



NEW YORK CITY BAR ARBITRATION COMMITTEE
SUBCOMMITTEE ON ARBITRATOR APPOINTMENT PROCEDURES

**ARBITRATOR APPOINTMENT PROCEDURES
OF ARBITRAL INSTITUTIONS IN
COMMERCIAL ARBITRATIONS**

Committee on Arbitration

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TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION / OVERVIEW.....	1
AMERICAN ARBITRATION ASSOCIATION (AAA)	2
I. Overview.....	2
II. Number of Arbitrators.....	2
A. Applicable Rules.....	2
B. Institutional Practices.....	3
III. Party Nominations	3
A. Applicable Rules.....	3
B. Institutional Practices.....	3
1. Enhanced Neutral Selection Process.....	5
2. Chair Selection.....	5
3. Non-Participation by a Party in the Appointment Process	5
IV. Institutional Appointments.....	6
A. General.....	6
1. Applicable Rules.....	6
2. Institutional Practices.....	6
B. Acting as Appointing Authority.....	7
C. Emergency Arbitrators.....	8
D. Small Claims in Expedited Arbitration.....	8
V. Special Situations.....	9
A. Multi-Party Arbitration	9
B. Consolidation	9
C. State Entities	9
D. Challenges to and Replacement of Arbitrators	9
VI. Arbitrator List Services.....	10
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION (ICDR)	12
I. Overview.....	12
II. Number of Arbitrators.....	12
A. Applicable Rules.....	12
B. Institutional Practices.....	13
III. Party Nominations	13
A. Appointment of Arbitrators by the Parties without the Assistance of the ICDR.....	13
B. Appointment of Arbitrators with the Assistance of the ICDR.....	14
C. Appointment of the Chair of the Tribunal	15
D. Institutional Practices.....	15
E. Emergency Arbitrators.....	16
F. Small Claims and Expedited Arbitration	17
IV. Special Situations.....	17
A. Multi-party Arbitration	17
B. Consolidation	18
C. State Entities	18

TABLE OF CONTENTS

	<u>Page</u>
D. Challenges to and Replacement of Arbitrators	18
V. Arbitrator List Services	19
INTERNATIONAL COURT OF ARBITRATION OF THE INTERNATIONAL CHAMBER OF COMMERCE (ICC)	21
I. Overview	21
II. Number of Arbitrators	21
A. Applicable Rules	21
B. Institutional Practices	22
III. Party Nominations	22
A. Applicable Rules	22
B. Institutional Practices	23
IV. Institutional Appointments	24
A. General	24
1. Applicable Rules	24
2. Institutional Practices	25
B. Acting as Appointing Authority in Non-ICC Cases	27
C. Emergency Arbitrators	28
D. Small Claims in Expedited Arbitration	30
V. Special Situations	30
A. Multi-Party Arbitrations	30
B. Consolidation	31
C. State Entities	32
D. Replacement of Arbitrators	32
VI. Arbitrator List Services	33
INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION AND RESOLUTION (CPR)	35
I. Overview	35
II. Party Nomination and Appointment, Three Arbitrator Panel	36
III. Party Nomination and Appointment, Sole Arbitrator (Or Panel of Three Arbitrators Not Designated by the Parties)	36
IV. Screened Appointments: Party “Designated” Arbitrators	37
V. Institutional Appointment	38
VI. Appointment by CPR Pursuant to CPR Non-Administered Arbitration Rules	40
VII. Special Situations	41
A. Multi-Party Arbitrations	41
B. Replacement Arbitrator	41
C. Interim Measures of Protection by a Special Arbitrator	41

TABLE OF CONTENTS

	<u>Page</u>
VIII. Features of CPR List Process/Neutral Rosters.....	42
JAMS.....	43
I. Overview.....	43
II. Number of Arbitrators.....	43
A. Applicable Rules.....	43
B. Institutional Practices.....	43
III. Party Nominations	44
A. Applicable Rules.....	44
B. Institutional Practices.....	44
IV. Institutional Appointments.....	45
A. General.....	45
1. Applicable Rules.....	45
2. Institutional Practices.....	45
B. Appointing Authority Only (<i>ad hoc</i> arbitrations)	46
C. Emergency Arbitrators.....	47
D. Small/Simple Claims (Default for Claims Under \$250,000).....	47
E. Special Situations.....	47
1. Multi-party	47
2. Consolidation	48
LONDON COURT OF INTERNATIONAL ARBITRATION (LCIA)	49
I. Overview.....	49
II. Number of Arbitrators.....	50
A. Applicable Rules.....	50
B. Institutional Practices.....	50
III. Party Nominations	50
A. Applicable Rules.....	50
B. Institutional Practices.....	51
IV. Institutional Appointments.....	52
A. General.....	52
1. Applicable Rules.....	52
2. Institutional Practices.....	52
(a) Arbitrator Selection Process:	52
(b) Initial lists of arbitrators:.....	53
(c) LCIA database of arbitrators:.....	53
(d) Verification of arbitrator impartiality/independence:	53
(e) Timing of appointments:.....	54
(f) LCIA Appointment Statistics:.....	54
B. Failure by a Party to Nominate an Arbitrator	55
C. Expedited Formation.....	56
D. Emergency Arbitrators.....	56
E. Small Claims in Expedited Arbitration.....	57

TABLE OF CONTENTS

	<u>Page</u>
V. Special Situations.....	57
A. Multi-Party Arbitrations.....	57
B. Consolidation	58
C. State Entities	58
D. Revocation, Challenge and Replacement of Arbitrators.....	58
VI. Arbitrator List Services.....	60
CONCLUSION	61
Committee on Arbitration.....	62

INTRODUCTION / OVERVIEW

This Report by the Arbitration Committee of the New York City Bar Association describes arbitrator appointment procedures of arbitral institutions in commercial arbitrations. The aim of this Report is to bring together information that is not easily accessible to arbitration users and counsel without extensive research and experience. The Report provides guidance on arbitrator appointment options that may not be readily apparent from the institution's arbitration rules and web site.

The arbitral institutions discussed in the Report are the American Arbitration Association (AAA) and its international arm, International Centre for Dispute Resolution (ICDR), the International Court of Arbitration of the International Chamber of Commerce (ICC), the International Institute for Conflict Prevention and Resolution (CPR), JAMS, and the London Court of International Arbitration (LCIA).

There is a section of the Report dedicated to discussing the arbitrator appointment procedures of the respective institutions. Each section is structured similarly for consistency to cover generally the same topics with respect to each institution. The information collected in the Report is the result of extensive research based on publicly available data, user experience, and interviews with representatives of the institutions. The institutions discussed were provided an opportunity to review and provide feedback on a draft of the section describing the practices of that institution. A substantial team from the Arbitration Committee participated in drafting the Report, with two or three members dedicated to researching and drafting each section.

Each section of the Report provides an overview of the arbitral institution and the institution's approach to the selection of both party-nominated arbitrators and institutional appointments. The Report also discusses the role of the institution as an appointing authority, in the appointment of emergency arbitrators, and in special situations such as multi-party arbitration, consolidated arbitration, arbitrations involving state entities, and small claims in expedited arbitration. The Report also discusses the institution's approach to arbitrator challenges and replacement of arbitrators. Where applicable, the Report discusses the institution's arbitrator list services.

The Report is designed to be user-friendly so that corporate in-house and outside litigation counsel who have less experience in arbitration can quickly learn about the arbitrator appointment procedures of various arbitral institutions with respect to commercial arbitrations. The Report reflects research performed in 2016 and 2017. For the most part, this Report does not capture developments within the respective arbitral institutions after 2017.

We take this opportunity to thank the members of the drafting subcommittee who contributed the substantial time and effort to prepare this Report: John Delehanty, Matthew Draper, James Hosking, Jennifer Kim, Giovanna Micheli, Jonathan Montcalm, Nancy Nelson, Steven Reisberg, Steven Skulnik, Joshua Slocum, Jonathan Tompkins and Jeffrey Zaino. Dana MacGrath served as Chair of the drafting subcommittee (during her term as Chair of the Arbitration Committee).

AMERICAN ARBITRATION ASSOCIATION (AAA)

I. Overview

Established in 1926, the American Arbitration Association (“AAA”) is headquartered in New York and has offices in major cities throughout the United States. The international arm of the AAA is the International Centre for Dispute Resolution (“ICDR”), which is discussed in a separate section of this Report. The AAA administers cases from filing to closing and provides various administrative dispute resolution services in the United States. For parties who wish to choose only select services rather than full arbitral administration, the AAA also offers the option to use stand-alone services, including eDiscovery Special Master appointments, arbitrator list or appointment services, arbitrator challenge review, expert case evaluation, and judicial settlement conferences.

The AAA Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes), amended and effective October 1, 2013 (the “AAA Commercial Rules”)¹ include rules for general commercial arbitration, preliminary hearing procedures, expedited procedures, procedures for large, complex commercial disputes, and commercial mediation procedures. Unless the parties agree otherwise, the Procedures for Large, Complex Commercial Disputes will be applied to all cases administered by the AAA under the AAA Commercial Rules in which the disclosed claim or counterclaim of any party is at least \$500,000, exclusive of claimed interest, arbitration fees and costs.

The primary AAA Commercial Rules governing arbitrator selection and appointment are Rules 12 through 16. As a general principle, the AAA will defer to party agreement and choice throughout the arbitral process. In the absence of such agreement or where certain Rules allow the AAA to exercise discretion, an understanding of the institutional practices of the AAA in the selection and appointment of arbitrators can be particularly helpful for users of AAA arbitration. This section of the Report describes AAA institutional practices in the selection and appointment of arbitrators and provides guidance on the various options available that may not be readily apparent from the text of the AAA Commercial Rules.

II. Number of Arbitrators

A. Applicable Rules

Where the arbitration agreement does not specify the number of arbitrators and the parties have not otherwise agreed to the number of arbitrators, the AAA Commercial Rules provide that the dispute shall be heard and determined by a sole arbitrator, unless the AAA in its discretion, directs that three arbitrators be appointed. A party may request three arbitrators in the Demand or Answer, which the AAA will consider in exercising its discretion regarding the number of arbitrators appointed to the dispute. *See* Rule 16(a). A party can also request to change the number of arbitrators as a result of an increase or decrease in the amount of a claim or

¹ Specific Rules within the Commercial Arbitration Rules section (Rules R-1 through R-58) of the AAA Commercial Rules are referenced in this section of the report without the “R” prefix. The AAA also maintains specialized arbitration rules for particular industries and sectors. This report focuses, however, on the AAA Commercial Rules.

a new or different claim. Such a request must be made to the AAA and other parties to the arbitration no later than seven calendar days after receipt by the AAA of the notice of change of claim amount required under Rule 6. If the parties are unable to agree on the request for a change in the number of arbitrators, the AAA will make the determination. *See* Rule 16(b).

B. Institutional Practices

Although Rule 16 gives the AAA discretion to direct the appointment of three arbitrators in the absence of party agreement on the number of arbitrators, in practice the AAA will usually apply the threshold set forth in Rule L-2 of the AAA Procedures for Large, Complex Commercial Disputes. Rule L-2 provides that if the amount in dispute is \$1,000,000 or higher, the AAA will almost always direct the appointment of three arbitrators and not a sole arbitrator. In circumstances involving the financial hardship of a party or other circumstances, however, the AAA may deviate from the foregoing threshold and require that, regardless of the amount in dispute, a sole arbitrator determine the case.

The AAA recently began offering parties to disputes over \$1,000,000 an interesting option for maintaining a three-person tribunal at a potentially lower cost. Under this Three Arbitrator Streamlined Process, only the chair is involved in the initial phases of the case and decides all initial procedural and disclosure issues. The other two arbitrators then actively join the case for the evidentiary hearings phase.

III. Party Nominations

A. Applicable Rules

If the agreement of the parties names an arbitrator or specifies a method of appointing arbitrator(s), the AAA will follow that designation or method. Upon the request of any appointing party, the AAA will provide a list of members of the National Roster from which the party may, if it so desires, make its appointment. *See* Rule 13(a). Under Rule 13(b), where the parties have agreed that each party is to name one arbitrator, the arbitrators so named must meet the standards of Rule 18 regarding impartiality and independence unless the parties have specifically agreed that the party-appointed arbitrators are to be partial and need not meet those standards.

The AAA may appoint the chairperson of the tribunal in certain circumstances. These include, for example, if the time period for appointment specified by the parties for the party-appointed arbitrators to appoint a chairperson has expired, or if no time period is specified by the parties and a chairperson is not appointed within 14 days of appointment of the last-appointed arbitrator, the AAA may appoint the chairperson. *See* Rule 14.

B. Institutional Practices

Like many other arbitral institutions, where the parties to an arbitration agreement have agreed upon the process for selecting a tribunal, the AAA will endeavor to fulfill the parties' agreement and generally will defer to a party's nomination. One arguably unique aspect of the AAA Commercial Rules is that Rule 13(b) provides the express right of the parties to appoint

non-neutral arbitrators. Rule 13(b) clarifies however that there is a presumption of neutrality for all arbitrators, including party-appointed ones, *unless* parties agree to the contrary.² Neutral arbitrators appointed by the parties must meet the impartiality and independence standards set forth in the AAA Commercial Arbitration Rules. *See* Rule 18(a); AMERICAN ARBITRATION ASSOCIATION, A GUIDE TO COMMERCIAL MEDIATION AND ARBITRATION FOR BUSINESS PEOPLE 21 (2013) (the “AAA GUIDE”).³ Furthermore, under Rule 18, the non-neutral arbitrator is still required to perform his or her duties “with diligence and in good faith.”

Where the parties have agreed to appoint non-neutrals under Rule 18(b), parties are exempted from the default prohibition against *ex parte* communications between a party and an arbitrator after the tribunal has been constituted. Rule 19(b). Nevertheless, the AAA’s administrative practice is to suggest to the parties that they agree that Rule 19(a), which limits *ex parte* communications after the tribunal is appointed,⁴ should nonetheless apply prospectively. Usually, this suggestion is made immediately prior to the initial conference among the arbitrators and counsel, so that the chairperson can raise the issue at the initial conference. *See* Carter & Fellas, INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK 155 n.33 (2d. ed. 2016). In cases where the party-appointed arbitrators are serving as non-neutrals, the AAA has issued guidance recommending that parties agree to not communicate *ex parte* with their party-appointed arbitrator after the appointment procedures in the rules have been completed. *See* AAA GUIDE 21. However, the parties still can agree to allow *ex parte* communications.

Because the default rule is to have neutral arbitrators, confusion can arise where parties agree to appoint non-neutral arbitrators. For example, the AAA Commercial Rules as well as the AAA Code of Ethics, both distinguish neutrality, on the one hand, from fairness, integrity, and good faith, on the other. For example, Canon X in the AAA Code of Ethics exempts party-appointed arbitrators serving as non-neutrals from certain ethical obligations, yet still requires such non-neutral arbitrators to “act in good faith and with integrity and fairness” even though they “may be predisposed toward the party who appointed them.” AAA Code of Ethics, Canon X(A)(1).⁵

The AAA has issued guidance to parties on ways to avoid or minimize some of the risks of agreeing to non-neutral arbitrators. *See* AAA GUIDE 21.

² This presumption is also consistent with the requirements of the AAA/American Bar Association Code of Ethics for Arbitrators in Commercial Disputes (effective March 1, 2004) (the “AAA Code of Ethics”). *See* AAA Code of Ethics, at 2. Ethical codes are not binding on courts but often are cited as “highly significant.” JOHN H. CARTER & JOHN FELLAS, INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK 155 n.29 (2d. ed. 2016) (citing *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 436 F.3d 495, 503 n.43 (5th Cir. 2006), *rev’d en banc* 476 F.3d 278 (5th Cir.), cert. denied, 127 S.Ct. 2943 (2007)).

³ Available at https://www.adr.org/sites/default/files/document_repository/A%20Guide%20to%20Commercial.pdf.

⁴ *See also* AAA Code of Ethics, Canon III (on the requirement of arbitrators to avoid impropriety or the appearance of impropriety in communicating with parties).

⁵ Similarly, under Canon X, non-neutral arbitrators are not exempt from either Canon IV’s obligation to conduct the proceedings “fairly and diligently” or Canon V’s requirement to make decisions in a just, independent and deliberate manner, “except that they may be predisposed toward deciding in favor of the party appointed them.” AAA Code of Ethics, Canons X(D); X(E).

1. Enhanced Neutral Selection Process

In the event that the parties need assistance in nominating a party-appointed arbitrator, a sole arbitrator, or a chairperson, the parties have the option of using the strike-and-rank list method, which is discussed in greater detail below, or the AAA's Enhanced Neutral Selection Process. Under the Enhanced Neutral Selection Process, the parties agree to use one or more screening and/or selection methods to assist them in choosing an arbitrator. The standard options that the AAA provides for the Enhanced Neutral Selection Process include (i) oral or written interviews of the arbitrator candidates; (ii) pre-screening arbitrator disclosures and availability; and (iii) expanded resumes (based on research conducted by the AAA or supplementary information provided by the arbitrators). Through this process, the AAA works with the parties to develop an interview protocol for a telephone conference or written questions to prospective arbitrators and to pre-screen a limited number of selected potential arbitrators for conflicts. *See* Carter & Fellas, *INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK* 147 (2d. ed. 2016). The parties must agree in advance on the questions to ask the candidates. In most cases, the parties submit their questions for the arbitrators in writing, and the AAA will review the questions and remove any that are substantive in nature. The AAA also will provide the parties with an early, initial sample of arbitrator resumes based on qualifications requested by the parties and receive feedback from counsel on the type of arbitrators preferred before preparing a final list of arbitrators from which the parties may select through the strike process. *Id.* Parties are not required to use the Enhanced Neutral Selection Process. If they wish to use a separate neutral selection process, the AAA is willing to implement the parties' agreed-upon alternative process so long as it is reasonable, fair and comports with applicable law and the AAA Commercial Rules.

2. Chair Selection

For selection of the chairperson, the AAA generally leaves the selection to the two arbitrators if they are party-appointed. The AAA may appoint a chairperson if there are difficulties in selecting the chairperson or if the selection has not been made within the time period required. In practice, the parties participate in this selection process through the list procedure. When all arbitrators are selected from a list or without a party-appointed selection process, the AAA will either select the highest ranked as chairperson or let the tribunal decide who will be chairperson.

3. Non-Participation by a Party in the Appointment Process

In some cases, a party will fail or refuse to nominate an arbitrator where required to do so. If the AAA confirms that a party has been served with a notice of arbitration but such party fails to participate in nominating an arbitrator, the AAA will complete the arbitrator appointment process. The AAA case administrator will provide notice to such party requiring it to nominate its arbitrator and, if the party fails to do so within 14 days of the notice, the AAA will make the appointment. *See* Rule 13(d). Generally, the AAA will provide additional time to such party to appoint its arbitrator before resorting to appointing the arbitrator itself but in any event will intervene to ensure a panel is formed.

IV. Institutional Appointments

A. General

1. Applicable Rules

The AAA Commercial Rules provide generally that if the parties have not appointed an arbitrator and have not provided for another method of appointment, the AAA will use the “strike-and-rank method” to select arbitrators. Rule 12(b). The AAA will send each party a list of ten names chosen from its National Roster of arbitrators. If the parties cannot agree on an arbitrator from this list within 14 days, each party must strike the names it finds objectionable and return the remaining names to the AAA in order of preference. *See* Rule 12. The AAA will then either appoint an arbitrator based on the parties’ preference or, if an appointment cannot be made based on the submitted lists, the AAA may select an arbitrator from its National Roster without submitting additional lists to the parties.

2. Institutional Practices

After filing of the submission or the answering statement, or upon the expiration of the time within which the answering statement is to be filed, the AAA sends each party a copy of the same list of proposed arbitrators. *Id.*

Rule 12(a) states that the AAA will provide to the parties a list of ten arbitrator candidates chosen from the National Roster. Where possible, the AAA’s practice is to provide ten arbitrator candidates for a sole arbitrator case and fifteen arbitrator candidates for a case with three arbitrators. When the lists are returned to the AAA, the case administrator reviews the parties’ indicated preferences and makes note of the mutual choices.

If desired, the parties can request that the AAA provide additional arbitrator candidates. Alternatively, the parties can create their own strike-and-rank list instead of having the case administrator create the list. Under this method, the parties create their own list and submit it to the case administrator. The case administrator will then add several other names to the list and the parties then proceed to strike and rank the combined list. Where parties are unable to find a mutual choice on a list, additional lists may be submitted at the request of both parties. If the parties cannot agree on an arbitrator, the AAA will make an administrative appointment, but in no case will an arbitrator whose name was crossed out by either party be appointed.

In drafting the list, the AAA is guided by the nature of the dispute. Biographical information on each arbitrator accompanies the list of candidates. AAA GUIDE 20. By default, the AAA will search within the geographical region of the seat of arbitration to minimize travel costs for the parties. When identifying arbitrators for the proposed lists, arbitrator availability is not initially considered. An arbitration agreement may specify that the arbitrator have certain experience or characteristics. For example, an arbitration clause may specify that the arbitrator have a certain number of years’ work experience in a particular industry. Where the arbitration agreement contains such specifics, the AAA will first search its National Roster using keyword searches or by contacting listed neutrals directly to determine if they have the requisite characteristics or experience.

The AAA seeks to have diverse candidates comprise at least 20% of all lists of arbitrator candidates provided to parties. If meeting the 20% diversity goal is not possible given other required attributes (*e.g.*, location, language, nationality, qualifications or experience), the AAA may waive its 20% diversity goal in particular circumstances.

If the AAA is unable to identify from its National Roster any neutrals with the specified characteristics or experience, the AAA may look for arbitrator candidates beyond its National Roster. This expanded research may also include contacting other industry or arbitration associations. To the extent that a non-AAA candidate is identified, all parties to the dispute must agree that such person may be appointed as an arbitrator. The AAA then will follow the parties' agreement and appoint a non-AAA candidate as an arbitrator. In the event that the AAA is not able to identify arbitrators with the requisite experience either on its National Roster or by searching beyond its roster, the AAA may contact the parties to determine whether they are amenable to deviating from the arbitration agreement in that regard. While the AAA Commercial Rules grant the AAA full authority to select the arbitrator or arbitrators if the parties are unable to agree for any reason whatsoever, the AAA generally tries to avoid administrative appointments.

The AAA offers users an online database called the Arbitrator Search Platform to view all of its panelists. The AAA has regional panels for various parts of the United States. Approximately 500 Commercial panelists are based in the greater New York area. The nationwide AAA panel consists of approximately 6,000 panelists, including more than 280 former federal and state judges. Approximately 15% of the AAA panel consists of non-attorney industry professionals. All AAA arbitrators must undergo AAA-organized training courses and updates. The AAA also requires that arbitrator applicants have a minimum of ten years of senior-level business or professional expertise or legal practice prior to being considered for the National Roster and maintains an ongoing review of the quality of its National Roster. AAA GUIDE 6-7. Current panelists as well as new applicants are evaluated for management skills, commitment, ethics, training, and suitability to the caseload. *Id.* at 7.

B. Acting as Appointing Authority

The AAA provides a service called “Arbitrator Select (List or List and Appointment)” for parties who do not require AAA administration of the arbitration past the point of arbitrator selection.⁶ The AAA's only role in providing this service is to generate a list of arbitrator candidates and complete the appointment process. Using the parties' own criteria, the AAA provides users with a list of the most appropriate arbitrators for their dispute. If desired, the AAA will facilitate conflicts checks with specified arbitrators and assist parties with arbitrator selection and/or appointment. This service may be used by a party to select a party-appointed arbitrator or by both parties to select their arbitrator(s).

As part of the process for the List and Appointment services, all parties must mutually agree to use the “List and Appointment” service. If the parties are unable to agree on a proposed

⁶ The costs for AAA Arbitrator Select (List and Appointment) Services are as follows: For a list of 5 arbitrators: \$750; 5 additional names, if needed: \$750 plus \$500 for each arbitrator appointed; for a list of 10 arbitrators: \$1,500; 10 additional names, if needed: \$750 plus \$500 for each arbitrator appointed; for a list of 15 arbitrators: \$2,000; 15 additional names, if needed: \$1,000 plus \$500 for each arbitrator appointed.

arbitrator, each party ranks the list of arbitrators in order of preference. The AAA then extends an invitation to the highest-ranked mutually agreeable candidate and facilitates a conflicts check. If the arbitrator declines, the AAA invites the next highest-ranked candidate, and so on. Upon the arbitrator's acceptance of the appointment, the AAA notifies the parties of the arbitrator's identity and provides any disclosure(s) the arbitrator may have made. Parties thereafter have seven calendar days to object to the arbitrator's appointment based on the disclosure(s). If the parties cannot agree on whether the disclosure(s) disqualifies the arbitrator from service, the AAA will determine whether to reaffirm or disqualify the arbitrator. If an arbitrator is disqualified due to a disclosure, the AAA will invite the next highest-ranked candidate to serve. Should no candidate remain from those originally provided, or if there are no mutually agreeable candidates, the AAA may appoint an arbitrator from its National Roster without the submission of additional lists, unless the parties agree otherwise.

C. Emergency Arbitrators

In circumstances where parties require immediate injunctive relief, the AAA Commercial Rules provide a process for emergency measures of protection. Prior to October 1, 2013, the AAA had as part of its Commercial Rules "Optional Rules for Emergency Measures of Protection." The Optional Rules applied only if the parties specifically adopted them in their arbitration clause or otherwise agreed to use them.

The current AAA Commercial Rules provide that, unless the parties agree otherwise, Rule 38 applies with respect to emergency procedures if the parties entered into their arbitration agreement on or after October 1, 2013. *See* Rule 38(a). A party seeking emergency relief must notify the AAA and all parties in writing regarding the nature of the relief sought and the reasons why such relief is required on an emergency basis. Pursuant to Rule 38(c), the AAA must appoint a single emergency arbitrator within one business day of receipt of notice of a party's request for emergency relief to make a determination on emergency measures of protection. Emergency arbitrators are selected from the Large Complex Case Panel and are required to immediately disclose any circumstance likely, based on the facts disclosed on the application, to affect such arbitrator's impartiality or independence. Any challenge to the appointment must be raised within one business day thereafter. The emergency arbitrator's authority ends when the tribunal is constituted. *See* Rule 38(f).

D. Small Claims in Expedited Arbitration

Unless the parties or the AAA determines otherwise, the AAA applies the Expedited Procedures (Rules E-1 through E-10) in any case involving claims or counterclaims less than \$75,000, exclusive of interest, attorneys' fees, and arbitration fees and costs. Pursuant to Rule E-4 (a), the AAA will provide a list of (5) five proposed arbitrators drawn from its National Roster from which a single arbitrator will be appointed. If for any reason the appointment of an arbitrator cannot be made from the list, under Rule E-4 (b) the AAA may make the appointment from other members of the panel without the submission of additional lists.

V. Special Situations

A. Multi-Party Arbitration

Whereas some arbitral rules specifically address joinder and multi-party arbitration procedures, the AAA Commercial Rules do not. Rather, the AAA Commercial Rules simply provide that, unless the parties agree otherwise, the Expedited Procedures will not apply in cases involving more than two parties.⁷ *See* Rule 1(b). The AAA therefore requires the parties to opt into the Expedited Procedures if they want the option of expediting the matter in cases with more than two parties. Under Rule 12(c), unless the parties agree otherwise, when there are more than two claimants or more than two respondents in a case, the AAA may appoint all the arbitrators.

B. Consolidation

The AAA Commercial Rules do not specifically address consolidation of arbitral proceedings. However, Rule P-2 suggests that at the preliminary conference arbitrators should inquire whether claims or counterclaims should be consolidated with another arbitration. If a party requests that two or more arbitral proceedings administered by the AAA be consolidated, the general practice of the AAA is for the first panel that was appointed to decide whether consolidation is warranted, in consultation with the parties. If the panel determines that the matters should be consolidated and heard together, that panel will hear the entire matter. The first panel also shall determine which rules will govern the dispute.

C. State Entities

The AAA Commercial Rules do not include specific rules on arbitrations involving states or state-owned entities.

D. Challenges to and Replacement of Arbitrators

Rule 17(a) requires parties and their representatives as well as any appointed arbitrator to disclose to the AAA any circumstance “likely” to give rise to “justifiable doubts” about an arbitrator’s impartiality or independence. Such disclosure obligations are ongoing. Failure of a party or a representative to comply with Rule 17(a) may result in waiver of the right to object to an arbitrator. *See* Rules 17(a), 41 (waiver of right to object for a party who proceeds with the arbitration “after [having] knowledge that any provision or requirement of [the AAA Commercial] Rules has not been complied with and who fails to state an objection in writing”). Rule 17(a) specifies examples of circumstances that require disclosure. These include any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. *See* ELLIOT E. POLEBAUM, INTERNATIONAL

⁷ For multi-party class arbitrations, the AAA has adopted Supplementary Rules for Class Arbitration (eff. October 8, 2003) under which the AAA agrees to administer demands for class arbitration where “(1) the underlying agreement specifies that disputes arising out of the parties’ agreement shall be resolved by arbitration in accordance with any of the Associations’ rules, and (2) the agreement is silent with respect to class claims, consolidation or joinder of claims.” American Arbitration Association, “AAA Policy on Class Arbitrations”, July 14, 2005, available at: https://www.adr.org/sites/default/files/document_repository/AAA%20Policy%20on%20Class%20Arbitrations.pdf.

ARBITRATION: COMMERCIAL AND INVESTMENT TREATY LAW AND PRACTICE 7-18 (1st ed. 2015). Unlike Rules 18 and 19, Rule 17 does not provide an exception for non-neutral arbitrators. This suggests that the disclosure obligations in Rule 17 apply even where the parties have agreed that the arbitrators may be non-neutral.

Upon objection of a party, or its own initiative, the AAA will determine whether the arbitrator should be disqualified under the grounds set forth in Rule 18(a).⁸ The AAA's determination regarding arbitrator disqualifications is conclusive. Rule 18(c). AAA disqualification determination decisions do not contain any statement of reasons and are not published. The vast majority of AAA arbitrator challenges are raised at the very beginning of the arbitral proceedings. Challenges to arbitrators are made in only 4-5% of arbitrations filed with the AAA each year.

Unlike some other arbitral rules, the AAA Commercial Rules do not specify the procedures for arbitrator challenges, responding to challenges, or determinations as to disqualification. The AAA has an Administrative Review Council (ARC) that rules on various administrative matters, including arbitrator challenges.⁹ The ARC is comprised of five members who meet on a weekly basis. The AAA has published "review standards" for arbitrator challenges, which state that removal is based on a weighing of four aspects of a suggested conflict: whether it is "direct, continuing, substantial, recent." CARTER AND FELLAS, INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK 168 (2d. ed. 2016). The determination as to an arbitrator challenge is based on whether the disclosed conflict "creates, to a reasonable person, the appearance that an award would not be fairly rendered." *Id.* Where a party raises a potential conflict not previously disclosed, the AAA will ask the arbitrator to make a supplemental disclosure to the parties regarding the new issue before the ARC considers the objection. *Id.*

If an arbitrator is unable or unwilling to perform the duties of the office, the AAA may, on proof satisfactory to it, declare the office vacant. *See* Rule 20(a). Some examples include when an arbitrator cannot physically perform the duties of the office or is unavailable for extended time periods. If the vacancy occurs prior to the commencement of hearings, the AAA will select the next available arbitrator on the strike-and-rank list. Should no arbitrator on the list be available, an additional list of arbitrators will be generated. If the vacancy occurs after commencement of hearings, the remaining arbitrators can proceed with the hearing and determination of the controversy, unless the parties agree otherwise. *See* Rule 20(b).

VI. Arbitrator List Services

Through the Arbitrator Select service, the AAA offers list and appointment services for those parties who do not want full administration. Under the List Only service (the List and Appointment service is discussed above), the AAA acts as a referral source to identify arbitrators

⁸ As discussed above, Rule 18(b) provides an exception to the grounds for disqualification where the parties have agreed in writing that the arbitrators appointed by the parties are to be non-neutral, in which case such arbitrators need not be impartial or independent and are not subject to disqualification for partiality or lack of independence.

⁹ The fee for this service is \$3,500.

to serve on arbitration cases and provides a list of 5, 10, or 15 arbitrators.¹⁰ To initiate the process, a party completes a detailed filing form, providing the number of arbitrators requested and preferences regarding the characteristics of the arbitrator (*e.g.*, area of expertise, geographic limitations). The AAA then will provide a list of arbitrators whose credentials best match the criteria specified by the parties along with their AAA Roster biographies. The arbitrators subsequently are notified that their information is being provided to a party seeking an arbitrator, which party may contact them directly. The parties handle the rest of the appointment process themselves without involvement of the AAA.

¹⁰ The costs for AAA Arbitrator Select (List Only) Services are as follows: For a list of 5 arbitrators: \$750; 5 additional names, if needed: \$750; for a list of 10 arbitrators: \$1,500; 10 additional names, if needed: \$750; for a list of 15 arbitrators: \$2,000; 15 additional names, if needed: \$1,000.

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION (ICDR)

I. Overview

The International Centre for Dispute Resolution (“**ICDR**”) is the international arm of the American Arbitration Association. Established in 1996, the ICDR provides administrative services for international disputes, including both arbitration and mediation. The ICDR maintains administrative offices in New York, Houston, and Miami in the United States and also operates offices through joint venture agreements in Mexico City, Singapore and Bahrain. In 2017, the ICDR administered international arbitrations seated in over 90 countries.

The ICDR issued its International Dispute Resolution Procedures, as amended and effective June 1, 2014 (the “**ICDR Rules**”), which includes mediation and arbitration rules for international cases. The ICDR Rules automatically apply to international cases unless the parties agree otherwise. The ICDR also administers cases pursuant to whatever set of rules the parties have designated. In practice, the ICDR routinely administers international arbitrations pursuant to the AAA’s Construction Industry Arbitration Rules, Commercial Arbitration Rules, and Employment Rules; the ICDR Protocol for Manufacture/Supplier Disputes; the Commercial Arbitration and Mediation Center for the Americas (CAMCA) Rules; and the UNCITRAL Arbitration Rules.

This section of the Report focuses on the ICDR Rules and institutional practices regarding the selection and appointment of arbitrators. The ICDR Rules fully recognize the principle of party autonomy regarding the selection of arbitrators, while providing rules and procedures which assure that each arbitrator will be impartial, independent and free of conflicts of interest.

As a general matter, it should first be noted that it has long been the practice of the ICDR to conduct an administrative conference with the parties before the arbitral tribunal is constituted (the “**Administrative Conference**”). This institutional practice is now formalized in Article 4 of the ICDR Rules. The conference is conducted by the ICDR case manager assigned to the case. The Administrative Conference provides an important opportunity for the parties to discuss with the ICDR issues such as the number and method of appointment of arbitrators, arbitrator qualifications, and other preliminary issues. The ICDR’s practice is to have such an administrative conference within ten business days after the Notice of Arbitration has been submitted.¹¹

II. Number of Arbitrators

A. Applicable Rules

Under the ICDR Rules, the parties can specify the number of arbitrators in either their arbitration agreement or after the dispute arises. The number of arbitrators is one of the issues the ICDR will discuss with the parties during the Administrative Conference. *See* Art. 4. In the

¹¹ *See* James M. Hosking and Gretta Walters, Ch. 3, The ICDR International Rules, INTERNATIONAL ARBITRATION IN THE UNITED STATES, at 57 (2018)(edited by Laurence Shore; Tai-Heng Cheng;Mara V.J. Senn; Jenella La Chiusa; Lawrence Schaner) (hereinafter “Hosking & Walters”).

absence of agreement by the parties, the ICDR Rules provide for the dispute to be heard by one arbitrator, unless the ICDR determines in its discretion that three arbitrators are more appropriate “because of the size, complexity, or other circumstances of the case.” *See* Art. 11.

B. Institutional Practices

Where the arbitration agreement does not specify the number of arbitrators, the ICDR first attempts, by means of the Administrative Conference, to obtain agreement by the parties as to the number of arbitrators. If agreement cannot be reached, the ICDR has discretion to decide the number of arbitrators taking into the account specific circumstances of the case. In practice, the ICDR will appoint a single arbitrator in smaller cases. While there is no monetary threshold specified in the ICDR Rules, the ICDR will normally direct that the arbitral tribunal consist of three members in cases where the amount in dispute exceeds \$1 million, especially where the underlying dispute is complex or the parties ask for arbitrators with different expertise.¹²

The ICDR may also use the Administrative Conference to discuss with the parties whether the appointment of a single arbitrator might be more appropriate in cases where the amount in dispute is less than \$1 million, even where the arbitration clause specifies a three-member tribunal. The major advantage of a sole arbitrator is that the arbitration will be at a lower cost and a sole arbitrator may be able to resolve the dispute with greater speed. However, in the absence of agreement of the parties, the number of arbitrators specified in the arbitration agreement will apply. During the Administrative Conference, the ICDR case manager will advise the parties of the availability of the Streamlined Three-Arbitrator Panel Option for Large Complex Cases. Under this option, the parties work with a single arbitrator through the preliminary procedural and discovery stages; the full panel of three arbitrators comes aboard only at the evidentiary hearing stage and to issue the final award.

III. Party Nominations

A. Appointment of Arbitrators by the Parties without the Assistance of the ICDR

The ICDR Rules provide that the parties “may agree upon any procedure for the appointing arbitrators.” *See* Art. 12. The parties may agree to select arbitrators with or without the assistance of the ICDR. In those cases where the parties have agreed to select arbitrators without the assistance of the ICDR, the parties are to inform the ICDR as to the procedures agreed upon and notify the ICDR when such selections have been made. However, any arbitrator selected by the parties must comply with the ICDR requirement that arbitrators serving on a tribunal pursuant to the ICDR Rules be “impartial and independent.” *See* Art. 13.

The ICDR Rules provide an important procedural safeguard to make sure that the arbitration is not unreasonably delayed because of the failure of the parties to reach agreement on a method of selection or to timely appoint the arbitrators. *See* Art. 12. The ICDR Rules provide that if within 45 days after the commencement of the arbitration the parties have not agreed on

¹² *See* James H. Carter & John Fellas, *INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK* 145 (2d. ed. 2016).

the procedure for appointing the arbitrators or have not agreed on the selection of the arbitrators, then “at the written request of any party” the ICDR will become directly involved in the process. *See Art. 12(3).*

Where the parties have failed to reach agreement upon the procedure for the selection of arbitrators, the ICDR, upon the written request of one of the parties, has the right to appoint the arbitrators. *See Art.12(3).* Similarly, in the event the parties have agreed upon a method of appointment, but one or more of the appointments has not been made within the agreed time period, the ICDR, upon the written request of one of the parties, will step in and perform any remaining functions that remain to be performed. *See Art.12(3).* This may include the ICDR appointing one or more of the party-appointed arbitrators or appointing the presiding arbitrator. This important procedural safeguard is intended to ensure that the arbitration proceeds in a timely manner and prevents one party from unreasonably delaying the process.

When the ICDR becomes directly involved in the appointment of one or more of the arbitrators, the IDCR Rules provide that it shall so do after inviting consultation with the parties. In addition, at the request of a party or on its own initiative, the ICDR may appoint nationals of a country other than that of any of the other parties as the arbitrators or as the sole or presiding arbitrator. *See Art. 12(4).*

Finally, and importantly, the ICDR Rules require that in all cases, and regardless of the method of appointment, each arbitrator selected to serve must be “impartial and independent,” and this requirement applies unless the parties have expressly agreed otherwise. *See Art. 13.* This requirement of impartiality and independence is further discussed in the sections below addressing the Notice of Appointment and the rules governing when a party may challenge the appointment of an arbitrator. *See Arts. 13, 14.*

B. Appointment of Arbitrators with the Assistance of the ICDR

If the parties have not agreed on the method of appointment of arbitrators, then the ICDR Rules provide that the ICDR may use the ICDR “list method” to appointment of the arbitrators. *See Arts. 12(1), (6).* The ICDR can also assist the parties in agreeing on arbitrators by providing temporary access to the Arbitrator Search Tool, which allows the parties to review the resumes of the entire International Panel. Where appropriate, the ICDR may also grant access, as applicable, to its domestic rosters of commercial, construction, or employment arbitrators. The ICDR, like the AAA also offers Enhanced Neutral Selection to assist the parties.

If the parties cannot agree on arbitrators, then under the list method, the ICDR will generally send each party a list of 10 names (in the case of a sole arbitrator) or 15 names (in cases involving a three person tribunal) of potential arbitrators, together with biographical information. Each party then has 15 days review the list, strike the names of those it objects to as potential arbitrators, and then rank the remaining names in order of preference. Each party returns the annotated list to the ICDR in confidence. The ICDR will then invite names from the list to serve as arbitrators in accordance with the designated order of mutual preference. If an arbitrator invited to serve is unable to do so, then the ICDR will approach the next ranking person on the list.

In some cases, there may not be sufficient overlap between the parties' rankings for the tribunal to be fully formed. In such event, the ICDR, after discussion with the parties, may send out a second list. The ICDR, after discussion with the parties, may also limit the number of names on the list that each party may strike. The ICDR Rules, however, provide that the ICDR retains the right to make the arbitrator appointments without sending out additional lists. *See* Art. 12(6). The ICDR will not designate as an arbitrator anyone who has been stricken from the list of potential arbitrators by one of the parties.

C. Appointment of the Chair of the Tribunal

In many cases, the arbitration agreement provides that each party shall appoint its own arbitrator, with the two party-appointed arbitrators appointing the chairperson. A common issue that arises in such cases is the degree to which the parties may consult with their party-appointed arbitrator with regard to the selection of the chairperson.

While the ICDR Rules generally prohibit any party from having *ex parte* communications with any arbitrator, they do permit the parties to discuss with their party-appointed arbitrator the suitability of candidates to serve as the presiding arbitrator where the arbitration agreement contemplates the participation of the parties or the party-appointed arbitrators in the selection of the presiding arbitrator. *See* Art. 13(6). However, the ICDR Rules prohibit any party from having any *ex parte* communications with any candidate for presiding arbitrator. *Id.* The ICDR Rules also allow a party when first considering a person for appointment as a party appointment arbitrator to have limited *ex parte* communications with such persons, provided such communications are restricted to advising the person of the general nature of the case and discussion of the candidates' qualifications, availability, or impartiality and independence. *Id.*

If requested, the ICDR can provide the parties with a list of potential candidates to serve as the chairperson. Also, upon agreement of the parties, or where the two party-appointed arbitrators cannot agree upon the chairperson within the proscribed time, the ICDR can use the list method as the means for the selection of the chairperson.

If the ICDR appoints all three arbitrators, unless the parties agree on who should serve as chairperson, the arbitrators will decide which of them will serve in that role. If requested by the arbitrators, the ICDR will designate the chairperson. In cases where the ICDR is appointing the chairperson, it may consult with the other members of the tribunal in selecting the presiding arbitrator.¹³

D. Institutional Practices

As previously noted, all arbitrators serving on an arbitral tribunal under the ICDR Rules must be impartial and independent. *See* Art. 13(1). As part of its procedures to ensure arbitrator independence and impartiality, the ICDR sends a Notice of Appointment to each of the arbitrators which sets forth the conditions of the appointment. *See* Art. 13(2). The appointment of the arbitrator becomes effective only after receipt by the ICDR of the Notice of Appointment

¹³ Martin F. Gusy, James M. Hosking & Franz J. Schwarz, A GUIDE TO THE ICDR INTERNATIONAL ARBITRATION RULES ¶ 6.27 (2011).

completed and signed by the arbitrator. *See* Art. 12(7). No person, regardless of the method of selection, will be confirmed by the ICDR as an arbitrator unless such person agrees and complies with the conditions set forth in the Notice of Appointment.

The Notice of Appointment requires the arbitrator to agree to act in compliance with the ICDR Rules, the Code of Ethics for Commercial Arbitrators, and to disclose any fact or circumstance which might give rise to any “justifiable doubts as to the arbitrator’s impartiality or independence.” *See* Art. 13(2). The Notice of Appointment contains a list of questions which are designed to help assure disclosure by the arbitrator of any past or present financial, professional, social or other relationship of any other kind that the arbitrator has had with any of the parties, their counsel, potential witness, or the other arbitrators on the tribunal that may be perceived as affecting the arbitrator’s impartiality or independence.

This disclosure obligation is a continuing one that applies throughout a person’s service as an arbitrator. *See* Art. 13(3). The arbitrator is required to sign and return the Notice of Appointment to the ICDR, and all disclosures made by the arbitrator are provided to the parties.

The ICDR maintains an International Panel of potential arbitrators for international cases. The International Panel consists of approximately 750 arbitrators, the majority of whom are located outside the United States. The ICDR draws from this panel, as well as its domestic panels, where appropriate, to compile lists or to make appointments.

The ICDR has signed the Equal Representation in Arbitration Pledge. As of 2017, more than 15% of the ICDR panel members are women. The ICDR has a policy of striving for a minimum of 20% of diverse arbitrator candidates for every list of potential arbitrators sent to the parties.

E. Emergency Arbitrators

The ICDR was one of the first arbitral institutions to include procedures for emergency relief prior to the formation of the arbitral tribunal. Under Article 6 of the ICDR Rules, a party may apply for emergency relief before the panel is constituted by filing a written notice to the ICDR setting forth the nature of the relief sought and why the party is entitled to such relief on an emergency basis. The request for emergency relief can be submitted concurrent with or following the submission of a Notice of Arbitration, and copies must be served on all other parties. A request for emergency relief cannot be made on an *ex parte* basis.

A sole emergency arbitrator will be appointed by the ICDR within one business day of its receipt of the request for emergency relief. *See* Art. 6(2). The emergency arbitrator is subject to the same independence and impartiality requirement as any other arbitrator, and prior to appointment must disclose, in accordance with Art. 13, any circumstances that may give rise “to justifiable doubts as to the arbitrator’s impartiality or independence.” *See* Art. 6(2). Any objection to the appointment of the emergency arbitrator must be made within one business day after the ICDR has given notice to the parties of the emergency arbitrator. The emergency arbitrator’s authority ends when the tribunal is constituted. The emergency arbitrator may not serve as a member of the tribunal unless the parties agree otherwise. *See* Art. 6(5).

The ICDR does not require any administrative fee for the emergency arbitration proceedings. The only cost to the parties are the compensation and expenses of the emergency arbitrator.¹⁴

F. Small Claims and Expedited Arbitration

The ICDR Rules provide for the application of its International Expedited Procedures in cases where no claim or counterclaim exceeds \$250,000, unless the parties agree otherwise. *See* Article 1(4). The International Expedited Rules are also available for use by the parties in larger cases upon mutual consent. The ICDR may discuss with the parties during the Administrative Conference use of the International Expedited Rules.

In cases where the International Expedited Procedures apply, the matter will be heard by a single arbitrator. *See* Art. E-6. For selection of the sole arbitrator, the ICDR will simultaneously send each party an identical list of five proposed arbitrators. If the parties are unable to agree upon an arbitrator within ten days after transmittal of the list, each party may strike up to two names, and return the list to the ICDR. If for any reason the appointment cannot be made from the submitted lists, the ICDR may make the appointment without the circulation of any additional lists. The parties will then be given notice by the ICDR of the name of the appointed arbitrator, together with any disclosures by the arbitrator as required by Article 13.

The International Expedited Procedures serve as a supplement to the ICDR Rules, rather than a stand-alone replacement of the ICDR Rules. Accordingly, all other provisions of the ICDR Rules, unless in conflict with a specific provision of the International Expedited Procedures, continue to apply.

IV. Special Situations

A. Multi-party Arbitration

The ICDR Rules provide that if there are more than two parties to the arbitration, then the ICDR may appoint all the arbitrators, unless the parties have agreed otherwise. *See* Art. 12(5). Notwithstanding the ICDR's authority to appoint all the arbitrators in multi-party cases, the ICDR's practice is to work with the parties to encourage agreement on a method of selection and suggest variations of the list method as the method of appointment.

The ICDR Rules allow for the joinder of additional parties. *See* Art. 7. However, no additional party may be joined after appointment of any arbitrator, except upon the consent of all parties, including the additional party. *Id.* This limitation is in recognition of the importance of each party's equal participation in the appointment process.¹⁵ Where joinder occurs prior to the appointment of any arbitrator, the additional party will be a full participant in the appointment process.

¹⁴ *See generally* The ICDR International Arbitration Reporter, at 5-6 (Fall 2016).

¹⁵ *See* The ICDR International Arbitration Reporter, at 4 (Fall 2016)

B. Consolidation

The ICDR Rules provide for the appointment of a special “consolidation arbitrator” (the “**Consolidation Arbitrator**”) to hear and rule on any request by a party to consolidate two or more arbitrations into a single arbitration. *See* Art. 8. The power to consolidate only applies to two or more arbitrations pending under the ICDR Rules or other arbitration rules administered by the AAA or the ICDR. The Consolidation Arbitrator’s sole power is to rule on the issue of consolidation. The Consolidation Arbitrator may not be an arbitrator who is part of the tribunal to any of the arbitrations subject to potential consolidation. *See* Art. 8(2)(c).

After receipt of a request for consolidation, the ICDR will notify the parties of its intent to appoint a Consolidation Arbitrator. The parties then have 15 days to agree upon an appointment procedure. Absent agreement of the parties, the ICDR will follow the list method set forth in Art. 12, which includes the right of the ICDR to appoint the Consolidation Arbitrator.

In deciding whether to consolidate, the Consolidation Arbitrator shall consult the parties, may consult with the arbitral tribunals at issue, and may consider all relevant circumstances.¹⁶ Where the Consolidation Arbitrator decides to consolidate an arbitration with two or more arbitrations, each party in those arbitrations shall be deemed to have waived its right to appoint an arbitrator. *See* Art. 8(6). The Consolidation Arbitrator has substantial discretion as to the membership of the tribunal designated to hear the consolidated arbitration, including the power to revoke the appointment of any previously appointed arbitrator, select one of the previously appointed tribunals to serve in the consolidated proceeding, and complete the appointment of the consolidation arbitration tribunal. Unless agreed by all parties, the Consolidation Arbitrator may not serve on the tribunal of the consolidated arbitration. *Id.*

C. State Entities

The ICDR Rules do not include specific rules relating to the appointment of arbitrators in arbitrations involving states or state-owned entities.

D. Challenges to and Replacement of Arbitrators

Article 14 of the ICDR Rules addresses a party’s right to challenge an arbitrator when circumstances exist that give rise to “justifiable doubts” as to an arbitrator’s impartiality or independence. A party must send a written notice of any challenge to the ICDR within 15 days after (i) being notified of the appointment of the arbitrator or (ii) learning of the circumstances giving rise to the challenge. *See* Art. 14 (1). The party shall not send a copy of this notice to any member of the tribunal.

Upon receipt of a challenge, the ICDR will notify the other party and give such other party an opportunity to respond. The ICDR notifies the tribunal only that a challenge has been received, without identifying the party making the challenge. *See* Art. 14(2). The ICDR may

¹⁶ Such relevant circumstances include: (1) applicable law; (b) whether one or more arbitrators have been appointed in more than one of the arbitrations and, if so, whether the same or different persons have been appointed; (c) the progress already made in the arbitrations; d) whether the arbitrations raise common issues of law and/or facts; and (e) whether the consolidation of the arbitrations would serve the interests of justice and efficiency. Art. 8(3).

also request information from the challenged arbitrator relating to the challenge. When a challenge has been made, the other party may elect to agree that the challenged arbitrator should withdraw and the challenged arbitrator then must withdraw. The challenged arbitrator may also independently elect to withdraw. However, in neither case does the withdrawal by the arbitrator imply acceptance of the validity of the grounds asserted in the challenge. *See* Art. 14(2).

Under the present rules, if the other party does not agree to the challenge or the challenged arbitrator does not independently elect to withdraw, then the ICDR makes the decision on the challenge. *See* Art. 14. The ICDR is also empowered on its own initiative to remove an arbitrator for failing to perform his or her duties. *See* Art. 14(3).

The ICDR plans to launch in 2018 an Administrative Review Council, along the lines of the ARC established by the AAA (*see* earlier section of this Report on the AAA, *supra*),¹⁷ that would rule on certain administrative matters, including arbitrator challenges. The ICDR is drafting guidelines to take into account issues that do not arise in the domestic arena (*e.g.*, choice of seat).

Article 15 of the ICDR Rules governs the replacement of an arbitrator in the event an arbitrator resigns or is removed. The procedure for the selection of the replacement arbitrator is set forth in Article 12 and is the same as that for the original appointment of an arbitrator. If a substitute arbitrator is appointed then, unless the parties agree otherwise, the arbitral tribunal at its discretion may decide whether all or part of the case will be repeated. *See* Art. 15(2). In rare cases, in the event an arbitrator on a three-person tribunal fails to participate in the arbitration, the two other arbitrators may, in their sole discretion, decide to continue the arbitration without the participation of such arbitrator. Alternatively, the ICDR may remove the arbitrator under Article 14(4), declare the position vacant, and appoint a substitute arbitrator.

V. Arbitrator List Services

The ICDR also offers services to parties separate from full administration of a case.¹⁸ Under the ICDR's Arbitrator Appointment Service, the ICDR will provide the parties with a list of the most appropriate arbitrators for their dispute, based on criteria specified by the parties. The arbitrators are notified that their information is being provided to parties and that they may be contacted directly by the parties. It then is up to the parties to handle the rest of the appointment process and case management as the ICDR's involvement ends once the list is provided.

The ICDR also offers Arbitrator Search and Appointing Authority services. Under this service, the ICDR assists the parties in identifying arbitrators and completing the selection and appointment process. The ICDR will provide the parties with a list of 10 or 15 arbitrators whose credentials best match the criteria specified. If the parties are unable to agree on a proposed arbitrator, they may strike any unacceptable candidates from the list and rank the remaining ones according to their preferences. The ICDR extends an invitation to the highest-ranked mutually

¹⁷ *See* Eric Tuchmann; Sasha Carbone; Tracey Frisch; Simon Kyriakides, *The American Arbitration Association's Administrative Review Council*, NEW YORK DISPUTE RESOLUTION LAWYER at 11-15 (Fall 2017).

¹⁸ *See* https://www.icdr.org/about_icdr.

agreeable candidate and facilitates a conflicts check. When a candidate accepts the appointment, the ICDR notifies the parties of the arbitrator's identity and provides the parties with any disclosures the arbitrator may have made. The parties have seven calendar days to object to the arbitrator's appointment. If the parties cannot agree on whether the disclosure disqualifies the arbitrator from service, the ICDR will determine whether to reaffirm or disqualify the arbitrator. If no candidate remains from those originally provided, or if there are no mutually agreeable candidates, the ICDR will appoint the arbitrator.

INTERNATIONAL COURT OF ARBITRATION OF THE INTERNATIONAL CHAMBER OF COMMERCE (ICC)

I. Overview

The International Court of Arbitration of the International Chamber of Commerce (“ICC”) is headquartered in Paris, France. The ICC Secretariat, with offices around the world, manages the day-to-day aspects of administering arbitrations under the auspices of the International Court of Arbitration and serves as the principal liaison to parties involved in ICC arbitrations. The North American arm of the Secretariat is known as SICANA (Secretariat of the ICC International Court of Arbitration in North America).

The ICC has promulgated Rules of Arbitration (the “ICC Rules”) to govern arbitrations under its administration, including detailed procedures for selecting arbitrators. The current edition of the ICC Rules went into effect on March 1, 2017.¹⁹ With few exceptions, the ICC permits parties to deviate by agreement from the procedures outlined in the ICC Rules, including for the selection of arbitrators. The ICC Rules thus permit significant flexibility in accommodating the parties’ wishes regarding the procedure of selecting arbitrators while also offering default procedures and the finality of an appointing authority as a backstop where party agreement proves elusive.

While the ICC’s approach to confirming arbitrators nominated by the parties or the co-arbitrators pursuant to such an agreement is highly deferential,²⁰ some of the ICC’s internal procedures for appointment may be less well-known. This section of the Report explores the applicable rules governing the nomination or appointment of arbitrators, primarily Articles 11 to 13 of the ICC Rules, as well as institutional practices of the ICC in carrying out its functions. We discuss how the ICC Rules intersect with special situations, including arbitrations with multiple parties or where a state is a party, the appointment of emergency arbitrators, and the ICC’s new Expedited Procedure Rules for smaller disputes, which went into effect with the amendment to the ICC Rules on March 1, 2017. Against this backdrop we include discussion of various techniques that parties may consider using to maintain greater control over the selection of arbitrators, including a list service offered by the ICC and other arrangements that parties have used to find agreement on sole arbitrators or tribunal presidents.

II. Number of Arbitrators

A. Applicable Rules

The ICC Rules contemplate that the arbitral tribunal will consist of one or three arbitrators. The number of arbitrators is frequently specified in the parties’ arbitration clause but may also be agreed afterwards, including after the arbitration is filed. However, an important feature of the ICC Rules is that where the parties have not agreed on the number of arbitrators,

¹⁹ The ICC Rules are available at <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration>.

²⁰ The ICC Rules distinguish between *nomination* of arbitrators by the parties and *appointment* of arbitrators by the ICC. Notwithstanding colloquial references to party appointment of arbitrators, parties cannot appoint arbitrators under the ICC Rules. The nomination of an arbitrator by one or more parties always remains subject to *confirmation* by the ICC.

the ICC will decide whether there will be a sole arbitrator or three. *See* Art. 12(1)-(2). In making this decision, the ICC will consider the comments of the parties, which must be included in the Request for Arbitration and in the Answer. *See* Art. 4(3)(g), 5(1)(e).

B. Institutional Practices

The criteria that the ICC considers in deciding between a one- and three-arbitrator tribunal include the amount in dispute and complexity of the issues. While there is no firm rule, the current guidance from the ICC is that it is unusual for the ICC to decide in favor of three arbitrators when the amount in dispute is less than \$5 million, or in favor of a sole arbitrator where the amount in dispute exceeds \$30 million.²¹ If the amount in dispute has not been quantified or the complexity of the dispute cannot be readily determined, the ICC may seek more information from the parties.

III. Party Nominations

A. Applicable Rules

Where there is a sole arbitrator, the ICC Rules grant the parties 30 days, running from when the respondent receives the Request for Arbitration, to attempt to agree on a nominee. If the parties do not agree within the prescribed period (or any extension thereon), the ICC will appoint the arbitrator. *See* Art. 12(3). Where there are three arbitrators, Article 12(4) of the ICC Rules provides that each side will nominate one arbitrator, in the Request for Arbitration and in the Answer, respectively.²² However, for the president of a three-arbitrator tribunal, the presumption is that the ICC will appoint *unless* the parties agree to another procedure, whether in the arbitration clause or otherwise. If the parties so agree, they may jointly nominate an arbitrator to serve as president, subject to confirmation by the ICC. *See* Art. 12(5). The parties must inform the ICC of their agreement before the ICC has appointed the arbitrator, as the decisions of the ICC as to the appointment of arbitrators are final (subject only to challenge, which is beyond the scope of this report). *See* Art. 11(4).

The criteria the ICC uses when confirming arbitrators nominated by the parties is set forth in Articles 11(1) and 13(1)-(2). Foremost among these are the requirements of independence and impartiality. It is a non-waivable requirement under the ICC Rules that all arbitrators, including party-nominated arbitrators, “must be and remain impartial and independent of the parties involved in the arbitration.” Art. 11(1). This is one of the few areas where the ICC will not permit derogation even by party agreement. The parties have the opportunity to raise objections to the other party’s nomination. *See* Art. 13(2).

²¹ J. Fry, S. Greenberg, F. Mazza, *The Secretariat's Guide to ICC Arbitration: A Practical Commentary on the 2012 ICC Rules of Arbitration from the Secretariat of the ICC International Court of Arbitration*, ICC (2012) (hereinafter, “Secretariat’s Guide”), § 3-440.

²² Special situations where there are multiple parties who are unable to agree on an arbitrator are discussed in Section V, *infra*.

B. Institutional Practices

While the nomination of an arbitrator by one or more parties always remains subject to confirmation by the ICC, the ICC's approach is highly deferential to the preference of the nominating party or parties. The ICC requires each nominated arbitrator to complete a Statement of Acceptance, Availability, Impartiality and Independence disclosing potential conflicts and other pertinent facts, as well as a confirmation of the arbitrator's availability, after which the parties have a week to submit any objection to the nomination.²³ Notwithstanding this deadline, the two party-nominated arbitrators are usually confirmed at the same time, not *seriatim*.

As a matter of practice, unless a party objects to a nomination or the ICC has information raising concerns about the arbitrator's independence or impartiality, the ICC will almost always confirm the arbitrator. Rare circumstances warranting an exception to this rule might include the proposed arbitrator having an excessive caseload, such that he or she could not carry out his or her duties in a timely fashion, or a particularly poor track record of doing so in prior ICC arbitrations. In addition, if the nomination does not comply with the criteria for arbitrators that the parties have established in their arbitration agreement (such as nationality, expertise, or language proficiency), the parties must expressly waive those criteria or the ICC will not confirm the nomination.

In the vast majority of cases, the ICC Secretariat will make the confirmation directly, rather than the ICC Court.²⁴ If a nomination is referred to the Court, it can add 2-3 weeks to the confirmation process. If an objection is raised, the nomination will be considered by the ICC Court, unless the objection is of a minor nature with no independence/impartiality implications, in which case the ICC Secretariat will usually confirm the nomination over the objection. Only the ICC Court has the power to refuse to confirm an arbitrator. If the ICC refuses to confirm a nomination, the nominating party will have an opportunity to nominate a different candidate. The ICC considers the confirmation process confidential and does not provide parties with its rationale for confirming, or refusing to confirm, party-nominated arbitrators.

One area in which the ICC has recently increased transparency is disclosing and updating on a monthly basis the names of all arbitrators sitting in ICC arbitrations since January 1, 2016. Once the terms of reference for an arbitration are finalized, the names of the arbitrators and nationality are made public on the ICC's website, unless the parties to an arbitration agree not to have them published for reasons of confidentiality.²⁵ Also included is the method by which the arbitrator was selected (i.e., nominated by a party or by the co-arbitrators, or appointed by the

²³ Occasionally, an arbitrator disclosure will elicit a request from a party for further information. If the ICC considers the request reasonable, it will act as an intermediary in obtaining such information from the arbitrator candidate.

²⁴ The ICC Court is composed of practitioners from around the world and is the ultimate decision-making body. The ICC Secretariat employs full-time staff and carries out ministerial and other routine functions that have been delegated by the ICC Court, which include confirming arbitrator nominations in the absence of a party objection. See <https://iccwbo.org/dispute-resolution-services/arbitration/icc-international-court-arbitration/>

²⁵ See <https://iccwbo.org/dispute-resolution-services/arbitration/icc-arbitral-tribunals>.

ICC). This enhanced transparency is intended to give users greater visibility into an arbitral candidate's existing commitments.²⁶

Given the flexibility that the ICC Rules grant parties in regard to the selection of arbitrators, parties have often devised procedures to facilitate agreement on the nomination of a sole arbitrator or president of a three-arbitrator tribunal. Such procedures commonly include the arrangement by which the co-arbitrators will collaborate, with or without input by the parties, on a nomination for president. Variations on this framework might include generating a list of candidates, either by the co-arbitrators alone or including candidates proposed by the parties, which the parties may then strike and rank to arrive on a joint nomination for the president. To the extent such a slate includes candidates proposed by the parties, it has been found helpful for the proposals to be made on a blind basis, where neither party knows which candidates were proposed by the adversary and which by the co-arbitrators. Alternatively, upon request, the ICC will supply a list of candidates, which the parties can strike and rank.²⁷ These list techniques can be adapted to the particular needs and preferences of the parties. However constructed, they permit the parties to retain some control over the selection of the sole arbitrator or president, rather than the default route of appointment by the ICC.

IV. Institutional Appointments

A. General

1. Applicable Rules

As noted above, unless the parties have agreed on a nominee, the ICC will appoint a sole arbitrator or president of a three-arbitrator tribunal. Art. 12(3), (5). In the vast majority of cases, appointment of arbitrators by the ICC is governed by Article 13(3) of the ICC Rules. It provides:

Where the [ICC] Court is to appoint an arbitrator, it shall make the appointment upon proposal of a National Committee or Group of the ICC that it considers to be appropriate. If the Court does not accept the proposal made, or if the National Committee or Group fails to make the proposal requested within the time limit fixed by the Court, the Court may repeat its request, request a proposal from another National Committee or Group that it considers to be appropriate, or appoint directly any person whom it regards as suitable.

Article 13(4) of the ICC Rules may also apply in certain circumstances where a direct appointment by the ICC Court is made without the need to involve a National Committee or Group²⁸ (for brevity, "**National Committee**").

²⁶ See Note to the Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, ICC, 30 October 2017 (hereinafter, "**Note to Parties**"), ¶¶ 27-31.

²⁷ The use of the "list method" to make appointments is discussed further below in Section VI.

²⁸ Territories that are not sovereign states (Palestine, Chinese Taipei, Hong Kong and Macau) have a "Group" rather than a National Committee. See Secretariat's Guide § 3-521.

Article 13(4) reads:

The Court may also appoint directly to act as arbitrator any person whom it regards as suitable where:

- a) one or more of the parties is a state or may be considered to be a state entity;
- b) the Court considers that it would be appropriate to appoint an arbitrator from a country or territory where there is no National Committee or Group; or
- c) the President certifies to the Court that circumstances exist which, in the President's opinion, make a direct appointment necessary and appropriate.

In addition to the general considerations noted above, for the appointment of a sole arbitrator or a tribunal president in particular, the ICC Rules presume that he or she “shall be of a nationality other than those of the parties” except “in suitable circumstances and provided that none of the parties objects within the time limit fixed by the Court.” Art. 13(5).

2. Institutional Practices

The ICC Rules clearly give the ICC significant latitude in how it selects arbitrator candidates. However, for some users, it can also make the appointment process seem opaque. For example, Article 13(5) of the ICC Rules states that the ICC will consult “a National Committee or Group of the ICC that it considers to be appropriate.” This raises several questions. What National Committee is the ICC likely to consider appropriate for a dispute? How does the choice of a National Committee influence the selection of arbitrators? How does a National Committee identify arbitrator candidates to propose to the ICC? The selection process by an ICC National Committee is confidential. Additionally, the ICC does not disclose the National Committee(s) with whom the ICC has consulted with respect to the selection of arbitrators on a case or whether the ICC accepted or declined a candidate proposed by a National Committee.

If the ICC requests that a National Committee propose an arbitrator candidate, the ICC typically asks for a response from the National Committee within seven days.²⁹ The ICC expects the National Committee to convey relevant case information to potential arbitrators and ask them to complete the disclosure forms, in which arbitrator candidates which must disclose “any facts or circumstances that might be of such a nature as to call into question the arbitrator’s independence in the eyes of the parties, or that could give rise to reasonable doubts as to the arbitrator’s impartiality.”³⁰ As a matter of practice, the ICC generally only accepts proposals

²⁹ See Note to National Committees and Groups of the ICC on the Proposal of Arbitrators, dated May 10, 2016 (hereinafter “Note to National Committees and Groups”), ¶ 27. When appropriate for the case, the ICC accommodates party requests to expedite formation of the arbitral tribunal by shortening the response time to three days and accelerating other internal procedures.

³⁰ See Note to National Committees and Groups, ¶ 41.

from National Committees where the arbitrator candidates provide unqualified disclosure statements.

A National Committee may propose more than one candidate, but usually proposes a single candidate. The ICC usually accepts the candidate proposed by the National Committee if suitable. If a National Committee does not respond to the ICC's request for candidates within seven days, or proposes a candidate that the ICC does not find suitable, the ICC may ask for a different proposal, contact a different National Committee, or appoint the arbitrator directly.³¹ If the ICC already has a particular candidate in mind before contacting the National Committee, it may inform the National Committee of that, but a National Committee is independent and free to propose any candidates it deems appropriate.³² The ICC also encourages National Committees to consider gender and generational diversity in their arbitrator candidate proposals, as well as to consider new or less experienced arbitrators for cases with less complexity or lower amounts in dispute.³³

The ICC will select a National Committee principally based on geography, where the ICC considers it appropriate that a national of that National Committee's country or territory serve as the arbitrator for a case. National Committees are almost invariably expected to nominate candidates who are nationals of the same country, though that is not a formal requirement.³⁴ As a matter of practice, when the ICC seeks a proposal from a National Committee, it is often (but not always) the National Committee of the place of arbitration. For example, for an arbitration seated in New York, the ICC would likely look to the United States Council for International Business ("USCIB"), which is the U.S. National Committee for the ICC. The USCIB has a standing Nomination Committee, currently consisting of six prominent practitioners responsible for making arbitrator candidate proposals. Nomination Committee members are appointed by the Executive Director of the USCIB and serve two-year terms, which may be renewed once. While the USCIB maintains a database of potential arbitrators, who are either U.S. citizens (wherever located) or non-U.S. citizens residing in the United States,³⁵ the Nomination Committee is not limited to the database when proposing arbitrators to the ICC.

Even for a U.S.-seated arbitration, the ICC may look to a different National Committee, or more than one, depending on the circumstances. Factors that may counsel in favor of contacting a different National Committee would include the nationality of the parties, the governing law, or any characteristics that are necessary or desirable in the arbitrator. For example, if one of the parties is domiciled in the U.S., Article 13(5) creates the presumption that the president or sole arbitrator should be of a different nationality. In the exceptional case where

³¹ See Note to National Committees and Groups, ¶ 28.

³² See Secretariat's Guide, § 3-527.

³³ See Note to National Committees and Groups, ¶¶ 33-34. The ICC has signed on to the Equal Representation in Arbitration Pledge, whose goal is to promote equal opportunities for women as arbitrators. See <https://iccwbo.org/media-wall/news-speeches/icc-pledges-support-for-equal-representation-of-women-in-arbitration/>. The ICC has seen an increase in women arbitrators. The ICC announced in a press release on May 31, 2017 that 209 women had been appointed as arbitrators in 2016 (whether by the parties, co-arbitrators, or the ICC), up from 136 in 2015. See <https://www.iccwbo.be/icc-court-sees-marked-progress-on-gender-diversity/>. Some progress remains, however, as women arbitrators represented only 14.8% of all arbitrators appointed in 2016, albeit up from 10.4% in 2015.

³⁴ See Secretariat's Guide, § 3-526.

³⁵ See <http://www.uscib.org/dispute-resolution-ud-835/>.

the ICC considers it appropriate to appoint an arbitrator of the same nationality of one of the parties, it would give the parties an opportunity to comment before making the appointment. The ICC may also seek recommendations from multiple National Committees where particular qualifications are needed.³⁶

As noted, Article 13(4) of the ICC Rules also gives the Court the power to make a direct appointment without seeking input from a National Committee.³⁷ This process applies in a much smaller number of cases than those covered by Article 13(3). Article 13(4) identifies three circumstances in which the Court may make such a direct appointment. First, where one of the parties “is a state or may be considered to be a state entity.” Art. 13(4)(a). In such a scenario, it is considered that the strict “neutrality” of the Court is more appropriate than involving a National Committee. Second, where the Court considers it appropriate to make an appointment from a territory where there is no National Committee. Art. 13(4)(b). Given that the ICC has more than 90 National Committees across the world, this situation arises rarely. Third, where the President certifies to the Court that circumstances exist that “make a direct appointment necessary and appropriate.” Art. 13(4)(c). Such circumstances might, for example, include where an identical tribunal is to be appointed in more than one case, and thus the involvement of a National Committee is unnecessary.³⁸

Where an appointment is made directly, candidates will be identified by the Secretariat through internal discussions. The Secretariat will consider the factors identified in Article 13(1) and discussed above. The candidates(s) will be approached and must provide the usual Statement of Acceptance, Availability, Impartiality and Independence and other background materials prior to being proposed to the ICC Court for appointment.³⁹

B. Acting as Appointing Authority in Non-ICC Cases

While most arbitration agreements designate an institution to administer the proceedings, the parties may also choose an *ad hoc* arbitration to be conducted outside any institutional framework, often but not necessarily by adoption of the UNCITRAL Arbitration Rules. In such *ad hoc* cases, the parties can agree to use the ICC to assist with constituting the tribunal and resolving any arbitrator challenges. Importantly, unlike many other institutions, the ICC currently will not administer such an *ad hoc* arbitration, although it recently has begun providing certain administrative services. The ICC has a separate set of rules that are applicable in such cases – the Rules of ICC as Appointing Authority (the “Appointing Authority Rules”), which were amended as of January 1, 2018.⁴⁰ The number of such cases is small compared to the total number of ICC cases. The ICC acted as an appointing authority in 16 cases in 2015, 15 of which were under the UNCITRAL Arbitration Rules. In 2016, the ICC was called upon to act as appointing authority in 12 cases, only 4 of which were under the UNCITRAL Arbitration Rules.

³⁶ See Secretariat’s Guide, § 3-528.

³⁷ See generally Secretariat’s Guide, §§ 3-537 - 3-545.

³⁸ In addition to these three circumstances, the Court also maintains a residual power to make a direct appointment if the National Committee process has failed. See Art. 13(3).

³⁹ See Secretariat’s Guide, §§ 3-545

⁴⁰ Available at <https://iccwbo.org/dispute-resolution-services/appointing-authority/rules-of-icc-as-appointing-authority>.

The ICC can only act as appointing authority in accordance with the parties' agreement as expressed in either the arbitration clause, by subsequent agreement,⁴¹ or when designated as appointing authority by a competent authority.⁴² *See* Appointing Authority Rules, Art. 1. The UNCITRAL Arbitration Rules, for example, provide for use of an appointing authority where the parties fail to appoint an arbitrator or the tribunal. The parties can designate the ICC to serve this role.⁴³ Where the ICC is designated to serve as appointing authority, its functions are carried out exclusively by the ICC Court, with the assistance of the ICC Secretariat. *See* Appointing Authority Rules, Art. 1(2).

The Appointing Authority Rules provide a timeline and procedures for appointing an arbitrator or the tribunal that differ with respect to an arbitration governed by the UNCITRAL Arbitration Rules (*see* Appointing Authority Rules, Art. 6) as opposed to any other *ad hoc* arbitration (*see* Appointing Authority Rules, Art. 7). These specific timelines and procedures are beyond the scope of this report. However, practitioners should familiarize themselves with the distinctions between these provisions and those applying to an arbitration governed by the ICC Rules. To take one example, unless otherwise agreed by the parties or the Court determines it to be inappropriate, the ICC will use the list method for making appointments of sole or presiding (third) arbitrators in UNCITRAL arbitrations. *See* Appointing Authority Rules, Art. 6(2).

The ICC acting as an appointing authority may in appropriate cases also have the power to decide any challenge to the appointment of an arbitrator and/or to appoint a substitute arbitrator. *See* Appointing Authority Rules, Arts. 6(1) and 7(1)). As of January 1, 2018, the ICC also offers certain administrative services in *ad hoc* arbitrations, which include maintaining the file, assisting with logistical arrangements or notifications, and administering funds. *See* Appointing Authority Rules, Art. 8.

C. Emergency Arbitrators

It is not uncommon for a commercial dispute to require some form of interim conservatory relief as the first step in the dispute resolution process, *e.g.*, a preliminary injunction to prevent the sale of an asset, a restraining order to seize funds, or an order to preserve crucial evidence. All arbitration rules permit the tribunal to order interim or conservatory relief but this is of little use when there is not yet a tribunal in place. At the same time, a party may not want to go to state court as the state court may not have the necessary authority to grant interim relief or may be perceived as slow or biased.⁴⁴

Since January 1, 2012, the ICC Rules have included an emergency arbitrator mechanism. Unless the parties opt out as provided in Article 29 of the ICC Rules, this mechanism allows for the appointment of an "emergency arbitrator" empowered to order interim relief before the

⁴¹ The agreement may also be in the form of an offer to arbitrate contained, for example, in an investment agreement.

⁴² For example, in accordance with the UNCITRAL Rules, the Secretary-General of the Permanent Court of Arbitration in The Hague may designate the ICC as appointing authority if the parties fail to agree on the choice of appointing authority. *See* UNCITRAL Rules, Art. 6(2).

⁴³ UNCITRAL Rules, Art. 6(1).

⁴⁴ *See* Secretariat's Guide § 3-1052.

arbitral tribunal has received the file and even before a Request for Arbitration has been filed.⁴⁵ Article 29 of the ICC Rules provides the framework for emergency arbitrator proceedings. Appendix V sets out the Emergency Arbitrator Rules themselves.

Article 29 states that a party in need of urgent interim or conservatory measures that cannot await the constitution of the tribunal may make an application for emergency measures. The President of the Court is responsible for appointing an emergency arbitrator as soon as possible, “normally within two days” from receipt of the application for emergency measures. *See* Appendix V, Art. 2(1). Given the timing, the President of the Court will appoint the emergency arbitrator before respondent submits its response to the emergency application.⁴⁶

When appointing an emergency arbitrator, the President of the Court will consider the challenging time restrictions in the Emergency Arbitration Rules.⁴⁷ While the parties are free to agree on attributes or qualifications for the emergency arbitrator, this rarely happens. In practice, the President will consult with the Secretariat to identify suitable candidates from the pool of individuals who have served as ICC arbitrators and who are available to sit as emergency arbitrators.⁴⁸ There is no specific list of emergency arbitrator candidates that is maintained. As with all other arbitrator appointments under the ICC Rules, the emergency arbitrator shall be independent and impartial. *See* Appendix V, Art. 2(4)-(5). The emergency arbitrator must sign the usual statement of acceptance that attests to availability, impartiality and independence. *Id.* At that time, the arbitrator (or prospective arbitrator) must disclose any circumstance that might call into question independence or impartiality.⁴⁹ Of course, this all takes place in an expedited timeframe to ensure the appointment is made urgently.

Any challenge to the emergency arbitrator must be made within three days of appointment. *See* Appendix V, Art. 3(1). The Secretariat will allow all parties and the arbitrator an opportunity to comment on the challenge, usually within a three-day time frame.⁵⁰ The ICC Court is to decide the challenge. *See* Appendix V, Art. 3(2).⁵¹

The emergency arbitrator becomes *functus officio* once the full arbitral tribunal is constituted; as of that time the full tribunal will be responsible for interim or conservatory measures. Art. 28. The emergency arbitrator shall not act as an arbitrator in any arbitration relating to the dispute unless all parties agree otherwise. *See* Appendix V, Art. 2(6).⁵² As of January 1, 2017, there had been more than 50 emergency arbitrator proceedings conducted under the ICC Arbitration Rules

⁴⁵ *See* Secretariat’s Guide § 3-1051.

⁴⁶ *See* Secretariat’s Guide, § 3-1058.

⁴⁷ *See* Secretariat’s Guide, § 3-1056(e).

⁴⁸ *See* Secretariat’s Guide, § 3-1056(e).

⁴⁹ *See* Note to Parties, ¶ 18.

⁵⁰ *See* Secretariat’s Guide, § 3-1056(d).

⁵¹ *See also* Secretariat’s Guide, § 3-1056(d).

⁵² *See also* Secretariat’s Guide, § 3-1056(e).

D. Small Claims in Expedited Arbitration

The 2017 amendments to the ICC Rules introduced an expedited procedure that is automatically applicable in cases where the amount in dispute does not exceed \$2 million. Article 30 provides that the Expedited Procedure Rules set forth in Appendix VI take precedence over any contrary terms of the arbitration agreement if the amount in dispute is \$2 million or less or if the amount in dispute is greater but the parties agree to use the Expedited Procedure Rules. Parties with a dispute less than \$2 million can opt-out of the Expedited Procedure Rules. *See* Art. 30(3)(b).

The Expedited Procedure Rules, Article 2, states that “notwithstanding any contrary provision of the arbitration agreement” the Court “may” appoint a sole arbitrator. By submitting to arbitration under the 2017 ICC Rules (and not opting out of the Expedited Procedure Rules), the parties agree that any agreement to have disputes resolved by three arbitrators is subject to the Court’s discretion, if the Expedited Procedure Rules apply.⁵³ Indeed, the Court “will normally appoint a sole arbitrator in order to ensure that the arbitration is conducted in an expeditious and cost-effective manner.”⁵⁴ The Court will invite comments from the parties before deciding the number of arbitrators.⁵⁵ The Secretariat will also allow the parties a period of time to nominate a sole arbitrator; but if they do not do so, the Court will make the appointment directly. *See* Appendix VI, Art. 2(2).

The Expedited Procedure Rules only apply where the arbitration agreement was concluded after March 1, 2017, unless the parties agree otherwise. For disputes involving arbitration agreements that predate the 2017 amendments, there is no equivalent provision.

V. Special Situations

A. Multi-Party Arbitrations

Where there are multiple claimants or multiple respondents, and where the dispute is to be referred to three arbitrators, the claimants, jointly, and the respondents, jointly, shall each nominate an arbitrator. *See* Art. 12(6). The same procedure applies if a party is joined to the arbitration. *See* Art. 12(7).⁵⁶ The additional party may align itself with either claimant(s) or respondent(s) for the purpose of nominating an arbitrator.⁵⁷

If either the multiple claimants or multiple respondents are unable to agree to a joint nomination, the Court has discretion to appoint *all* members of the tribunal. *See* Art. 12(8).⁵⁸ This is a significant departure from the procedure applicable where there are only two parties to

⁵³ *See* Note to Parties, ¶ 83.

⁵⁴ Note to Parties, at ¶ 84.

⁵⁵ Note to Parties, at ¶ 85.

⁵⁶ Pursuant to Article 7, a party cannot be joined after the arbitrator has been confirmed or appointed unless the party has agreed otherwise. Participation in the constitution of the tribunal is a fundamental principle of the ICC Rules. This explains why the ICC does not permit a party to join the arbitration after the tribunal has been confirmed or appointed. *See* Secretariat’s Guide, § 3-479.

⁵⁷ *See* Secretariat’s Guide, § 3-467.

⁵⁸ *See also* Secretariat’s Guide, § 3-481

the dispute.⁵⁹ In that case, where one party defaults in its nomination, the Court will appoint an arbitrator on behalf of the defaulting party only. *See* Arts. 12(2), 12(4).

By way of background, up until 1992 the Court would only appoint an arbitrator on behalf of a side where one or more parties had failed to make a nomination. In 1992, the French Court of Cassation issued a landmark decision in *Sociétés BKMI et Siemens v. Société Dutco construction*, Cour de cassation (7 January 1992), *Revue de l'arbitrage* (1992) 470 (“*Dutco*”). In the *Dutco* arbitration, the ICC Court confirmed the arbitrator nominated by the sole claimant. The multiple respondents jointly nominated an arbitrator, but they did so under protest. Respondents argued that they should each be able to nominate a co-arbitrator. They challenged the ICC Rule in French litigation. The Court of Cassation ultimately held that parties are entitled to equal treatment, including in the nomination of arbitrators. When the ICC Rules were revised in 1998, the provisions relating to a failure of multiple parties to nominate an arbitrator jointly were amended to provide that where multiple claimants or respondents fail to jointly nominate an arbitrator, the Court may (and typically will) appoint all arbitrators. What is now Article 12(8) was enacted to ensure equality between parties in the process of constituting the tribunal.⁶⁰

In practice, it is extremely rare for multiple claimants not to nominate a co-arbitrator jointly as their interests are typically aligned on commencement of the proceedings. It is also not uncommon for multiple respondents to nominate a co-arbitrator jointly.⁶¹ However, the ICC occasionally administers cases where there are more than two opposing sides—*e.g.*, where third party claims are asserted, or where the respondents’ interests are adverse. In those cases, it is unlikely that the parties will agree on the co-arbitrators, so the Court usually appoints all arbitrators under Article 12(8).⁶²

While the ICC has discretion not to apply Article 12(8), it rarely does so absent exceptional circumstances, *e.g.*, where the multiple parties are closely related or if their failure to agree to a co-arbitrator appears to be a tactical decision.⁶³

If the ICC decides to appoint all arbitrators, it will generally select and appoint three arbitrators whom it considers appropriate. It need not consult a National Committee, and it will not appoint the candidates previously nominated by the parties.⁶⁴ Where the ICC appoints arbitrators in two or more related cases, it may decide to appoint the same tribunal in each case. In practice, the ICC Court has done so where the disputes arise out of the same contracts or contracting parties.⁶⁵

B. Consolidation

Article 10 provides that the Court may, at a party’s request, consolidate two or more arbitrations pending under the Rules into a single arbitration. In deciding whether to consolidate,

⁵⁹ Secretariat’s Guide, §§ 3-468-69.

⁶⁰ *See* Secretariat’s Guide, §§ 3-471-72.

⁶¹ *See* Secretariat’s Guide, § 3-476.

⁶² Secretariat’s Guide, § 3-477.

⁶³ *See* Secretariat’s Guide, §§ 3-483 – 3-485.

⁶⁴ *See* Secretariat’s Guide, § 3-486.

⁶⁵ *See* Secretariat’s Guide, § 3-489.

one of the factors most often considered is whether arbitrators have been confirmed or appointed in one or more of the arbitrations, and, if so, whether the same or different arbitrators have been confirmed. *See* Art. 10. If the arbitrations have different arbitrators the Court would be unable to consolidate unless the different arbitrators resign or are removed at the parties' request.⁶⁶ Where the Court decides not to consolidate, it may still appoint the same tribunal in each case to allow the cases to run in parallel.⁶⁷

C. State Entities

As discussed above, where the ICC is charged with appointing one or more arbitrator(s), it shall make the appointment upon proposal of a National Committee that the ICC Court considers appropriate. In cases where one party is a state or may be considered to be a state entity, however, the Court need not seek a recommendation from the National Committee prior to appointing an arbitrator. Article 13(4) provides that in such cases the Court may appoint the arbitrator directly. This provision was added in the 2012 amendments to the Rules, on advice from the ICC's Task Force on Arbitration Involving States or State Entities, to address the perception that National Committees favor business interests over state interests.⁶⁸

While Article 12(2) creates a presumption in favor of a sole arbitrator, in disputes involving one or more state entities as parties the Court will often decide that three arbitrators are appropriate.⁶⁹

D. Replacement of Arbitrators

Article 15 of the ICC Rules governs the replacement of an arbitrator during the arbitration. Reasons why an arbitrator would be replaced include death, incapacity, or voluntary resignation. The ICC Court is vested with discretion to decide whether the replacement arbitrator will be selected according to the original nominating process. *See* Art. 15(4). In addition, if the proceedings are closed before the death or departure of the prior arbitrator, the ICC Court may elect not to order a replacement, taking into account the views of the parties and the remaining arbitrators. *See* Art. 15(5).

As a matter of practice, where the former arbitrator was a co-arbitrator nominated by one of the parties, the ICC will typically ask that party to nominate the replacement. Deviations from this practice are rare, but may arise if, for example, the ICC considers that the party in question is attempting to delay or derail the arbitration.⁷⁰ Likewise, where the departing arbitrator is the president of the tribunal and was nominated by the co-arbitrators, the ICC will usually invite the

⁶⁶ *See* Secretariat's Guide, § 3-358.

⁶⁷ *See* Secretariat's Guide, § 3-360.

⁶⁸ *See* Secretariat's Guide, § 3-539. In the 2012 ICC Rules, Article 13(4) would apply where a party "claims" to be a state entity. This was intended to relieve the ICC Court of the potentially difficult task of deciding whether the party is a state entity. Secretariat's Guide, §§ 3-539 to 3-540. The 2017 amendment broadened the provision to apply where a party "may be considered to be a state entity." In this regard, the ICC Task Force report, as updated in June 2017, emphasized that the ICC Court always has the discretion to decide whether to make a direct appointment. *See* ICC Commission Report, States, State Entities and ICC Arbitration (rev'd June 2017) ¶¶ 37-40.

⁶⁹ *See* Secretariat's Guide, § 3-439.

⁷⁰ Secretariat's Guide, §§ 3-635, 3-639-640.

co-arbitrators to nominate a replacement.⁷¹ However, where the ICC appointed the departing arbitrator directly, its practice is to appoint the replacement directly without seeking a proposal from a National Committee.⁷² It is important to note that, while the Secretariat might not solicit comments from the parties, the parties will usually have a window of time, after being notified of the removal of the departing arbitrator, to comment on the process for selecting the replacement, and the Secretariat will consider such comments.⁷³

VI. Arbitrator List Services

The ICC's National Committees maintain databases of potential arbitrators. Anyone can submit an application to be considered for inclusion in such a database. In the U.S., information on how to apply to be considered for appointment as an ICC arbitrator is available on the USCIB website. <http://www.uscib.org/dispute-resolution-ud-835/>.

The arbitrator candidate lists are not generally publicly available. However, the relevant ICC case management team may be willing to provide names and resumes for recommended arbitration candidates if requested as part of an agreement subject to ICC arbitration or where the ICC acts as appointing authority.

Separately from the above informal recommendations, the ICC Secretariat will also provide a list of candidates as part of an agreement between the parties that the sole arbitrator or president will be selected by the parties using the list method.⁷⁴ The ICC does not dictate a specific procedure for implementing list appointments. Typically, with the assistance of an ICC case manager, the parties will agree on a protocol.

In most cases, the ICC will require the parties to advise of the desired characteristics of the arbitrator (or note divergences if there are any) before identifying candidates. Unlike some other institutions, the candidates will be contacted and required to submit a Statement of Acceptance, Availability, Impartiality and Independence before their names are proposed to the parties. The ICC will then provide, typically, a list of five candidates who have already advised that they are willing and able to serve. The candidates on the list will be selected by the ICC Secretariat (unless the ICC is acting as appointing authority, in which case the list must be approved by the ICC Court). The ICC Secretariat generates the list based on its knowledge of arbitration practitioners; it does not consult a National Committee. In appropriate cases, the ICC uses the list method to provide opportunities for younger or less experienced arbitrators. The ICC also attempts to achieve balance in its list proposals in terms of gender diversity.

The parties will be given a certain number of days to return the list to the ICC ranking the candidates in order of preference. If part of the agreed protocol, the parties may also object to the inclusion of a particular candidate on the list, although the fact that all candidates have

⁷¹ Secretariat's Guide, § 3-642.

⁷² Secretariat's Guide, § 3-643.

⁷³ Secretariat's Guide, § 3-637.

⁷⁴ As noted above, the list method is the default appointment mechanism where the ICC is acting as appointing authority in UNCITRAL arbitrations. See Section IV.B, *supra*. The list method provisions set out in the UNCITRAL Rules and the Appointing Authority Rules provide a useful template where the parties must adopt an agreed protocol.

already provided a Statement of Acceptance, Availability, Impartiality and Independence should limit the likelihood of this occurring. The candidate with the highest ranking will be selected, and that nomination will then be subject to Court confirmation.

The ICC's willingness to use the list method as part of a party agreement is not well-known. SICANA advises that as of mid-2017 this agreed list-method approach had only been used approximately 5-7 times in the prior year. Because the list of candidates is compiled by the Secretariat rather than through a National Committee, there may be greater scope for including a more geographically diverse slate of potential arbitrators.

INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION AND RESOLUTION (CPR)

I. Overview

The International Institute for Conflict Prevention and Resolution (“CPR”) entered the realm of dispute resolution focused on enabling parties to take charge of their disputes and fashion their own solutions. CPR very actively promoted mediation processes as the most flexible of party-controlled practices best suited to achieve efficient, effective and amicable results; however, it also promulgated arbitration rules for situations where the parties preferred a more structured adjudicatory approach or where mediation had failed to result in an agreement. Central to CPR’s early arbitration regime was its non-administered nature, reflecting its view that “[m]ost disputes are best resolved privately and by agreement.” Principle 1, CPR Non-Administered Arbitration Rules (2007) Principles.

After years of experience with its non-administered rules, CPR, in consultation with its advisors and members, began administering arbitration. CPR administers arbitrations under CPR’s Administered Arbitration Rules (2013) and CPR Rules for Administered Arbitration of International Disputes (2014). Citations to specific rules by number in this Report are to the CPR domestic rules except as noted.

The range of arbitrator selection methods anticipated by the rules is broad and flexible: Arbitrators may be directly selected with no intervention from CPR; CPR may assist the parties to select their arbitrators; or CPR may appoint the arbitrators. CPR’s non-administered rules provide for CPR assistance in the appointment process only by party request, and are dealt with separately in Section VI.

CPR’s international and domestic appointment procedures vary only slightly, as follows: (1) time periods are somewhat lengthened and telephone conferences made discretionary under the international rules in recognition of increased communication difficulties where parties and CPR are presumed likely located more distantly from each other; (2) nationality may form a basis of appointment in international matters; (3) under the international rules, greater flexibility is provided in selecting arbitrators—in that nominated arbitrators are not required to be drawn from the CPR panels—again in recognition that international arbitrations are more likely to require arbitrators of less common nationalities and/or expertise. Unless otherwise noted, quoted provisions are identical in the international and domestic rules.

In keeping with the underlying nature of arbitration as created by the parties and subject to their needs, CPR rules for the most part may be varied by the parties by agreement either prior to or during the arbitration process. This feature makes the CPR rules among the most flexible of arbitration paradigms available to parties: the CPR rules buttress the parties’ freedom to agree by providing fallbacks for when they find themselves in disagreement.

Of particular note: CPR’s rules provide an opt-in screening process for parties who prefer that their party-appointed arbitrators not be informed of the identity of the party designating them for appointment. Also, in creating lists of arbitrators from which the parties

make their selection, CPR first consults with the parties jointly to determine their needs and then pre-screens arbitrators for availability and absence of conflicts.

CPR maintains its Panels of Distinguished Neutrals from which arbitrators appointed under its rules are drawn (subject to exceptions as delineated in its rules). CPR panels include specialized panels, such as a Global Panel of neutrals located outside the U.S., a Cross-Border Panel of arbitrators experienced in transnational disputes, and many others. CPR lists the individual arbitrators on its panels on its website. Certain panels are publicly available while others are accessible only by CPR members. See www.cpradr.org.

While institutional rules, when read carefully, may be quite clear as to appointment procedures, parties may find that they are unfamiliar with how those rules work in practice. Parties may also be unaware of options they have in interacting with the appointing institution so as to enhance the appointment of the most satisfactory arbitrators. This Report describes both formal and informal practices available under CPR's rules governing arbitrator appointment.

II. Party Nomination and Appointment, Three Arbitrator Panel

CPR's default ("unless the parties have agreed otherwise in writing...") arbitral panel consists of three arbitrators, two of whom are selected by the parties and a third selected separately. Rule 5.1(a).

If the parties will be appointing their own arbitrators, both the domestic and international CPR Rules 3.2(f) and 3.7(d) provide for the appointment to be initiated by designation in the notice of arbitration and the notice of defense. Arbitrators designated by parties are **not** required to be members of CPR's panels. After receiving the parties' designations and pursuant to Rule 5.1(c), CPR will contact the named arbitrator to obtain information about the arbitrator's availability and disclosures of potential conflicts, and convey those to the parties. After any objections are determined by CPR in accordance with the rule, CPR will make the appointment.

In accordance with Rule 5.2, the third arbitrator may be appointed by the already-appointed party arbitrators, or by CPR, depending on what the parties have agreed. (CPR appointment is governed by Rule 6, discussed in Institutional Appointment, Section IV below.) The party-appointed arbitrators have 20 days (30 days under the international rules) after appointment of the second arbitrator in which to make their designation of the chair, or CPR will make the appointment as provided in Rule 6.2. As with party-nominated arbitrators, CPR will contact the arbitrator proposed by the party-appointed arbitrators for information as to availability and disclosure, transmit that information to the parties, determine any objections, and make the appointment.

III. Party Nomination and Appointment, Sole Arbitrator (Or Panel of Three Arbitrators Not Designated by the Parties)

CPR rules specifically provide for party participation in the arbitrator appointment process even in instances in which the arbitration agreement does not provide for party appointment:

If the parties have agreed on a Tribunal consisting of a sole arbitrator or of three arbitrators none of whom shall be designated for appointment by either party, the parties shall attempt jointly to designate such arbitrator(s) within [20 (domestic)/30 (international)] days after the notice of defense provided for in Rule 3.6 is due.... The parties may extend their selection process until one or both of them have concluded that a deadlock has been reached, but in no event for more than [30 (domestic)/45 (international)] days after the notice of defense provided for in Rule 3.6 is due. In the event the parties are unable to designate the arbitrator(s) within the extended selection period, the arbitrator(s) shall be selected as provided in Rule 6.2.

Rule. 5.3.

Although under other institutional rules nothing prevents parties from reaching agreement on arbitrators whose appointment is either not provided for or where a sole arbitrator is provided for, CPR formally includes the parties in the appointment process before any institutional appointment process begins, again emphasizing that CPR considers the arbitration to belong wholly to the parties (to the extent that they can agree).

If the parties fail to jointly designate an arbitrator, CPR follows the process set forth under its rule, Rule 6.2, for CPR appointment, discussed in Section V. below.

IV. Screened Appointments: Party “Designated” Arbitrators

CPR, uniquely, has also developed an arbitrator “screening” process with the goal of promoting arbitrator neutrality. The screened arbitrator selection process aims to insulate the parties and the arbitrators from knowledge of which party-designated arbitrator may be associated situationally with which party. In applying this feature, CPR provides the parties with a list of prospective arbitrators derived from its panels; CPR will appoint each party’s first choice from the list (provided CPR has not sustained an objection to the arbitrator on independence/partiality grounds):

If the parties have agreed on a Tribunal consisting of three arbitrators, two of whom are to be designated by the parties without knowing which party designated each of them, ...CPR shall conduct a “screened” selection of party-designated arbitrators as follows:

- a. CPR will provide each party with a copy of a list of candidates from the CPR Panels together with confirmation of their availability to serve as arbitrators and disclosure of any circumstances that might give rise to justifiable doubt regarding their independence or impartiality as provided in Rule 7. Within 10 days after the receipt of the CPR list, each party shall designate from the list three candidates, in order of preference, for its party-designated arbitrator, and so notify CPR and the other party in writing.

- b. ...If there is no objection to the first candidate designated by a party, or if the objection is overruled by CPR, CPR shall appoint the candidate as the arbitrator....
- c. If the independence or impartiality of the first candidate designated by a party is successfully challenged, CPR will appoint the subsequent candidate designated by that party...
- d. Neither CPR nor the parties shall advise or otherwise provide any information or indication to any arbitrator candidate or appointed arbitrator as to which party selected either of the party-designated arbitrators. No party or anyone acting on its behalf shall have any *ex parte* communications relating to the case with any arbitrator candidate or appointed arbitrator....

Rule 5.4.

Significantly different in effect is the provision for screening in arbitrations under the CPR international rules: parties may nominate their own designees to be included in the list of candidates circulated by CPR; and, such designees are not required to be drawn from the CPR Panels. As a practical matter, then, parties in CPR international arbitrations may effectively select their own arbitrators and yet also screen them from being informed of which party supported their appointment. Rule 5.4, 2014 CPR Rules for Administered Arbitration of International Disputes.

V. Institutional Appointment

Rule 6 governs appointment of arbitrators by CPR itself, and by its terms applies in the following circumstances:

- (1) Party failure to designate its arbitrator;
- (2) Failure of joint designation process;
- (3) Failure of party-appointed arbitrators to designate a third arbitrator;
- (4) Agreement provides for appointment by CPR of one or more arbitrators;
- (5) Multi-party arbitration covered by Rule 5.5.

In the first situation, where a party has failed to make its designation of an arbitrator, the rule provides that “CPR shall appoint a person whom it deems qualified to serve as such arbitrator.” Rule 6.3.

In the international version, the rule adds that CPR will “take...into account the nationalities of the parties and any other relevant circumstances,” thus reflecting common practice and the complexities often arising due to the nature of international arbitration.

For all other instances of appointment by the institution, CPR’s rules emphasize the primacy of party input into the selection process: Rule 6.2 provides as the beginning step in the appointment process for CPR to meet jointly with the parties by telephone to discuss selection. In domestic cases, this consultation is mandatory; it is discretionary on CPR’s part in international matters.

In the party conference, CPR engages the parties in a wide-ranging discussion designed to elicit the best information to form the basis of arbitrator selection. Topics include:

- Review of the full CPR process and applicable rules;
- Venue for the proceedings;
- Estimated length of arbitration hearings;
- Likely calendar date range within which the proceedings should take place;
- Any additional names of individuals and entities for which the parties wish candidates to check conflicts;
- Preferred qualifications and experience of prospective candidates;
- Geographic area from which candidates are to be drawn;
- Any provisions in the parties' dispute resolution agreement that may need review;
- CPR and arbitrator fees and expenses.

Parties can express preferences, discuss desired expertise and other arbitrator characteristics and generally raise concerns they have with respect to arbitrator appointment. CPR thereby gains information that makes identification of appropriate arbitrators more likely.

Once the initial consultation with the parties has concluded, CPR prepares and provides to the parties a list of candidates (numbering at least 5 if a single arbitrator is being selected, and at least 7 if two arbitrators are sought for a three-arbitrator panel). In domestic arbitrations, CPR draws candidates from the CPR Panels. If the international rules apply, CPR may list, in addition to candidates on the CPR Panels, candidates not found in such lists. Parties in international cases are also entitled to request that arbitrator candidates be of a nationality other than the nationalities of the parties.

CPR's list distributed to the parties includes "a brief statement of each candidate's qualifications, availability and disclosures in writing of any circumstances that might give rise to justifiable doubt regarding the candidate's independence or impartiality." Rule 6.2(b). In practice, CPR derives its final list as follows:

- (1) After having the discussions with the parties provided for in Rule 6, CPR narrows the field of potential candidates, considering such factors, among others, as geography, skill sets, expertise, and the like;
- (2) Internally, CPR creates an initial list, usually containing the names of 20-30 candidates, although at times up to 40-50;
- (3) CPR then winnows the initial list internally based on disclosures and availability of candidates;
- (4) Only then does CPR externally circulate a list to the parties containing, as set forth above, biographical information, arbitrator rates, and potential conflict disclosures--the parties can request additional information if they so desire.

After considering the listed candidates, each party ranks them numerically in order of preference. CPR will then appoint as arbitrators the nominees collectively ranked the highest by the parties, and who are available and meet CPR's criteria of independence and impartiality.

CPR follows the above procedure unless the parties agree to change it. For instance, the parties may alter the ranking process in favor of alternating strikes or some other selection method. Rule 6 also specifically provides that the parties may agree that CPR circulate each party's rankings and objections to further facilitate efficiency and agreement in the appointment process. In the event of a tied ranking, CPR may designate either candidate. In so doing, CPR's practice is to base its appointment choice on the nominees' disclosures; CPR also may consider other factors such as the neutral's case management style and availability.

Finally, in the event that the above-described appointment procedure fails to produce the requisite number of arbitrators, "CPR shall appoint a person or persons whom it deems qualified to fill any remaining vacancy." Rule 6.2(b).

VI. Appointment by CPR Pursuant to CPR Non-Administered Arbitration Rules

CPR's Non-Administered Arbitration Rules do provide for CPR to assist the parties in the appointment process. Rule 6 of those Rules closely tracks its counterparts in CPR's domestic and international rules for administered arbitration. Rule 6 applies when:

- (1) A party has failed to make its appointment as provided in the contract;
- (2) The parties have failed in making a joint appointment;
- (3) Party-appointed arbitrators have been unable to agree on a third arbitrator;
- (4) The parties' contract provides for appointment by CPR;
- (5) The arbitration is a multi-party arbitration (covered by Rule 5.5).

Any party may initiate an appointment by CPR by making a written request to CPR including copies of the notice of arbitration and the notice of defense or any submission agreement. Rule 6.3. As is the case with CPR's administered rules, Rule 6 begins the appointment process with a joint consultation:

Promptly following receipt by it of the request provided for in Rule 6.3, CPR shall convene the parties in person or by telephone to attempt to select the arbitrator(s) by agreement of the parties.

Rule 6.4.a. Here is evidenced an even stronger preference for achieving party consensus than what appears in the rules for administered arbitrations. If the parties do not succeed in agreeing on their arbitrators, the remainder of Rule 6 comes into play, and institutes the list procedure set forth in CPR's administered arbitration rules. Likewise, the non-administered rules provide for the same screening procedure as that set forth in the administered rules—also in Rule 5.4.

VII. Special Situations

A. Multi-Party Arbitrations

CPR anticipates that in cases of multiple claimants and/or multiple respondents, the parties on each side will agree on an arbitrator for their side; otherwise CPR will appoint all of the arbitrators:

Where the arbitration agreement entitles each party to designate an arbitrator but there is more than one Claimant or Respondent to the dispute, and either the multiple Claimants or the multiple Respondents do not jointly designate an arbitrator, CPR shall appoint all of the arbitrators as provided in Rule 6.2

Rule 5.5. The above is the sole provision in CPR's rules dealing with multiple parties (consolidated arbitrations are not mentioned). As can be seen, the rules contemplate bilateral opposing claims; tribunals are not enlarged to accommodate multiple parties.

B. Replacement Arbitrator

If an arbitrator is to be replaced (as a general matter, for some inability to serve, resignation, or successful challenge), Rule 7.9 provides that a party that designated the departing arbitrator may designate a successor arbitrator; otherwise the substitute arbitrator is replaced in the same manner as he or she was originally appointed. The same procedure applies in the case of an arbitrator who fails or is unable fully to perform the duties of an arbitrator. In the event that the parties do not agree whether the arbitrator should be replaced, CPR is empowered to make that determination.

C. Interim Measures of Protection by a Special Arbitrator

Should a party request, prior to an arbitration tribunal being established, to hear the matters in dispute in the arbitration, a special arbitrator may be appointed for the purpose of ruling on an application for interim measures. Such an arbitrator appointment is made as follows:

If the parties agree upon a special arbitrator within one business day of the request, that arbitrator shall be appointed by CPR subject to Rule 14.6. If there is no such timely agreement, CPR shall appoint a special arbitrator from a list of arbitrators maintained by CPR for that purpose. To the extent practicable, CPR shall appoint the special arbitrator within one business day of CPR's receipt of the application for interim measures under this Administered Rule.

Rule 14.5. Once the tribunal has been constituted, the tribunal may modify or vacate the award or order rendered by the special arbitrator (Rule 14.14). The special arbitrator may not serve as a member of the tribunal unless the parties agree otherwise (Rule 14.15)

VIII. Features of CPR List Process/Neutral Rosters

CPR qualifies a neutral for one or more of its panels. Neutrals may be invited or apply for inclusion, and are selected only after they have been reviewed and approved by CPR and/or selected users of dispute resolution services, peers and/or academics. They are screened for their litigation and ADR expertise and training, and candidate references are asked to comment specifically on the applicant's qualifications to serve on complex commercial disputes. Subject matter expertise is examined and noted. CPR seeks geographic and other diversity; it expects all neutrals to maintain the highest ethical standards as set out by the governing ethical codes and rules. As well as its National Panel and its Global Panel, CPR maintains 23 specialized panels of neutrals, including a General Counsel Panel, a Cross-Border Panel and a Judicial Panel. Bios of all of CPR's panelists are available only to CPR members on its website. Currently, CPR's lists contain approximately 600 neutrals, 60% of whom are experienced in mediation as well as arbitration.

In providing its arbitration administration services, CPR uses experienced lawyers who, among other things, evaluate neutrals for inclusion on CPR Panels, develop the candidate lists circulated to the parties in the appointment process, and determine challenges to proposed arbitrators.

JAMS

[Note: this section of the Report was updated on April 26, 2018]

I. Overview

JAMS is a private alternative dispute resolution provider. It is associated with over 300 full-time neutrals, who have experience resolving a wide variety of case types. The vast majority of JAMS neutrals are exclusive to JAMS. The JAMS' corporate offices are located in Irvine, California. Arbitrations before JAMS neutrals are conducted throughout the United States and internationally. Although the parties generally are free to select their JAMS arbitrators, JAMS provides a set of rules and procedures governing arbitrator selection, with a primary focus on the strike-and-rank method.

Most of the disputes administered by JAMS are governed by the JAMS Comprehensive Arbitration Rules & Procedures (hereinafter, the “**Rules**”).⁷⁵ JAMS also has separate rules applicable to streamlined disputes, construction disputes, employment disputes, international disputes, and surety adjudication. Unless indicated otherwise below, the rules and procedures applicable under these other sets of rules do not differ materially from those under the Rules.

II. Number of Arbitrators

A. Applicable Rules

The JAMS Rules provide that arbitrations are to be heard by a sole neutral arbitrator unless the parties agree otherwise. *See* Rule 7(a); *but see* Rule 7(a) of the JAMS Engineering and Construction Arbitration Rules & Procedures (providing for three neutral arbitrators in certain commercial construction disputes). This default rule applies regardless of the subject matter of the arbitration or the amount in controversy. Accordingly, the majority of JAMS arbitrations are conducted before a sole arbitrator. Nevertheless, the JAMS Rules empower the parties to modify the default rule by agreement (Rule 2), so JAMS arbitrations also can be heard by a tripartite panel of neutral and independent arbitrators.⁷⁶ In the majority of cases heard by a tripartite panel, each party will name one arbitrator, and will then either agree upon, or enlist JAMS' assistance with, naming the third member of the panel. *See* Rule 7(c).

B. Institutional Practices

Unless the parties agree otherwise, JAMS does not deviate from the default rule that JAMS arbitrations are to be heard by a sole arbitrator. As a result, there are JAMS arbitrations with many millions (and even billions) of dollars at stake that are heard by a sole arbitrator. When the parties do agree to have the arbitration conducted by a tripartite panel, and that each party will name one arbitrator, those arbitrators are almost always neutral and independent.

⁷⁵ The JAMS Comprehensive Arbitration Rules & Procedures are located at: www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_comprehensive_arbitration_rules-2014.pdf.

⁷⁶ In theory, the parties could agree to have the Arbitration conducted by any number of arbitrators. However, in practice, all JAMS arbitrations are conducted either by a sole arbitrator or a tripartite panel.

Although the JAMS Rules permit the parties to agree that their named arbitrators can be non-neutral, in practice most JAMS arbitrators prefer to sit as neutral arbitrators.

III. Party Nominations

A. Applicable Rules

JAMS will follow the methods for arbitrator appointment that are agreed upon by the parties so long as they are consistent with applicable law and JAMS policies. *See* Rule 2. This includes allowing the parties to choose their own arbitrator or arbitrators.

If the parties cannot reach an agreement on their own, JAMS may help to facilitate such agreement. *See* Rule 15(a). This could include providing a list of potential arbitrators to the parties that focuses the parties' attempt at agreement by pre-selecting arbitrators based on party-chosen criteria, such as cost, location or subject matter expertise. Also, in tripartite cases, the parties can agree upon the chairperson, regardless of the method by which the members of the panel were selected. *See* Rule 7(b). In other words, where the parties can reach agreement in any form as to the selection of arbitrators, the JAMS Rules generally provide for and encourage such agreement.

B. Institutional Practices

JAMS encourages the parties to agree upon the selection of the arbitrator or arbitrators. To that end, JAMS makes available on its website the biographies and other pertinent information about all of its neutrals to assist the parties in conducting their own due diligence. The neutrals can be searched by name, location, areas of expertise, language and key words.⁷⁷ So, if the parties agree on the selection of the arbitrator or arbitrators, they can simply inform JAMS of their selection and those persons will be named the arbitrators if their schedules permit.

In sole arbitrator cases, the arbitrator typically is a JAMS arbitrator. Most of the time in tripartite cases, all three arbitrators are JAMS arbitrators, but there are many cases in which only one or two members of the panel are from JAMS. For example, the parties could each select their own non-JAMS arbitrator, and then agree upon the selection of a JAMS arbitrator as the third member of the panel. Alternatively, the parties could have their individually-selected arbitrator choose the third member of the panel. Regardless of how the parties agree upon the selection of arbitrators, those arbitrators must be neutral and independent, unless the parties have agreed otherwise, which is rare.

Outside of simply agreeing on their own to the appointment of arbitrators, parties can also agree to a specific method for arbitrator appointment that enlists the assistance of JAMS. For example, the arbitration agreement could specify that JAMS will provide a list of arbitrators meeting certain criteria, and the parties will select the arbitrators from that list. As discussed above, even if the parties do not formally agree to request a list from JAMS in their arbitration agreement, they can request such a list from JAMS during the selection process to aid them in reaching an agreement. In at least one instance, the arbitration agreement provided that if the

⁷⁷ *See* <https://www.jamsadr.com/neutrals/search>.

parties could not agree to any of the arbitrators on a list provided by JAMS, but had narrowed the choices down, a coin toss would decide arbitrator selection. The lesson, as always, is that the parties control the process through their agreement and can provide for the selection of arbitrators as they see appropriate.

The chairperson in a three-member tribunal usually is the arbitrator who was not individually selected by the parties. The parties can either agree to this beforehand, or can permit their chosen arbitrators to select the chairperson. In the rare cases where the parties cannot agree by any method on which arbitrator will serve as the chairperson, JAMS will select the chairperson. There is no requirement that a JAMS arbitrator serve as the chairperson, so long as at least one of the three arbitrators is a JAMS arbitrator.

IV. Institutional Appointments

A. General

1. Applicable Rules

Although JAMS encourages parties to select their own arbitrators, and will facilitate such agreement, the parties often rely on JAMS to appoint the arbitrator or arbitrators. This occurs when the parties do not agree otherwise, and the arbitration agreement is silent regarding appointment, simply refers to the JAMS Rules, or specifically provides for the appointment by JAMS. Under these circumstances, JAMS will “appoint” the arbitrator(s) through the use of the strike and rank method. *See* Rule 15(b). Most JAMS cases are single arbitrator cases in which a strike list is used to select the arbitrator. For tripartite cases, the parties typically will each have chosen their own arbitrator, and will then use the JAMS strike list to select the chairperson.

When the strike and rank method is applied, JAMS sends the parties a strike list of at least five arbitrators (ten for 3 member arbitral tribunals), along with descriptions of the background and experience of each arbitrator. *See* Rule 15(b). Except in rare circumstances, the strike lists will always be made up solely of JAMS arbitrators. Within one week of receiving the list, each party strikes two names (three for tripartite panel cases), and then ranks the remaining candidates in order of preference. *See* Rule 15(c). The remaining candidate(s) with the highest ranking(s) is appointed as the arbitrator. *Id.* JAMS will grant reasonable extensions of the time to strike and rank the candidates. It is important that parties communicate with JAMS about the need for such extensions, because the failure entirely to respond to a strike list will be deemed as an acceptance of all candidates on the list. *See* Rules 15(c), (e).

2. Institutional Practices

In the typical case, JAMS will send out the strike list shortly after the arbitration is formally commenced. The strike lists are supplemented if the location is in flux or if JAMS learns that the location has changed. The strike lists are created by either a case manager or senior case manager who is assigned to the case after commencement. In addition to being knowledgeable about the composition of the JAMS panel of neutrals, the case managers also have access to the statement of claims, so they are aware generally of the subject matter of the arbitration, the amount in controversy, and the contractual requirements of the arbitration. They

use that information, along with any supplemental information from the parties regarding, *e.g.*, sensitivity to costs or additional experience requirements beyond those provided for in the arbitration agreement, when creating the lists. The case managers can also enlist the help of ADR specialists when creating the list, who are regional resources at JAMS with more specialized knowledge about JAMS neutrals in particular areas of the country.

The goal of the case managers in creating the strike lists is to provide the parties with options for JAMS arbitrators that fit the parties' needs, including the contract requirements. For example, if a contract requires that arbitrators have a minimum level of experience in a particular field, the strike list will only include qualifying arbitrators. Also, if the parties are particularly concerned about costs, or the amount in controversy is relatively small, then the list will not include the most expensive JAMS arbitrators. Other inputs utilized by the case managers include the travel time and travel expense associated with particular arbitrators, and the availability of arbitrators if the contract contains a timeline for the completion of the arbitration or the parties have chosen the JAMS Streamlined Procedures, which are discussed in further detail below.

All of the strike lists are reviewed by management at some point during the process. The case managers and senior case managers responsible for creating the lists are subject to regular, ongoing training. Also, JAMS sends evaluations to the parties regarding the JAMS neutrals, and they also engage in periodic surveys of JAMS clients. Accordingly, there are procedures in place to ensure that JAMS is reviewing the performance of its employees and its neutrals to help ensure that the appointment process is as fair and effective for JAMS' clients as possible.

The strike and rank method is the way in which JAMS typically appoints arbitrators. Only in very rare circumstances does JAMS actually impose its choice of arbitrator upon the parties. This occurs when (a) the parties have explicitly agreed that JAMS will be solely responsible for the selection of the arbitrators, or (b) if the procedures for selecting the arbitrators repeatedly fail. By way of example, parties sometimes agree to solicit a list of arbitrators from JAMS and provide that the parties can strike as many names from the list as they want. At least one of the parties will then strike every candidate. If this process is repeated, it becomes clear that the parties will be unable to select an arbitrator using their agreed-upon method, and only then will JAMS select the arbitrators. JAMS will also select the arbitrators if the strike and rank method does not yield an arbitrator or a complete panel, but these situations are rare.

Finally, if a party completely fails to participate in the strike and rank process, JAMS will use the selections of the participating party to appoint the arbitrators. As discussed above, reasonable extensions will be granted, but parties risk having their adversary's choices foisted upon them if they do not participate in the selection process.

B. Appointing Authority Only (*ad hoc* arbitrations)

JAMS does not appoint arbitrators for *ad hoc* arbitrations except in the rare circumstance where the contract explicitly states that the parties will use JAMS to appoint arbitrators but for nothing else. JAMS will, however, assist its clients and its neutrals that are participating in *ad hoc* arbitrations. For example, JAMS will run disclosures and provide billing assistance to its neutrals who are presiding over *ad hoc* arbitrations. Although the JAMS Rules provide that

parties may subsequently agree to have JAMS administer an *ad hoc* arbitration (*see* Rule 2(b)), in practice this is unlikely to occur.

C. Emergency Arbitrators

Parties in need of emergency relief prior to the appointment of an arbitrator may notify JAMS by facsimile, email or hand delivery of the need and reasons why emergency relief is sought. Rule 2(c)(i). Prior to doing so, the party seeking emergency relief must notify all other parties and certify as much to JAMS. *Id.* JAMS will then appoint an emergency arbitrator, typically within 24 hours. Rule 2(c)(ii). All challenges to that emergency arbitrator must be made within 24 hours. *Id.* Within two days of appointment, the emergency arbitrator will then set a schedule that permits the parties to be heard. Rule 2(c)(iii).

The use of JAMS' emergency arbitrator appointment procedures is uncommon. JAMS has appointed emergency arbitrators in rare circumstances where the parties did not choose to go to court to obtain preliminary relief, such as in disputes involving trade secrets or other confidential information that the parties did not want made publicly available. After appointment of the tribunal, any request related to the relief granted or denied by the emergency arbitrator is determined by the tribunal. Rule 2(c)(v).

D. Small/Simple Claims (Default for Claims Under \$250,000)

Where no disputed claim or counterclaim exceeds \$250,000 (not including interest or attorneys' fees), or where the parties otherwise agree, the JAMS Streamlined Rules and Procedures⁷⁸ apply. Arbitrator selection under the Streamlined Rules proceeds much like that under the Comprehensive Rules, albeit with shorter lists and fewer candidates. More specifically, streamlined arbitrations must be conducted by one neutral arbitrator. If the parties do not agree on the selection of that arbitrator, a strike list with three candidates will be provided, and each party can strike one candidate and rank the remaining three. JAMS will then appoint the arbitrator based on the results of the strike and rank. *See* Streamlined Rule 12.

JAMS administers many of its cases under the Streamlined Rules. If one party wants to proceed under the Streamlined Rules, but this is not provided in the contract (and the case is over \$250,000), the arbitrator will be selected using the Comprehensive Rules procedures, but that arbitrator can decide later that the case should proceed pursuant to the Streamlined Rules. The Comprehensive Rules also have Expedited Procedures that the parties can agree to apply.

E. Special Situations

1. Multi-party

Cases are considered "multi-party" when there are more than two parties whose interests are adverse and who are represented by separate counsel. In these cases, arbitrator selection

⁷⁸ The JAMS Streamlined Arbitration Rules & Procedures are located at:
www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_streamlined_arbitration_rules-2014.pdf.

proceeds in the same way as two-party cases. If the parties are unable to reach an agreement on arbitrator selection, strike lists are provided to all parties.

2. Consolidation

Where not prohibited by applicable law or the parties' agreement, JAMS may consolidate arbitrations that have common issues of law or fact when: (i) a party files more than one arbitration with JAMS; (ii) when a demand for arbitration is submitted naming parties already involved in another JAMS arbitration; and (iii) when a demand for arbitration is submitted naming non-identical parties to those already involved in another JAMS arbitration. Rule 6(e).

LONDON COURT OF INTERNATIONAL ARBITRATION (LCIA)

I. Overview

Headquartered in London, England, the London Court of International Arbitration (“**LCIA**”) is one of the world’s leading international institutions for commercial dispute resolution. The international focus of the LCIA and its services are reflected in the fact that “typically, over 80% of parties in pending LCIA cases are not of English nationality.”⁷⁹ The LCIA operates under a three-tiered structure, comprising the Company, the arbitration Court and the Secretariat.

The Company is a not-for-profit, run by a board made up largely of prominent London-based arbitration practitioners who are principally focused on the operation and development of the LCIA’s business and its compliance with applicable company law.

The LCIA Court (or “**Court**”) is made up of up to thirty-five members, as well as representatives of associated institutions, and former LCIA Presidents, all of whom are selected to maintain a balance of leading commercial arbitration practitioners. The Court has a President and seven Vice Presidents. The LCIA Court, specifically the Vice President assigned to the particular case, typically decides on issues of arbitrator appointment(s). The Court is aided in substantial part by two primary teams (one led by the Deputy Registrar and another led by LCIA Senior Counsel), each of which assists the Court in making decisions on arbitral appointments by providing the Vice President assigned to a particular case a summary thereof and an initial list of proposed arbitrators.

The Secretariat is headed by the Registrar and Deputy Registrar and is based at the International Dispute Resolution Centre (**IDRC**) in London. The Secretariat is responsible for the day-to-day administration of LCIA disputes and substantially aids the Court in administering LCIA arbitrations.

The LCIA has promulgated Rules of Arbitration (the “**LCIA Rules**”) to govern arbitrations under its administration, including detailed directives relating to the appointment of arbitral tribunals. Nonetheless, the LCIA Rules permit significant flexibility in accommodating the parties’ agreement regarding the procedure of selecting arbitrators. The current edition of the LCIA Rules went into effect on October 1, 2014 and is available on the Court’s website.⁸⁰

This section of the Report explores the applicable rules governing the nomination and appointment of arbitrators, primarily Articles 1 to 2 and 5 to 7 of the LCIA Rules, as well as institutional practices of the LCIA in carrying out its functions.

⁷⁹ LCIA website, available at <http://www.lcia.org/LCIA/introduction.aspx>.

⁸⁰ The current 2014 LCIA Rules are available at http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx.

II. Number of Arbitrators

A. Applicable Rules

The LCIA Rules contemplate that the arbitral tribunal will consist of one or three arbitrators. *See, e.g.*, Art. 5.8. While the number of arbitrators is frequently specified in the parties' arbitration clause or agreement, the number may be agreed upon afterwards, including after the arbitration is filed. Where the parties have not agreed on the number of arbitrators, the LCIA Rules provide that a "sole arbitrator shall be appointed unless the parties have agreed in writing otherwise or if the LCIA Court determines that in the circumstances a three-member tribunal is appropriate (or, exceptionally, more than three)." Art. 5.8.

B. Institutional Practices

There are no firm criteria that the LCIA considers in determining whether a particular dispute requires a three (as opposed to a one) member arbitral tribunal, outside the requirement that the "LCIA Court shall appoint arbitrators with due regard for any particular method or criteria of selection agreed in writing by the parties." Art. 5.9. The LCIA Court will take into account such issues as "the transaction(s) at issue, the nature and circumstances of the dispute, its monetary amount or value, the location and languages of the parties, the number of parties and all other factors which it may consider relevant in the circumstances" (Article 5.9), in addition to hearing from the parties.

III. Party Nominations

A. Applicable Rules

The LCIA Rules provide that the Claimant, in its Request for Arbitration, must provide details of its nominee for party appointed arbitrator, if the arbitration clause so permits. *See* Art. 1.1(v). The Respondent, in its Response to Claimant's Request for Arbitration, must provide details of its nominee for party appointed arbitrator, if the arbitration clause so permits. *See* Art. 2.1(v). The parties are free to nominate arbitrators, including the presiding arbitrator, as they wish pursuant to agreement, subject to such nominees' compliance with Articles 5.3 to 5.5 of the LCIA Rules. *See* Art. 7.1. The LCIA Court shall "appoint the Arbitral Tribunal promptly after receipt by the Registrar of the Response or, if no Response is received, after 35 days from the Commencement Date (or such other lesser or greater period to be determined by the LCIA Court pursuant to Article 22.5)." Art. 5.6.

The criteria used by the LCIA in choosing whether to confirm arbitrators nominated by the parties is set forth in Articles 5.3 to 5.5 of the LCIA Rules. Foremost among these is the requirement of independence and impartiality. Specifically, "[a]ll arbitrators shall be and remain at all times impartial and independent of the parties; and none shall act in the arbitration as advocate for or representative of any party. No arbitrator shall advise any party on the parties' dispute or the outcome of the arbitration." Art. 5.3. Moreover, before being appointed, each candidate "shall furnish to the Registrar (upon the latter's request) a brief written summary of his or her qualifications and professional positions (past and present)," "shall also agree in writing fee-rates conforming to the Schedule of Costs," and "shall sign a written declaration" attesting to

his or her independence and impartiality and confirming that he or she will be able “to devote sufficient time, diligence and industry” to the matter to ensure that it proceeds expeditiously and efficiently. Art. 5.4.

More recently, the LCIA adopted changes to its Notes for Arbitrators (*see LCIA Notes for Arbitrators*, <http://www.lcia.org//adr-services/lcia-notes-for-arbitrators.aspx>) to provide that tribunal secretaries also are required to complete a Statement of Independence and Consent to Appointment and to provide the same to the parties prior to their appointment, to ensure that the proposed tribunal secretary has no relevant conflicts and to allow the parties an opportunity to object. (*LCIA implements changes to tribunal secretary processes*, 26 October 2017, available at: <http://www.lcia.org/News/lcia-implements-changes-to-tribunal-secretary-processes.aspx>; *LCIA Notes for Arbitrators*, <http://www.lcia.org//adr-services/lcia-notes-for-arbitrators.aspx>, Notes 74-75.)

The duty of independence and impartiality continues throughout the course of the arbitration. Arbitrators (and tribunal secretaries) are required to update the LCIA Court of any changes in circumstances that might give rise in the minds of the parties to any “justifiable doubts as to his or her impartiality or independence.” Art. 5.5; *LCIA Notes for Arbitrators*, <http://www.lcia.org//adr-services/lcia-notes-for-arbitrators.aspx>, Note 78.

B. Institutional Practices

While party-nomination of an arbitrator remains subject to confirmation by the LCIA, the LCIA is highly deferential to the preference of a nominating party. As a matter of practice, unless a party submits an objection to a nomination or the LCIA has information raising concerns about the arbitrator’s independence or impartiality, the LCIA very rarely will refuse to confirm an arbitrator chosen by a party. However, if the LCIA refuses to confirm a party’s nomination, the Court will provide that party the opportunity to nominate a different candidate. The LCIA confirmation process is confidential, and the LCIA does not provide the parties with its rationale for confirming, or refusing to confirm, a party-nominated arbitrator.

The LCIA does not publicize the names of the arbitrators, their nationality, or the method by which any of the arbitrators were selected (*i.e.*, nominated by a party or appointed by the LCIA).

Lastly, there has been some confusion regarding the interplay of Articles 5.7 and 7.1 of the LCIA Rules. Article 5.7 provides that “[n]o party or **third person may appoint** any arbitrator under the Arbitration Agreement.” (Emphasis added.) Article 7.1 provides that “[i]f the parties have agreed howsoever that any arbitrator is **to be appointed** by one or more of them or **by any third person**...” (Emphasis added.) The LCIA suggests that these two rules should not be read to conflict. Article 5.7 is simply meant to clarify that only the LCIA Court can **appoint** (as opposed to nominate) an arbitrator; while, pursuant to Article 7.1, the parties, or third persons approved by the parties, may “nominate” arbitrators for appointment by the LCIA Court. In other words, parties can nominate arbitrators, but the Court alone has the power to “appoint” these nominees or any other arbitrators ultimately chosen.

IV. Institutional Appointments

A. General

1. Applicable Rules

Appointment of arbitrators by the LCIA is governed primarily by Article 5 of the LCIA Rules. Article 5, *inter alia*, provides:

- The appointment of arbitrators will not be impeded by any controversy between the parties, including by the lack or sufficiency of the parties' Request for Arbitration or Response. *See* Art. 5.1.
- All arbitrators must be impartial and independent and must confirm the same in writing. *See* Arts. 5.3 to 5.5.
- Absent an agreement of the parties, the LCIA alone will appoint either a sole arbitrator or three-member arbitral tribunal within 35 days from the commencement of the arbitration, or such other period of time as determined by the LCIA Court. *See* Arts. 5.6 and 5.7.
- The LCIA will appoint a sole arbitrator unless the parties have agreed otherwise or if the LCIA Court determines that a three-member tribunal (or, exceptionally, more than three) is appropriate. *See* Art. 5.8.
- The LCIA will appoint arbitrators with due regard for any method or criteria agreed in writing by the parties. *See* Art. 5.9.

Additionally, for the appointment of a sole arbitrator or a tribunal president, the LCIA Rules provide that, “[w]here the parties are of different nationalities, a sole arbitrator or the presiding arbitrator shall not have the same nationality as any party unless the parties who are not of the same nationality as the arbitral candidate all agree in writing otherwise.” Art. 6.1.

2. Institutional Practices

(a) Arbitrator Selection Process:

If the LCIA receives a Request for Arbitration (or Response) containing an arbitration clause that does not allow the parties to nominate an arbitrator or arbitrators, the LCIA Court will make the appointments itself. As previously discussed, the LCIA has two primary teams: one led by the Deputy Registrar and another led by LCIA Senior Counsel. Each of these teams assists the LCIA Court in making its decision on arbitral appointments by providing the Vice President assigned to a particular case a summary of the case – including its complexity, the parties' positions, amount in dispute, etc. – and an initial list of proposed arbitrators.

These initial lists will typically contain between three and five arbitrator candidates if the case involves a sole arbitrator. If the case may require a three-person tribunal, the teams will

typically provide two lists to the Vice President: one containing candidates for the potential president; and one containing candidates for the so-called “wing” arbitrators.

These two lists will typically contain between five and six arbitrator candidates for the wings and three to five arbitrator candidates for the president or chairperson. The Vice President, in determining a president, will make sure that the president has as much or more experience as the wing arbitrators. One of the LCIA’s primary concerns is to form balanced tribunals. Importantly, the Court is not bound to choose anyone from these initial lists; it may decide to appoint someone from outside these lists.

The Vice President’s decision on the appointment of particular arbitrators is considered final and not subject to appeal.

(b) Initial lists of arbitrators:

In compiling the above mentioned initial lists for the Vice Presidents of the Court, the Deputy Registrar and Senior Counsel make objective determinations based on the specific needs for each individual case. *See* Art. 5.9. The LCIA staff and LCIA Court aim for precision in the qualifications of the potential arbitrators and how those qualifications would match with the needs of any individual case. There are no formal criteria in assisting the Court to determine which arbitrator(s) should be chosen; it is very case determinative. The Court will make selections both from its internal database of arbitrators and from outside the database.

The LCIA has the capability to conduct detailed searches within its database to winnow down potential candidates. Search criteria may include, for example, the relevant or required industry (*e.g.*, insurance, shipping, banking, etc.), type of agreement, nationality, legal qualifications, knowledge of relevant legal system, and language proficiency. In researching potential arbitrator candidates, the LCIA will not rely exclusively on the information contained in the database of arbitrators, but will also conduct additional due diligence on the qualifications and other attributes of arbitrators, including reviewing current *curricula vitae* of potential arbitrator candidates.

(c) LCIA database of arbitrators:

The LCIA’s arbitrator database currently contains approximately 19,000 potential arbitrator profiles. Anyone may seek to be included in the LCIA’s database of arbitrators free of charge by filling out the appropriate forms, which can be found on the LCIA’s website. The LCIA Membership and Conferences staff will periodically send reminders to the arbitrators whose profiles are included in the database to revise or update their profiles in order to keep them current. The database is not public.

(d) Verification of arbitrator impartiality/independence:

While the LCIA Court seeks to verify the impartiality and independence of the arbitrators, the Court generally relies on the information provided to them by the arbitral candidates pursuant to Articles 5.3 to 5.5. However, where the LCIA Court is aware of certain information that may affect the impartiality or independence of the arbitral candidate, the LCIA

Court will typically give the candidate a courtesy call and discuss with the candidate their concerns with respect to particular disclosures. The LCIA Court, however, will request that the arbitrator be full and frank in their disclosure to avoid any potential complications in the future.

(e) Timing of appointments:

According to Article 5.6 of the LCIA Rules, the “LCIA Court shall appoint the Arbitral Tribunal promptly after receipt by the Registrar of the Response [to the Request for Arbitration] or, if no Response is received, after 35 days from the Commencement Date (or such other lesser or greater period to be determined by the LCIA Court pursuant to Article 22.5).” Moreover, Article 5.1 states that “[t]he formation of the Arbitral Tribunal by the LCIA Court shall not be impeded by any controversy between the parties relating to the sufficiency of the Request or the Response,” and the “LCIA Court may also proceed with the arbitration notwithstanding that the Request is incomplete or the Response is missing, late or incomplete.” Art. 5.1.

These rules together demonstrate that it is the practice of the Court to make arbitral appointments quickly following the receipt of the Response. Such appointments will not be affected by any tactics of the parties to stall the arbitral appointment process.⁸¹ Typically, the Deputy Registrar or Senior Counsel will provide a summary of the case file to the Vice President appointed to that case within a day or two of receipt of the Response. The Vice President will then typically provide a response within two business days. The Vice President will typically respond by either confirming the parties’ nominees or, where the parties have not so agreed, providing the name or names of the arbitrators it has chosen to appoint. The Vice President may also provide a list of candidates by order of preference, which may be useful to the extent one of the preferred candidates is unable to accept the appointment. This eliminates the need for the staff to reintroduce the issue to the Vice President in circumstances where the arbitrator is conflicted or cannot otherwise perform.

The LCIA Court strictly applies its mandate in the LCIA Rules that appointments be made “promptly.”

(f) LCIA Appointment Statistics:

Number of arbitral appointments: In 2015, the LCIA made 449 arbitral appointments. LCIA Registrar’s Report 2015 (“**2015 LCIA Report**”). Of these 449 appointments, 45.4% were candidates selected by the parties, 43.5% were candidates selected by the Court, and 11.1% were candidates selected by the co-arbitrators. *See* 2015 LCIA Report, pp. 3-4. As compared to 2014, this reflects a “small decrease in the percentage of arbitrators selected by the parties (from 49% to 45.4%).” 2015 LCIA Report, p. 4.

In 2016, the LCIA Court made 496 arbitral appointments. *Facts and Figures 2016: A Robust Caseload* (“**2016 LCIA Report**”). Of these 496 appointments, 44.2% were candidates

⁸¹ For example, the LCIA Court has seen situations where the Respondent has attempted to delay the appointment process by arguing Claimant did not provide enough information in its Request for Arbitration to allow Respondent to make a reasoned arbitral appointment. Article 5.1 stands as a reminder to the parties that the LCIA Court will move forward with the appointment process notwithstanding any so-called deficiencies in the parties’ Request for Arbitration or Response.

selected by the parties, 39.7% were candidates selected by the LCIA Court, and 16.1% were candidates selected by the co-arbitrators. *See* 2016 LCIA Report, p. 11. As with the year prior, compared to 2015, this reflects a small decrease in the percentage of arbitrators selected by the parties (from 45.4% to 44.2%). *See* 2016 LCIA Report, p. 13.

One versus three member tribunals: According to the 2015 Report, there was a slight preference for sole arbitrator tribunals (52%) over three person tribunals (48%). *See* 2015 Report, p. 3. For 2015, of the 449 appointments, 323 were to three member tribunals in 109 arbitrations under the LCIA Rules (including five replacement arbitrators) and 118 were of sole arbitrators in 117 arbitrations under the LCIA Rules (including two replacements). *See* 2015 LCIA Report, p. 3.

In contrast, the 2016 Report reflects a preference for three person tribunals (62%) as compared to sole arbitrators (37%). *See* 2016 LCIA Report, pp. 11-12. Still, there does not appear to be a trend over the years in favor of three versus one person tribunals (or vice versa). *See* 2015 LCIA Report, p. 3; 2016 LCIA Report, p. 12. For 2016, of the 496 appointments, 400 were to three member tribunals in 141 arbitrations under the LCIA Rules (including 16 replacement arbitrators) and 85 were of sole arbitrators in 83 arbitrations under the LCIA Rules (include seven replacements). In 2016, the LCIA also saw six two-member tribunals in three arbitrations under the LCIA Rules, and five appointments were in UNCITRAL or other ad hoc arbitrations. *See* 2016 LCIA Report, p. 11.

B. Failure by a Party to Nominate an Arbitrator

If the parties' arbitration agreement provides for an arbitral appointment process, but the Claimant does not submit the name of an arbitral candidate, the LCIA Court is entitled to make the appointment itself pursuant to Article 7.2 of the LCIA Rules. *See* Art. 7.2 (“[T]he LCIA Court may appoint an arbitrator notwithstanding any absent or late nomination”). In practice, however, the Court will typically invite the Claimant to make such nomination as soon as possible if it has not done so. Typically, the Claimant will then nominate an arbitral candidate. The Respondent will be provided the opportunity to object based on the Claimant's late nomination. The ultimate decision as to whether the Claimant's nomination will be accepted is made by the Vice President assigned to the case. It is, however, very rare in practice that the Claimant does not nominate an arbitrator if the arbitration agreement allows for it, and it is also very unlikely that the Court would reject Claimant's nomination if made late (*i.e.*, subsequent to the submission of its Request for Arbitration).

Interestingly, if the parties' arbitration agreement provides for an arbitral appointment process but the *Respondent* does not submit the name of an arbitral candidate, Article 2.4 of the LCIA Rules would appear to bar Respondent from making a subsequent appointment. *See* Art. 2.4 (“Failure to deliver a Response within time **shall constitute an irrevocable waiver** of that party's opportunity to nominate or propose any arbitral candidate.”) (emphasis added). However, the Deputy Registrar has made clear that this rule is not as preclusive as it might seem; rather, the Court is attempting to impress upon the parties that they must act expeditiously and to inform the parties that failure to nominate an arbitral candidate will not slow down or otherwise impede the LCIA's appointment of the tribunal. In practice, the Deputy Registrar advised that, as with a Claimant who fails to nominate an arbitral candidate, the Court will invite the

Respondent to make such nomination as soon as possible. If the Respondent thereafter submits a nomination, it will go to the Vice President for approval. Again, it is very rare that a Respondent would not submit a nomination where its arbitration agreement provides such an opportunity, and there has not been an occasion where the Court has refused to accept a late nomination.

C. Expedited Formation

Under Article 9A of the LCIA Rules, in the case of “exceptional urgency,” any party may apply to the LCIA Court for the expedited formation of the arbitral tribunal. *See* Art. 9.1. The party must submit its application in writing to the Registrar setting out the grounds for exceptional urgency requiring the expedited formation of the tribunal. *See* Art. 9.2. The Court will determine the application as expeditiously as possible under the circumstances, and, if granted, for purposes of forming the tribunal, it may abridge any period of time under the arbitration agreement or other agreement of the parties. *See* Art. 9.3.

In 2015, the LCIA Court received a total of 30 applications for expedited formation, although 18 of those applications involved related cases. *See* 2015 LCIA Report, p. 5. Of those 30 applications, only 12 were granted; 17 were rejected; and one application was withdrawn. *See* 2015 LCIA Report, p. 5. In 2016, the LCIA Court received a total of 15 applications for expedited formation. *See* 2016 LCIA Report, p. 14. Of those 15 applications, only 2 were granted; 13 were rejected. *See* 2016 LCIA Report, p. 14.

Whether such application will be granted is very case dependent, and it is difficult to advise what criteria specifically would compel the court to grant an application for expedited formation.

D. Emergency Arbitrators

It is not uncommon for a commercial dispute to require some form of interim conservatory relief as the first step in the dispute resolution process, e.g., a preliminary injunction to prevent the sale of an asset, a restraining order to seize funds, or an order to preserve crucial evidence. The LCIA Rules, like many other institutional rules, permit the tribunal to order interim or conservatory relief, but this is of little use when there is not yet a tribunal in place. At the same time, a party may not want to go to state court as the court may not have the necessary authority to grant interim relief or may be perceived as slow or biased. The LCIA, in the 2014 revision of its rules, included Article 9B, which provides for the appointment of an emergency arbitrator to remedy situations where a tribunal has not yet been constituted.

Article 9B provides, *inter alia*:

- Prior to the formation or expedited formation of the arbitral tribunal, any party may apply to the LCIA Court for immediate appointment of a temporary sole arbitrator to conduct emergency proceedings. *See* Art. 9.4.
- The party shall apply to the Registrar in writing, setting out (i) the grounds for requiring appointment of an emergency arbitrator; (ii) the claim, with reasons, for

emergency relief; and (iii) confirmation that the applicant has paid or is paying the special fee to the LCIA Court, without which such application will be dismissed. *See* Art. 9.5.

- The LCIA Court will determine the application as soon as possible, and, if granted, an emergency arbitrator will be appointed within three days of the Registrar’s receipt of the application (or as soon as possible thereafter). *See* Art. 9.6.
- The emergency arbitrator is provided much discretion in determining how to proceed, and he or she is not required to hold hearings and may determine the issues requested on the available documentation alone. *See* Art. 9.7.
- The emergency arbitrator will decide the claim for relief as soon as possible, but no later than 14 days following his or her appointment. The deadline will only be extended in exceptional circumstances or by written agreement of all parties. *See* Art. 9.8.
- The emergency arbitrator’s decision will be made in writing and contain reasons. *See* Art. 9.9.
- There is no ability to appeal a decision by the emergency arbitrator.
- The emergency arbitrator’s decision may be confirmed, varied, discharged or revoked, in whole or in part, by order or award by the arbitral tribunal on application by any party or on its own initiative. *See* Article 9.11.

In 2015, the LCIA Court received no requests for an emergency arbitrator. *See* 2015 LCIA Report, p. 5. In 2016, the LCIA Court received only one request for an emergency arbitrator, which was denied. *See* 2016 LCIA Report, p. 14. Given that this rule has only been in existence since October 2014 and only applies to agreements concluded after this date (absent party agreement), it is not surprising that the LCIA Court would not have seen many such applications to date.

E. Small Claims in Expedited Arbitration

The LCIA Rules do not contain any articles which are specific to arbitrations involving simple or small claims.

V. Special Situations

A. Multi-Party Arbitrations

Article 8.1 of the LCIA Rules provides that, where the parties’ arbitration agreement “entitles each party howsoever to nominate an arbitrator, the parties to the dispute number more than two and such parties have not all agreed in writing that the disputant parties represent collectively two separate ‘sides’ for the formation of the Arbitral Tribunal (as Claimants on one side and Respondents on the other side, each side nominating a single arbitrator), the LCIA

Court shall appoint the Arbitral Tribunal without regard to any party's entitlement or nomination." In such circumstances, Article 8.2 provides that the parties' arbitration agreement "shall be treated for all purposes as a written agreement by the parties for the nomination and appointment of the Arbitral Tribunal by the LCIA Court alone."

Articles 8.1 and 8.2 thus make clear that where there exists an arbitration agreement providing for how the parties will nominate arbitrators, such agreement will be disregarded where there are more than two parties in the dispute and at least one of them has not agreed on how such nominations will take place. The Deputy Registrar advised that it is unlikely that the LCIA Court will have to effectively reject the parties' agreed appointment process in the case of a multi-party arbitration. More often than not, the parties' arbitration clause will be sufficiently well drafted to account for multi-party issues; even if not, the Court will typically seek confirmation from the parties on how to interpret the clause so as to implement their agreement as regards appointments, and most of the time the parties will give their consent to interpret the clause so as to accommodate their agreement as regards appointments.

B. Consolidation

Article 22.1(ix) of the LCIA Rules provides that the tribunal may decide, upon application of a party, "to order, with the approval of the LCIA Court, the consolidation of the arbitration with one or more other arbitrations into a single arbitration subject to the LCIA Rules where all the parties to the arbitrations to be consolidated so agree in writing." Art. 22.1(x) provides that the tribunal may decide, upon application of a party, "to order, with the approval of the LCIA Court, the consolidation of the arbitration with one or more other arbitrations subject to the LCIA Rules commenced under the same arbitration agreement or any compatible arbitration agreement(s) between the same disputing parties, provided that no arbitral tribunal has yet been formed by the LCIA Court for such other arbitration(s) or, if already formed, that such tribunal(s) is(are) composed of the same arbitrators."

C. State Entities

The LCIA Rules do not contain any articles that are specific to arbitrations involving State entities.

D. Revocation, Challenge and Replacement of Arbitrators

Article 10 of the LCIA Rules governs the revocation and challenge of arbitrator appointments. Article 10.1 provides that the Court "may revoke any arbitrator's appointment upon its own initiative, at the written request of all other members of the Arbitral Tribunal or upon a written challenge by any party" under the following circumstances:

- (i) that arbitrator gives written notice to the LCIA Court of his or her intent to resign as arbitrator;
- (ii) that arbitrator falls seriously ill, refuses or becomes unable or unfit to act; or
- (iii) circumstances exist that give rise to justifiable doubts as to that arbitrator's impartiality or independence.

This central tenet of impartiality and independence is reflected in Article 5.3 of the LCIA Rules: “All arbitrators shall be and remain at all times impartial and independent of the parties; and none shall act in the arbitration as advocate for or representative of any party.”

Absent agreement of all parties in writing to revoke the arbitrator’s appointment, or the challenged arbitrator resigns in writing within 14 days of receipt of a party’s written statement of reasons for the challenge, the “LCIA Court shall decide the challenge and, if upheld, shall revoke that arbitrator’s appointment.” Art. 10.6. The Court recently has indicated that, “[d]epending on the complexity of the challenge, the LCIA will appoint either one member or three members (or former members) of the Court as decision-makers.” Further, “[o]nce appointed, these decision-makers may hold a hearing or ask for further written submissions if necessary.” *LCIA Releases Challenge Decisions Online*, 12 February 2018, available at: <http://www.lcia.org/News/lcia-releases-challenge-decisions-online.aspx>. Decisions on arbitrator challenges must be provided in writing and contain reasons. *See* Art. 10.6. On average, it takes only 27 days for the LCIA Court to provide a reasoned decision, and over half of all decisions are provided in less than 14 days. *LCIA Releases Challenge Decisions Online*, 12 February 2018, available at: <http://www.lcia.org/News/lcia-releases-challenge-decisions-online.aspx>.

Recently, the LCIA made available anonymized digests of 32 LCIA arbitration challenge decisions from between 2010 and 2017. These digests can be found online at the following link: <http://www.lcia.org/challenge-decision-database.aspx>.

According to the LCIA, it has published these excerpts of decisions, as “[w]ritten challenge decisions are an invaluable resource for users, counsel, and arbitrators – they give guidance in relation to standards of conduct, and provide a greater understanding of the reasoning applied by the Court.” The Court intends to update the decisions database periodically when new decisions are issued. *LCIA Releases Challenge Decisions Online*, 12 February 2018, available at: <http://www.lcia.org/News/lcia-releases-challenge-decisions-online.aspx>.

From these decisions, it appears that challenges in LCIA arbitration are not only rare, but those that are pursued rarely succeed. For example, the LCIA reports that, during the eight-year period covered by the decisions, over 1,600 cases were registered with the LCIA; challenges were heard by the Court in less than 2% of these cases; and only one-fifth of those challenges were successful.

Under circumstances where an arbitrator must be replaced, Article 11 of the LCIA Rules governs such replacement. Article 11.1 provides that, “[i]n the event that the LCIA Court determines that justifiable doubts exist as to any arbitral candidate’s suitability, independence or impartiality, or if a nominee declines appointment as arbitrator, or if an arbitrator is to be replaced for any reason, the LCIA Court may determine whether or not to follow the original nominating process for such arbitral appointment.” Art. 11.1. Article 11.2 provides that “[t]he LCIA Court may determine that any opportunity given to a party to make any re-nomination (under the Arbitration Agreement or otherwise) shall be waived if not exercised within 14 days (or such lesser or greater time as the LCIA Court may determine), after which the LCIA Court shall appoint the replacement arbitrator without such re-nomination.” Art. 11.2.

VI. Arbitrator List Services

As previously discussed, the LCIA keeps a database of arbitrators. The LCIA Arbitrator database is not publicized. The LCIA Court will update the information regarding the arbitrators in its database periodically, although it is primarily the responsibility of the arbitrators to update their arbitrator profiles.

CONCLUSION

Each of the arbitral institutions discussed in the Report have unique aspects to their approach to the appointment of arbitrators as well as areas of common ground. Additionally, each of the arbitral institutions increasingly are willing to work with parties and their counsel to tailor an arbitrator selection process that is most appropriate for the case and parties.

We hope that this Report serves as a useful reference to those seeking to appoint arbitrators in arbitrations administered by the AAA, ICDR, ICC, CPR, JAMS and LCIA. We encourage parties and counsel to reach out to the arbitration institution administering an arbitration to see if there are additional ways in which the institution can assist in the selection of arbitrators.

Finally, we welcome feedback on this Report. If there is sufficient interest, we may expand the Report to cover additional arbitral institutions or topics with respect to the appointment of arbitrators in administered arbitrations.

NEW YORK
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Committee on Arbitration

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April 2018

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