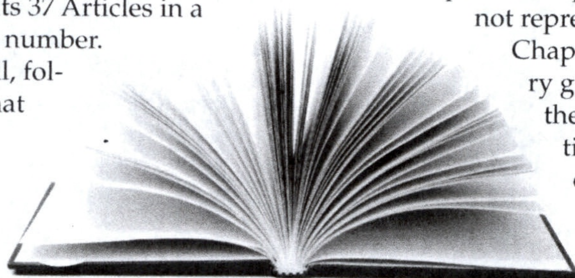
Book Reviews

A Guide to the ICDR International Arbitration Rules

By Martin F. Gusy, James M. Hosking and Franz T. Schwarz (Oxford University Press 2011)

Reviewed by Stefan B. Kalina

To date, the *ICDR Rules of Arbitration* have not enjoyed "stand-alone treatment." Thus, this rules guide merits attention as a welcome and needed tool. The book focuses on the *ICDR Rules*, treating each of its 37 Articles in a dedicated chapter of corresponding number. Each chapter states the Article in full, followed by introductory comments that explain the scope of the Article and illuminate issues and trends arising thereunder. This introduction is followed by textual comments that examine each rule of each Article in detail.



The textual analysis deconstructs the constituent sentences and phrases of particular rules to extract their meaning and application. At both the introductory and textual levels, the authors provide historical context, comparison with other arbitral rules on the same subject, and citations to judicial or other interpretative sources. The *ICDR Rules* themselves are presented in the Appendix along with additional guidelines and supplementary procedures as well as other comparable and oft-cited UNCITRAL and AAA Rules for ease of reference.

The extensive annotations elevate the analysis from technical treatment to a substantive reference work without being overbearing. The authors carefully keep pace with arbitration itself by citing the major treatises and specialized articles in lieu of lengthy discussions on any particular rule. At the same time, readability is maintained by footnotes that do not obscure the text. Consequently, the authors enable readers, like parties to arbitration itself, to flexibly pursue topics of interest as they deem necessary.

The authors' analysis guides readers through issues that commonly arise under the rules. No issue is too basic for consideration. For example, the very first chapter addresses the "cornerstone" topic of the parties' written agreement to arbitrate. The authors immediately red flag that the "*ICDR Rules* themselves do not contain any written definition of what constitutes an agreement 'in writing.'" Nor even, is the term "international" easily defined. To help solve these threshold issues, the authors provide scenarios in which the ICDR would have jurisdiction, including several examples of what constitutes a genuine or intrinsic international dispute.

This useful approach is replicated in varying degrees throughout the entire volume with regard to increasingly complex issues. The authors smartly use chronology as their guide and present issues as they would arise in the course of an actual ICDR proceeding. For example, the authors tackle Article 7's requirement of arbitrator impartiality and independence despite the fact "none of the institutional or non-administered rules define 'impartiality' or 'independence.'" Likewise, they seek to clarify a party's right to representation although "Article 12 does not provide express guidance as to who may or may not represent a party in arbitration." Again, in Chapter 19, the authors provide evidentiary guidance under the *ICDR Rules* despite the lack of uniformly accepted definitions "on the subject of the standard of proof." Furthermore, the authors discuss the panel's broad discretion to decide procedural issues under Article 26 (subject to the parties' agreement under Article 16 discussed below) and raise the "open debate" over what precisely "constitutes 'questions of procedure.'" In this regard, the authors offer commentary by leading authorities under "the analogous 1976 UNCITRAL Rules" for guidance, citing those issues that might fall within the panel's authority, such as "time limits and scheduling," and those issues that might fall outside its authority because of the impact on "the substance of the dispute" or "the rights of the parties," such as "disclosure or admissibility of material evidence." By using examples or by turning to other rules systems for interpretative guidance, the authors provide useful examples and citations to help fashion a solutions to these recurring issues under the *ICDR Rules*.

This book does more than remedy an "omission" in the arbitration literature by providing a needed rules guide for the ICDR. Along the way, the authors also offer "constructive ideas and profitable discussion" points about arbitration generally. One theme echoing throughout their commentary is that absent a rules-based system, arbitration would become the closed province of practitioners conversant in its arcane language and practices. This would be especially true under the ICDR whose rules have rapidly developed in less than a twenty year period. For this reason, the book contends, an exposition on the application of the *ICDR Rules* is necessary to avoid this outcome. It posits that a rules-based system, open and applicable to everyone, is a key element to preserving arbitration as "great agency for *human* happiness and public welfare" (emphasis added).

Against this backdrop, the authors' practice pointers take on greater significance. For example, while they point

out that the ICDR does not impose any strict pleading requirements, they also explain that the rules "encourage" narrative claim presentation. The authors' tellingly suggest that this opening permits narration to address:

> the equities of the case: the *human sense* of fairness or unfairness or unfairness when examining the parties' acts or omissions; the wrongs that were committed by one party against another; and the injury that was suffered by one or more parties as a result (emphasis added).

The authors' commentary also sounds the theme that although "[p]arty control is the guiding principle of international arbitration," it is "not without limits." In so doing, the authors tackle the inherent conflict between rules-based arbitration and arbitration's promise of flexibility and informality. To resolve this tension, the authors examine the rules' existence as positive agents for achieving these goals rather than rigid ends in and of themselves.

In line with this theme, the authors present the binding aspects of the *ICDR Rules* as "guideposts for the process" that, nonetheless: (1) can be subject to variants by the parties to tailor the process to their needs and (2) leave significant discretion to arbitrators to manage the process "economically" and "efficiently." This idea is amplified at several points throughout the book, resulting in a set of commentaries that specifically reveal how and when the parties can exercise control and engage the arbitrators to craft a tailored process.

For example, the authors look at how Article 4 "affords the parties relatively wide latitude to modify claims…as long as the arbitral tribunal considers it appropriate." The arbitral tribunal is vested with the discretion to consider the appropriateness of proposed "amendments or supplements" based "on the individual circumstances of the case" while treating "the parties with equality." This approach avoids an "unduly static or formalistic rule that would require parties to recommence every time the adversarial evolution of argument and evidence suggests the need for a different legal articulation of the claims." That said, the arbitral tribunal may discharge its "mandate" to "carefully structure procedural directions and it is not for the parties to treat…[that] direction with an unwelcome disregard on its own motion."

Similarly, the authors examine how Article 16 grants "the tribunal more discretion" in the conduct of the arbitration itself "than the majority of other institutional rules." "Still," the authors' note, "in practice, the parties have significant influence over the process" because "[d]espite the strong focus on arbitral discretion under the ICDR rule as written, arbitrators…will virtually always seek agreement by the parties on procedural issues and will only in the rarest of cases overrule such agreement." Accordingly, the "several limitations to the discretion of the arbitral tribunal in conducting proceedings" are enumerated for the benefit of procedural guidance.

Importantly, the Appendix provides the *ICDR Guidelines for Arbitrators Concerning Exchanges of Information* which specifically addresses the arbitrators' authority to conduct proceedings insofar as discovery is concerned. Unless otherwise agreed by the parties, these guidelines took effect in all ICDR arbitrations commenced after May 31, 2008 and may be adopted at the panel's discretion in pending cases. The guidelines are expected to be reflected as amendments in the next revision of the *ICDR Rules*. Sensitive to the differences between litigation and arbitration, the ICDR cautions arbitrators "to prevent the importation of procedural measures and devices," such as American style discovery, that may be inappropriate to international arbitration. Accordingly, the *ICDR Guidelines* "make it clear to arbitrators" that they have a responsibility, if not the duty in certain jurisdictions, to provide, through management, "a simpler, less expensive, and more expeditious form of dispute resolution than resort to national courts." Including these *ICDR Guidelines* (and eventual amendments) in the book is timely and important because of the growing concern in the international arbitration community about how discovery affects selecting an arbitral forum as well as the arbitration proceeding itself.

The author's blend of theory and practice also opens the text to those looking for strategic guidance on how to apply seemingly static rules to the dynamics of their particular matter. The authors cite to the optional aspects of Article 2 which vest claimants with discretion to "include proposals as to the means of designating and the number of arbitrators, the place of arbitration, and the language(s) of the arbitrators." Interestingly, the authors suggest that:

> [e]ven in cases in which the parties have already agreed upon these items in the arbitration agreement, the circumstances *may merit* an attempt to change the agreements reached in light of possibly difference economic interests and factual scenarios at the time the dispute arose as compared to when the business relationship was initiated (emphasis added).

The authors also identify that the process for appointing arbitrators under Article 6 "supplies the parties with a *strategic opportunity to tailor* the composition of the tribunal to their individual and substantive needs" (emphasis added). To aid the discussion, the authors consistently depict scenarios to illustrate the "restrictions" as well as the opportunities for exercising party autonomy on the process.

In the end, this very stately hard-cover edition may be deceiving. On one hand, it certainly merits a place on

"shelves [already] laden with books on arbitration" because it does "stimulate constructive ideas and profitable discussion" while preparing for, or studying, arbitration. Yet, on the other hand, the intuitive features inside its covers make this work as useful as a soft-bound rules pamphlet that may be kept at the ready during proceedings for quick clarification and prompt references to key authorities. Therefore, it should be useful to many across the arbitral spectrum, from neophyte to expert, including those who may be revisiting ICDR arbitration or international arbitration generally after some hiatus.

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The Evolving International Investment Regime: Expectations, Realities, Options

By José E. Alvarez and Karl P. Sauvant, with Kamil Gérard Ahmed and Gabriela P. Vizcaíno (eds.)

Reviewed by Edward G. Kehoe

Introduction

Investment disputes that are resolved through international arbitration have experienced dramatic and unprecedented growth over the past two decades, and the market segment is experiencing growing pains. Through a compendium of chapters that comprise the fine publication entitled *The Evolving International Investment Regime*, the editors, José Alvarez and Karl Sauvant—noted experts in the field of international policy and law—bring together a diverse group of established figures in this field who provide varying perspectives, ideas and potential paths forward for resolving international investment disputes. In broad terms, the book analyzes the recent proliferation of international arbitration disputes between foreign investors and the host states where these investments are made under "international investment agreements" or "bilateral investment treaties," and it explores whether the current dispute resolution system is adequate.

By way of a brief background, international investment agreements and bilateral investment treaties between sovereign states provide, among other things, protections for "investments" that are made by nationals of each country in the jurisdiction of the other country to the treaty. For example, the United States of America and the Republic of Honduras signed a bilateral investment treaty on July 1, 1995 that entered into force on July 11, 2001. If a U.S. company were to build a pencil factory in the Republic Honduras, that activity would be considered an investment, and if the Republic of Honduras were to, for example, expropriate the investment without paying adequate compensation or treat the investment unfairly or inequitably through improper regulation, the treaty allows the investor to assert a claim directly against the Republic of Honduras, and the dispute would be resolved through international arbitration. Today there are more than 2,800 investment treaties between countries across the world. Trade transactions are not considered investments that are protected by investment treaties or international investment agreements. So, if a U.S company were to manufacture pencils at its headquarters in the United States and ship them to Honduras under a contract of sale, that transaction would not fall within the investment regime and would not be protected by the treaty.

As the authors of the book eloquently describe and debate, the challenge of today's international investment treaty regime—both in the drafting of investment treaties and in the resolution of disputes arising under them—is to strike the appropriate, albeit delicate, balance of the interests of the various stakeholders, which include not only protection of the investment but also promotion of foreign investments, the balance of interests of developed and developing countries, the fair administration of justice, and the confidence of the "users" in the system.

James Crawford provides a characteristically insightful Foreword for the book, stating: "Since the first modern investment treaty claim was referred to arbitration just two decades ago, the ad hoc tribunals deciding these claims have produced at times conflicting decisions, sometimes with little regard for the regulatory interests of the host states." He goes on to say, however, that these "problems are not unique to the investment treaty regime," and that "in fresh contrast to a mass of literature on the so-called 'crisis' of international investment law," this book approaches the question thoughtfully and deliberately by considering the interests and expectations of each relevant stakeholder, including the state and the investor."

The Preface by Louis T. Wells begins by identifying the main players' fundamental concerns regarding foreign investments: "To make investments, business must have some conviction that governments will not unreasonably take property and that contracts generally will be enforced. In turn, governments expect taxes from businesses but also impose regulations and accountability standards to direct business activities toward the public interest." Wells sees a "backlash from developing countries" to perceptions of inconsistent decisions under the international arbitration regime, and concludes that the backlash itself is sufficient justification to reexamine the system because "perception matters."