out a number of new deadlines aiming to make arbitration faster and more efficient: Under Article 7.1 of the revised DIS Rules, the respondent shall notify the DIS of any proposals regarding the seat of the arbitration, the language of the proceedings and the rules of law applicable to the merits within 21 days after receipt of the request for arbitration.

If the tribunal consists of three arbitrators, the respondent shall also nominate its co-arbitrator within 21 days. In its submission, the respondent may also request an extension of the deadline to submit the answer to the request for arbitration ("answer"). In general, the deadline for the respondent's answer is 45 days following its receipt of the request for arbitration. The respondent may also request that the deadline be extended up to a maximum of 30 days.

The DIS will request that the co-arbitrators, once appointed, jointly nominate the president of the arbitral tribunal ("president") within 21 days (instead of 30 days

under the 1998 DIS Rules). If they fail to do so, the DIS Appointing Committee selects and appoints the president.

#### **Further Rules For More Efficiency**

The revised DIS Rules establish further new requirements for more efficiency in arbitration. Article 27 establishes some of these measures. For example, a case management conference has to be held within 21 days from the constitution of the arbitral tribunal. In that conference, the tribunal shall discuss with the parties the procedural timetable, which of the measures set forth in the new Annex 3 to the DIS Rules should be applied in the proceedings, whether the expedited rules should be applied, and the possibility of using mediation or any other method of amicable dispute resolution. Annex 3 also outlines a set of measures—such as the limitation of submissions and witness testimonies, the issuance of partial awards and document production—that shall be discussed at a future case management conference.

#### **Increased Involvement Of The DIS**

The revised DIS Rules furthermore provide for an increased involvement of the DIS in the arbitration by strengthening the competences of the institution. Thus, in order to enhance efficiency in the proceedings and ensure the application of the new provisions, the DIS Rules require the tribunal to keep the DIS informed by transmitting to the DIS, *inter alia*, a copy of the procedural timetable and all procedural orders.

#### **Arbitration With Multiple Parties And/Or Under Multiple Contracts And Consolidation**

The DIS Rules also set out provisions for arbitration proceedings involving more than two parties and arbitration proceedings based on multi-contract claims as well as joinder. Claims arising out of or in connection with multiple contracts may be decided in a single arbitration (multi-contract arbitration), provided that all parties to the dispute have agreed thereto. If such an agreement is disputed, it is on the arbitral tribunal to decide the admissibility of such a multi-contract arbitration.

Also, claims between more than two parties may be decided in a single arbitration (multi-party arbitration) if there is an arbitration agreement that binds all of the parties to have their claims decided in a single arbitration

or if all of the parties have so agreed in a different manner. It is on the arbitral tribunal to decide the admissibility of a multi-party arbitration if a dispute arises regarding whether the parties have agreed on such an arbitration.

Furthermore, the DIS Rules allow a party to submit a request for arbitration to the DIS in order to join an additional party after the arbitration has started. The party can only do so prior to the appointment of any arbitrator. Again, it is on the arbitral tribunal to decide the admissibility of such a joinder if a dispute arises over whether claims made by or against the additional party may be resolved in the pending arbitration.

Upon the request of one party and if all parties agree, the DIS may consolidate several arbitration proceedings into a single arbitration proceeding.

#### **Appointment And Challenge Of Arbitrators**

If an arbitrator is challenged, the DIS informs the arbitrators and the other party of the challenge and sets a reasonable time limit for comments from the challenged arbitrator, the other arbitrators and the other party. Under the 1998 DIS Rules, the other arbitrators do not comment on the challenge, as it is they who decide on the challenge of the arbitrator. Under the revised DIS Rules, this competence will now shift to the DIS, and a newly established body, the Arbitration Council, will decide on the challenge once the arbitrators and the other party have submitted their comments.

The revised DIS Rules furthermore aim to enhance the neutrality of arbitral tribunals. If the co-arbitrators do not nominate the president within the time limit set, the DIS Appointing Committee will elect and appoint an arbitrator of a different nationality than the parties unless the parties are of the same nationality or have agreed otherwise.

Article 12.2 of the DIS Rules now allows for the co-arbitrators to consult with the parties regarding the selection of the president.

#### **Interim Measures**

Furthermore, the DIS Rules now contain a more elaborate provision on interim measures. The 1998 DIS Rules already state that unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any interim measure of protection as the

arbitral tribunal may consider necessary in respect of the subject matter of the dispute. The revised DIS Rules explicitly state in Article 25 that the arbitral tribunal may also amend, suspend or revoke any such measure. The new provision also sets out the procedure once a party has requested an interim measure. In general, the arbitral tribunal submits the request to the other party for comments. The arbitral tribunal may refrain from doing so if submitting the request for interim relief and hearing the other party would risk frustrating the purpose of the measure. However, in such a case, the arbitral tribunal has to notify the other party of the request no later than when ordering the measure. The arbitral tribunal shall promptly grant the other party a right to be heard. Thereafter, the arbitral tribunal has to confirm, amend, suspend or revoke the measure.

**Mealey's: Why was it important to provide an updated version of these rules?**

**Hilgard:** Overall, the DIS Rules Arbitration Rules 2018 aim at increasing the efficiency of arbitration procedures and to satisfy the needs of domestic and international users. The new rules for more efficiency oblige the tribunal and the parties to discuss and agree on the procedure at an early stage of the arbitration. The new rules furthermore offer a wide range of measures that can lead to faster and less expensive proceedings, if the parties make use of them. The new deadlines set out in the DIS Rules will also help increase efficiency. The consolidation of multiple disputes into a single arbitration, multi-party or multi-contract arbitration proceeding, as well as joinder, are considered progress in respect to the efficiency of the arbitration proceedings. In light of that—and given that multi-party and multi-contract arbitration situations have increased significantly in recent years due to a growing complexity of business relationships—it is a welcome development that the revised DIS Rules now set out procedures in this regard.

Furthermore, by obliging the parties to make their submissions only in electronic form once the arbitration tribunal has been constituted, the DIS follows recent trends. German state courts are currently undergoing improvements that will oblige lawyers to file their submissions only electronically.

**Mealey's: How have the new rules affected DIS arbitration since their enactment, and how will the rules impact cases in the future?**

**Hilgard:** Arbitral institutions are always under considerable pressure to provide a mechanism for a quick

dispute resolution mechanism. The competition between arbitral institutions such as the DIS, the ICC, the LCIA and other arbitral institutions is considerable. The newly introduced deadlines are meant to increase the efficiency. Whether it really helps the efficiency that some duties which in the old rules were the core duties and obligations of arbitrators are now being transferred onto the institution itself remains to be seen.

**Mealey's: How do the new rules promote the goals of the DIS?**

**Hilgard:** It is too early to judge how the new rules really have affected DIS Arbitration. Since March 2018, only a two-digit number of new arbitrations has been filed. It may very well be, however, that the new rules will also have an indirect impact on arbitration cases still pending under the old rules.

**Mealey's: How have the new rules been accepted by the arbitration community in Germany?**

**Hilgard:** The new rules definitely strengthen the power of the institution and shift certain responsibilities which formerly had been attributed to the arbitrators onto the DIS.

If one has a close look at legal literature dealing with the introduction of the new rules, one could come to the conclusion that the arbitration community is entirely happy with the new rules. This might also be due to the fact that the proposed rules have been widely discussed for a number of months within the community and most of the lawyers active in the arbitration industry have been given the opportunity to provide their input and criticism. Thus, one can say that the acceptance rate of the arbitration community is overwhelming. I personally would have preferred if the competence and authority of the arbitral tribunal would not have been affected by shifting core responsibilities onto the arbitration institution. However, as this is the case in several of the arbitral rules with which the DIS competes (in particular the rules of the ICC), there is probably no way back.

**The Hong Kong International Arbitration Centre Administered Arbitration Rules**

On Aug. 29, 2017, the Hong Kong International Arbitration Centre (HKIAC) announced that it was considering possible amendments to the current version of

the 2013 HKIAC Administered Arbitration Rules, which became effective on Nov. 1, 2013, and updated a 2008 version of the rules. The HKIAC said that it intended to amend the rules due to a significant increase in the number of arbitrations filed with it since the 2013 rules became effective. On July 11, the HKIAC announced that it had issued a second draft of the proposed rules. Andrew Aglionby has been involved in arbitration since 1986. Since 2015, he practices mostly as an independent arbitrator and is involved in commercial cases of many different types, including technology, telecoms, construction, international trade and shareholder issues. He was formerly the head of arbitration for Baker & McKenzie in Asia Pacific and head of construction for Hong Kong. Aglionby is a member of the ICC Commission on Arbitration and ADR. He is a Chartered Arbitrator and a Fellow of the Chartered Institute of Arbitrators and of the Hong Kong Institute of Arbitrators.

**Mealey's: What is the status of the consultation process, and when can the release of the updated rules be expected?**

**Aglionby:** The HKIAC has sought comments on evolving drafts of revisions to the existing (2013) Administered Rules, most recently with a draft published on 11 July 2018. The next steps planned are for the HKIAC to hold working group sessions in Hong Kong and possibly other places, including China, Singapore, Russia and London. Comments and suggestions are sought and welcomed by the HKIAC. The outcome of those initiatives will be considered by the HKIAC when finalizing the revisions to the rules.

There is no fixed date for publication of the final revision as yet. It would not be surprising to have progress by Hong Kong Arbitration Week which is in October each year.

**Mealey's: What are the key amendments to the rules?**

**Aglionby:** There is a focus throughout the arbitral world on issues arising from third party funding in arbitration. In Hong Kong there have been recent legislative changes to make clear that third party funding is permitted (in arbitration) and does not contravene rules relating to champerty and maintenance. The HKIAC rules revisions respond to that recent focus. In particular the draft rules specifically require additional disclosure of third party funding.

Third party funding creates issues in the separate categories of conflict of interest and cost recovery. It is not immediately clear which of those is the principal target of the amendments. If it is conflict of interest, then existing rules may already be sufficient. The same can probably be said for cost recovery issues.

At the moment the draft rule contains no definition of a third party funding agreement, and that is an issue for further consideration. That definition can change from jurisdiction to jurisdiction, so there are good reasons for not being overly prescriptive. However, having no definition may create circumstances which lead to disputes about the meaning and effect of the provisions.

It is proposed that the existence of a third party funding agreement be included in the Notice of Arbitration. Some parties may not wish to disclose such arrangements. It is also not clear what sanction would apply if such a notice were not included—perhaps it may even lead to a challenge to the validity of the Notice of Arbitration and so a threat to the jurisdiction of the arbitrators. It may be less risky to have any such notice requirement as a separate later step.

There is now an express rule allowing the arbitrators to take account of third party funding when awarding costs. The overall determination of costs is still a discretionary matter for the tribunal. This is a helpful addition which resolves a possible ambiguity about the power of the tribunal to take account of third party funding.

There are some substantial revisions to the approach to consolidation, joinder and multiple contracts being dealt with under a single arbitration. On a related theme there is a new provision allowing concurrent arbitrations to be conducted by the same arbitral tribunal. These all address a significant commercial issue which is that different parties can be involved in related transactions. Facts can be relevant in disputes between different parties. A simple example is a traded commodity, bought from party A by party B and onsold to party C. Disputes about quality might well be the same. Issues of conflict of interest and respecting confidentiality of information jostle uncomfortably with themes of efficiency and consistency of decision. And, of course, arbitration is a contractual right which only binds parties who have agreed to it (and only to the extent of that agreement). Having one arbitration with

parties who cannot easily be said to have agreed to arbitrate with each other is something that may risk enforcement, however convenient and sensible it is at one level.

The user demand is to address these issues and that is what the HKIAC draft rules do. It seems likely that voluntary compliance with the resulting awards will be more common than disputes about enforcement. Some arbitrations applying these provisions have potential to raise challenges to enforcement in due course, and it will be interesting to see how that story progresses.

The draft rules specifically provide for adjustments to the procedures to accommodate ADR process such as mediation. The proposal is that the tribunal will have the power to suspend the arbitration at the request of one party. The tribunal retains a discretion on whether to do so. There is a balancing provision requiring that the arbitration resume at the request of any party. It would be unusual and apparently short-lived for one party to have this unilateral power, and it is likely to be more usual for all parties to request a suspension (which would not usually require an express rule to permit that). The rules provide a logical approach in that it covers a conceivable event, but do not propose a change that is likely to make much difference in most arbitrations. It may be a signal to the parties that ADR approaches are consistent with arbitration and so should be considered.

There are provisions for early determination of points of law or fact which are alleged to be manifestly without merit, or manifestly outside the jurisdiction of the tribunal, or would add nothing even if assumed to be correct. A request for early determination would be made by one of the parties and decided within a short period of time (subject to extension by the parties or the HKIAC, but not by the tribunal).

This is not the same as a summary decision on the merits of a claim (for example one that has not been defended). It is an early review of weak or irrelevant points. It is a power that is useful to add. It is also one that would have to be exercised carefully to avoid challenges to the award as unsuccessful parties may allege that they did not have a reasonable opportunity to put the case on which they relied. That fair process issue is a real one of course, and tribunals would no doubt have it firmly in mind if and when exercising these powers.

Having the right to undertake the review clearly set out in the institutional rules means the parties have agreed to it, which is a helpful step in managing complaints when it is applied.

The draft rules contain a specific power for the tribunal to award deposits of costs paid on behalf of another party. This is helpful and clear as it avoids any arguments over the Tribunal's power to take such action. It can happen that some parties take a tactical decision not to make payments demanded for the arbitration. That arises during the course of the arbitration and has been argued not to be a breach of contract within the jurisdiction of the arbitrators. Having the specific power to manage this situation is a good clarification.

The rules add provisions to recognise the upload of documents onto a secured online repository as a valid means of service provided that the parties have agreed. Parties may agree to use their own repositories or a dedicated repository provided by HKIAC. This is a useful recognition of current commercial practice more generally. There are some very large companies who have strict IT policies (for example, financial institutions, or technology companies) which may not permit the use of such repository's, and they will not agree to use it, but cannot be compelled to. It is not completely clear how the costs involved will be calculated or allocated although that point can be considered at the time the parties are agreeing the use of such facilities.

The HKIAC requires the arbitrators to provide an anticipated date for delivery of the award. This is something the ICC has taken further with a benchmark delivery date of 2 months from final submissions for sole arbitrators and 3 months from final submissions for three-person tribunals. For complex matters those can be challenging timetables which can be extended. It is helpful to communicate a realistic date for publication of the award. The parties have every right to know when it is coming and are very interested in what it will say.

### **Mealey's: Why is it important to provide an updated version of these rules?**

**Aglionby:** The HKIAC has a policy of reviewing its rules every 5 years. The current version came into effect in 2013 and the current review follows that policy.

The review allows the HKIAC to consider its experience of the current rules, comments from parties and

people interested in and experienced in the sector and take account of current best practice globally. The review includes ideas and concepts discussed and implemented by other arbitration institutions and commissions.

### **Mealey's: How do the proposed rules promote the goals of the HKIAC?**

**Aglionby:** The HKIAC aims to provide tools and support for effective resolution of disputes. Its rules are there to serve the needs of the parties that use them. A review that provides new or better tools fits with that approach.

A rules revision is also an opportunity for the HKIAC to promote its services and show that it is alert to the demands of the global and Asian market places for arbitration institutions.

### **Mealey's: How will the updated rules significantly impact HKIAC-administered arbitrations?**

**Aglionby:** The HKIAC's aim with the revised rules is to remove uncertainty or ambiguity from the rules. The rules are designed to promote a streamlined, efficient and cost-effective process. The rule changes appear incremental rather than fundamental and in most situations there is likely to be little difference in the day-to-day conduct of HKIAC-administered arbitrations.

## **Vienna International Arbitral Centre (VIAC) Rules**

A new version of the Vienna International Arbitral Centre (VIAC) Rules became effective Jan. 1. The new rules were approved by the Extended Presiding Committee of the Austrian Federal Economic Chamber on Nov. 29. The VIAC announced that the rules, which include Rules of Arbitration, Rules of Mediation and Annexes, apply to all arbitrations commenced after Dec. 31, 2017. The previous version of the rules was issued in 2013. Dr. Veit Öhlberger, M.Jur. (Oxon), is a partner at DORDA Rechtsanwälte GmbH, and a member of the Vienna Bar. His practice focuses on arbitration (as party counsel and as arbitrator) as well as on trade, supply and distribution. He heads the firm's China desk.

### **Mealey's: Why was it important to provide an updated version of these rules?**

**Öhlberger:** An amendment of the Austrian Federal Economic Chamber Act earlier in 2017 broadened VIAC's

mandate to include also purely domestic cases. As a result, the rules of the VIAC ("Vienna Rules") needed to be updated. VIAC used this opportunity to introduce some further amendments to increase procedural efficiency, to deal with certain aspects of costs and to further promote gender diversity.

### **Mealey's: What are the key amendments to the rules?**

**Öhlberger: Domestic cases:** Leaving the division between domestic and international cases behind, VIAC is now authorized to also administer purely domestic cases (Article 1 Vienna Rules). As of July 1, 2018, VIAC supersedes the arbitration institutions of the 9 regional economic chambers, formerly exclusively competent for domestic cases.

**Security for costs:** At respondent's request, arbitral tribunals may under certain circumstances order claimant to provide security for costs. The respondent has to demonstrate that the recoverability of a potential claim for costs is, with a sufficient degree of probability, at risk. Article 33 (6) Vienna Rules requires the arbitral tribunal to hear also claimant's views before deciding on such request. If a party fails to comply with an order for security for costs, the arbitral tribunal may, upon request, suspend in whole or in part, or terminate, the proceedings (Article 33 (7) Vienna Rules).

**Efficient and cost-effective proceedings:** The new rules clarify that proceedings should be conducted in an efficient and cost-effective manner. Arbitral tribunals may take this aspect into consideration when rendering a decision on costs (Article 38 (2) Vienna Rules).

**Flexibility when determining arbitrator's fees:** The Secretary General has the discretion to increase or decrease on a case-by-case basis the arbitrator's fees by a maximum total of 40 percent vis-à-vis the fee schedule annexed to the Vienna Rules. When applying this discretion, in particular the complexity of the case and the efficient conduct of proceedings shall be taken into account (Article 44 (7) Vienna Rules).

**Gender diversity:** The revised rules address gender diversity by clarifying that terms used in the Vienna Rules, which refer to natural persons, shall apply to all genders and that in practice these terms shall be used in a gender-specific manner (Article 6 (2) Vienna Rules).



**Electronic case management system:** All cases are administered through a new electronic case management system. With the exception of the statement of claim and the arbitral award, all correspondence between the parties and the arbitral tribunal may be submitted to the Secretariat in electronic form only.

**New structure:** The Vienna Rules are now divided into three equal parts: Part I the Vienna Arbitration Rules, Part II the Vienna Mediation Rules and Part III the annexes, including the fee schedules and model clauses. The new structure reflects the increased relevance of mediation as a mechanism for alternative dispute resolution.

**Secretary of the arbitral tribunal:** In line with the practice of many arbitral tribunals to seek administrative support from younger colleagues, the Vienna Rules now also contain a reference to tribunal secretaries. It is clarified that parties shall not be charged with any fees or costs for involving an administrative secretary, with the exception of reasonable expenses for travel and subsistence, which may be reimbursed as part of the procedural costs.

**Fees:** Registration and administration fees have been reduced for low amounts in dispute of up to EUR 75,000. At the same time, for high-value claims over EUR 5,000,000 the Vienna Rules provide for a slight increase in the administrative fees.

#### **Mealey's: How will the new rules change arbitration in Vienna?**

**Öhlberger:** Vienna is one of the prime European arbitration hubs. In addition to VIAC arbitrations, we also see a lot of ICC and ad hoc arbitrations seated in Vienna.

Opening the Vienna Rules for domestic cases without requiring an international aspect further promotes alternative dispute resolution in Austria. Domestic parties will benefit from the longstanding experience of the VIAC and the number of cases administered by the VIAC will increase.

#### **Mealey's: How do the updated rules promote the goals of the VIAC?**

**Öhlberger:** VIAC is a prominent and leading arbitral institution in Europe, as such one of its main aims is

to provide a flexible and efficient procedure for parties. The updated rules enhance efficiency in arbitral proceedings.

The revision also further promotes mediation by formally putting the Vienna Mediation Rules on an equal footing with the Vienna Arbitration Rules and by making ARB-MED-ARB possible.

By including a reference to gender in the new rules, VIAC confirmed its policy priority of maximizing gender diversity, which is also reflected in its institutional appointments and their online disclosures. As of 2015 the VIAC also reports on the number of women and men in their arbitral tribunals and since 2016 also regarding mediators (see <http://www.viac.eu/en/service/statistics>).

#### **Mealey's: How have the new rules been accepted by the arbitration community in Vienna?**

**Öhlberger:** The Vienna Rules are liked for their simple and flexible character. The latest revision has maintained these key features and has been well received by the arbitration community, in particular for the possibility to request security for costs and the option to also conduct purely domestic cases under the administration of the VIAC. As one colleague put it: "the hallmarks of VIAC arbitration are a maximum of party autonomy and arbitrator discretion, grounded in a safe, reliable, tried and tested institutional platform. In that sense, the latest revision enlarged the tool kit, without disrupting the continuity that users have come to expect from the VIAC as an institution."

#### **International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (ICAC) Rules**

The International Arbitration Court at the Ukrainian Chamber of Commerce and Industry (ICAC) issued new rules, which became effective Jan. 1. The new ICAC Rules, approved by the Presidium of the Ukrainian Chamber of Commerce and Industry (UCCI) No. 25(6) on July 27, 2017, updated the 2007 ICAC Rules. Olena Perepelynska is a partner and head of CIS Arbitration Practice at INTEGRITES with offices in Ukraine, Russia and Kazakhstan. She is also a President of the Ukrainian Arbitration Association and Fellow of the Chartered Institute of Arbitrators. Perepelynska is an experienced counsel and arbitrator in CIS-related disputes.

### **Mealey's: Why was it important to provide an updated version of these rules?**

**Perepelynska:** In many respects, previous edition of the ICAC Rules of 2007 was rather old-fashioned and tinted with some peculiarities of the Ukrainian commercial court proceedings, which in itself until the reform of December 2017 was outdated, inflexible and affected by the soviet past. For example, the ICAC Rules of 2007 simply did not provide for use of any modern technologies for communication, submissions, hearing or any other procedural purposes. Their evidentiary rules did not correspond to the best arbitration practices, and for instance, did not allow the parties to appoint their own experts. The updated version of the ICAC Rules fills many of these gaps, and responds to the criticism of the arbitration community. Despite the fact that there is still room for further improvement, 2018 ICAC Rules are a significant step forward in developing arbitration procedural framework in Ukraine.

### **Mealey's: What are the key amendments to the rules?**

**Perepelynska:** Key innovations of the 2018 ICAC Rules include new provisions on expedited arbitration procedure (Article 45), on assistants to the arbitral tribunal (Article 10), on evidentiary matters (Articles 52-55), on scrutiny of an arbitral award by the Secretary General of the ICAC (Article 60), on awards publishing policy (Article 68), as well as new rules on determination of the amount of claim, and respective arbitration fee based on the relief sought (Article 15).

In addition, the 2018 ICAC Rules incorporate a number of digital and technical improvements, and now expressly allow for, *inter alia*, commencement of arbitration on the basis of arbitration agreements concluded in electronic form (Article 4), submission and circulation of documents relating to arbitral proceedings in electronic form (Article 11), submission of electronic evidence in electronic form (Article 52) and recording of oral hearings (Article 50).

### **Mealey's: How will the rules affect ICAC arbitration going forward?**

**Perepelynska:** The new ICAC Rules have solved many existing problems and filled in many gaps in the previous edition of the Rules. They increase time- and cost-efficiency of proceedings, transparency of ICAC's arbitration practice, and improve services of

the institution to better meet the needs of its users. It is expected that they will enhance the ratio in time-cost-quality triad of ICAC arbitrations, and make ICAC more competitive not only in Ukraine, but on a regional level.

### **Mealey's: How do the updated rules promote the goals of the ICAC?**

**Perepelynska:** The updated ICAC Rules aim to promote the following goals of the ICAC further: (i) to be a flagship institution among the arbitration institutions in Central and Eastern Europe, (ii) to integrate leading international arbitration standards in Ukraine, and (iii) to offer comfortable, efficient, fast and transparent arbitration procedures to the parties.

### **Mealey's: How have the new rules been accepted by the arbitration community in Ukraine?**

**Perepelynska:** Arbitration community in Ukraine accepted the new ICAC rules with cautious optimism. It is definitely a positive development to see so many refinements and market-leading innovations in the new Rules, but ultimately, their application is not only in the institution's hands, but also in those of arbitrators. Unfortunately, new Rules have not changed the situation with ICAC arbitrators. In spite of all the criticism of the users towards mandatory roster of arbitrators, and in spite of ICAC's promises to introduce a procedure allowing parties to appoint an arbitrator not included in the roster, the new ICAC Rules do not allow for that.

## **The International Institute for Conflict Prevention and Resolution (CPR) Revised Non-Administered Arbitration Rules**

On March 5, the International Institute for Conflict Prevention and Resolution (CPR) announced that it revised the CPR Non-Administered Arbitration Rules for domestic and international arbitrations. The rules became effective on March 1 and were introduced at the CPR's annual meeting in Atlanta. The CPR Rules were last updated in 2007. Albert Bates Jr. is a partner in the Construction Practice Group of Pepper Hamilton LLP and leads the Group's International Construction Arbitration Practice. Bates focuses his practice on the arbitration of domestic and international construction disputes, particularly in the areas of power generation, infrastructure and industrial processing

and refining facilities. He has acted as an arbitrator for over 100 domestic and international construction disputes. Bates is a member of the Board of Directors of the American Arbitration Association/International Centre for Dispute Resolution and a Fellow of the American College of Construction Lawyers and the College of Commercial Arbitrators.

### **Mealey's: Why was it important to provide an updated version of these rules?**

**Bates:** Arbitral institutions like CPR serve a critical role in arbitral practice by issuing rules and offering services that assist parties interested in utilizing arbitration as a cost-effective and efficient dispute resolution mechanism. Those rules and services, however, must adapt to the needs of users. Over the course of the past decade, several arbitral institutions like the AAA, International Centre for Dispute Resolution, International Chamber of Commerce, and the London Court of International Arbitration, to name just a few, have revised their arbitration rules to incorporate new procedures aimed at addressing issues confronted by the arbitration community.

The 2018 updates to the CPR's Non-Administered Arbitration Rules, which were last updated in 2007, is part of this trend. Like the updates issued by other arbitral institutions, the 2018 CPR's Non-Administered Arbitration Rules now include provisions concerning multiparty arbitration, the apportionment of costs, emergency arbitration rules—along with a pair of slightly more innovative procedures related to the “screened selection” of arbitrators and cybersecurity measures. The CPR also aimed to improving opportunities for young attorneys. These updates are important because, without them, the CPR's Non-Administered Arbitration Rules would not fully reflect current “best practices” in the arbitration community.

### **Mealey's: What are the key amendments to the new rules?**

**Bates:** As mentioned above, the 2018 update to the CPR's Non-Administered Arbitration Rules include a variety of procedures including multiparty arbitration, cost apportionment, and emergency arbitrations. These updated procedures are generally intended to conform the CPR Non-Administered Rules to the procedures and rule changes that have been implemented by other arbitral institution rules and thus, are not worth describing in significant detail here. The point is that

CPR's Non-Administered Arbitration Rules have been revised to reflect current practices in the arbitration community.

There are, however, three changes that are worth discussion; (i) CPR's “screened selection process”; (ii) addressing cybersecurity measures during the preliminary hearing conference; and, (iii) the “Young Lawyer” rule.

#### **Screened Selection Rule**

The CPR's screened selection process enables the parties to select party-appointed arbitrators without informing the arbitrator-candidates of the appointing party's identity in order to eliminate perceived bias by party-appointed arbitrators to their appointing party.<sup>1</sup> While the CPR's inaugural Administered Arbitration Rules from 2013 incorporated the “screened selection” procedure, the CPR Non-Administered Rules did not reflect the procedure prior to the 2018 revisions.

According to Rule 5.4 of the Non-Administered Arbitration Rules, if the parties have opted into the CPR's screened selection process, the CPR will invite the parties to provide a list of potential arbitrators to be circulated between the parties by the CPR. At the time the CPR circulates the parties' list of potential candidates, the CPR also provides a confirmation of the candidates' availability and the disclosure of any circumstances that might give rise to concerns over the candidates' lack of impartiality or independence. From the list of candidates, the parties select three candidates, in order of preference, for their party-appointed arbitrator and notify the CPR and opposing party of their selections in writing. The tribunal is then appointed from this list, with the CPR ensuring that the potential party-appointed arbitrators remain unaware of the party that selected them. Overall, while other institutions have utilized similar procedures, CPR's 2018 revisions suggest that “blind” or screened selection procedures are gaining greater acceptance in the marketplace.<sup>2</sup>

#### **Cybersecurity Measures**

The 2018 update to the CPR Non-Administered Rules also includes a new provision concerning data protection and cybersecurity measures. With reference to the initial pre-hearing conference, Rule 9.3(f) provides that the parties *may* consider a variety of matters concerning the administration of the arbitration, including “[t]he possibility of implementing steps to address issues of

cybersecurity and to protect the security of information in the arbitration.” By including an explicit reference to cybersecurity, the 2018 revisions suggest that tribunals consider adequate measures to ensure the protection of the parties’ confidential information.

The CPR’s efforts to focus attention on cybersecurity in arbitration are commendable, as the need to protect confidential information is among the most pressing issues facing the legal community and its clients. Rule 9.3(f) facilitates the discussion between the tribunal and the parties from the outset of the case and, as best practices would suggest, may ultimately produce an appropriate confidentiality and data protection protocol for each case. In short, Rule 9.3(f) takes a step forward from prior rules by explicitly reminding all tribunals to discuss data protection and cybersecurity issues at the outset of the arbitration.

#### **Young Lawyer Rule**

Possibly among the most in unique elements of the 2018 update is the CPR’s “Young Lawyer” rule which aims to increase opportunities for junior lawyers to take a more active role in arbitration hearings.

Specifically, according to Rule 12.5 of the CPR’s Non-Administered Rules:

In order to support the development of the next generation of lawyers, the Tribunal, in its discretion, may encourage lead counsel to permit more junior lawyers with significantly less arbitration experience than lead counsel to examine witnesses at the hearing and present argument. The Tribunal, in its discretion, may permit experienced counsel to provide assistance or support, where appropriate, to a lawyer with significantly less experience during the examination of witnesses or argument. Notwithstanding the contents of this Rule 12.5, the ultimate decision of who speaks on behalf of the client in an arbitration is for the parties and their counsel, not the Tribunal.

The CPR’s “Young Lawyer” Rule is an admirable effort to promote the professional experience of young attorneys within the arbitration field. However, as the rule acknowledges, the ultimate decision of

whether a young lawyer can be given significant authority to act on behalf of a client, rests with the client itself.

#### **Mealey’s: How will the new rules impact CPR arbitration in the future?**

**Bates:** Candidly, I am not certain that the 2018 updates to the CPR Non-Administered Arbitration Rules of Arbitration will fundamentally impact how, or the extent to which, those rules are used in the future. As explained above, the principal motivation for the 2018 update to the CPR’s Non-Administered Arbitration Rules was to conform the Rules to the current practices in the arbitration community. As a result, I do not believe that the 2018 update to CPR’s Non-Administered Arbitration Rules will have much impact on their use.

#### **Mealey’s: How do the updated rules promote the goals of the CPR?**

**Bates:** CPR, as an independent non-profit organization, has made its mission to assist businesses effectively and efficiently prevent and resolve commercial disputes. To that end, the 2018 updates to the CPR’s Non-Administered Arbitration Rules advance the CPR’s mission by incorporating procedures (e.g., rules concerning multiparty arbitration, emergency arbitration) that reflect the current practices in the arbitration community. Further, CPR sought to address three issues that it perceived as problematic: (i) perception of bias by party-selected neutral arbitrators; (ii) data protection and cybersecurity issues presented in connection with the data being used and exchanged in the arbitration; and, (iii) increased opportunities for young lawyers under the supervision of experienced lawyers.

#### **Mealey’s: How have the new rules been accepted by the CPR arbitration community?**

**Bates:** I am not aware of any hard data on the updates to the Rules, but anecdotally the Rules appear to have been very well received by CPR users and the arbitration community at large. Given the increased significance the arbitration community has placed on cybersecurity, I expect that most will view the CPR’s consideration of cybersecurity measures as step in the right direction. Likewise, the option of a “blind” selection process for party-selected neutral arbitrators is becoming more common and widely accepted in some circles. Finally, expressly authorizing the arbitral tribunal to “encourage lead counsel” to allow the junior lawyers to participate

more fully in the proceedings is an innovative step forward in the training and development of the next generation of arbitration specialists. Consequently, I am optimistic that the updates will be favorably accepted by the CPR arbitration community.

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### Endnotes

1. Whether such bias actually exists is the subject of some debate. See Jan Paulsson, *Moral Hazard in International Dispute Resolution*, 25 ICSID Rev. 339 (2010); Albert Jan van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, in LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL
2. While the AAA has informally offered list and appointment services on non-administered matters for a long time, it formally began offering the AAA's "À La Carte Services" for non-administered cases, including similar assistance with the screening, selection and "blind" appointment of arbitrators, in 2016. ■

LAW IN HONOR OF W. MICHAEL REISMAN (2011); Charles Brower & Charles B. Rosenberg, *The Death of the Two-Headed Nightingale: Why the Paulsson-Van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded*, 6 WORLD ARB. & MED. REV. (2012); Sergio Puig & Anton Strezhnev, *Affiliation Bias in Arbitration: An Experimental Approach*, ARIZ. LEGAL STUDIES DISCUSSION PAPER No. 16-31 (2016).

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*edited by Lisa Hickey*

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1600 John F. Kennedy Blvd., Suite 1655, Philadelphia, PA 19103, USA

Telephone: (215)564-1788 1-800-MEALEYS (1-800-632-5397)

Email: [mealeyinfo@lexisnexis.com](mailto:mealeyinfo@lexisnexis.com)

Web site: <http://www.lexisnexis.com/mealeys>

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