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ALERT MEMORANDUM

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ICDR Issues Revised International Arbitration Rules

On June 1, 2014, the International Centre for Dispute Resolution ("ICDR") of the American Arbitration Association ("AAA") published revised International Dispute Resolution Procedures, which include its International Arbitration Rules (the "Rules"). The new revisions are the most significant changes made to the Rules since they were first issued in 1991. Now as then, the AAA's international rules and the ICDR administering institution are meant to offer a more international platform and procedures to parties to arbitration than the AAA Commercial Arbitration Rules are designed for. This is particularly the case where one or more of the parties, the applicable law, the seat or other important elements of the arbitration agreement or arbitration itself are non-American.

The Rules are therefore an important element in the landscape of international arbitration in and related to the United States. They are also noteworthy against the backdrop of recent and forthcoming revisions to other leading international arbitration rules, including those of the International Chamber of Commerce ("ICC") in 2012 and the London Court of International Arbitration ("LCIA") expected in 2014. The key revisions in the Rules are discussed below.

1. Joinder and Consolidation

Conforming to a recent trend exemplified by the recent revision to the ICC Rules, the new Rules contain provisions on joinder of parties and consolidation of arbitrations (Articles 7 and 8). They allow a party to join additional parties by submitting a Notice of Arbitration against the additional parties, but only as long as the request is made before the appointment of an arbitrator (Article 7). They also contain a unique consolidation provision (Article 8) allowing a party to request the Administrator to appoint a "consolidation arbitrator" with the power to consolidate two or more arbitrations pending under the Rules (or under the Rules and other rules administered by the AAA or ICDR). A consolidation decision must be rendered within 15 days of the date for final submissions on the issue. Notably, if consolidation is ordered, each party is deemed to have waived its right to appoint a party-appointed arbitrator. Furthermore, the consolidation arbitrator may select one of the previously appointed tribunals to serve in the consolidated proceedings.

Accordingly, parties will want to consider carefully the advantages and disadvantages of seeking consolidation weighed against such priorities as that of selecting one's own party arbitrator and carrying forward fact-findings and rulings from the prior commenced arbitration to the later one.

2. Expedited Procedures

Also conforming to a recent trend exemplified by the recent revisions to the ICC Rules and the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the "SCC

Rules"), the new Rules contain provisions on expedited arbitration procedures. In contrast to certain other revision approaches, the new Rules include expedited procedures (Articles 1(4) and E-1 to E-10) which provide for a sole arbitrator where no announced claim or counterclaim exceeds USD $250,000 or where the parties have otherwise agreed. In such a case, the default timeline is as follows: procedural order issued within 14 days of arbitrator appointment; final written submissions due or a one-day oral hearing to take place within 60 days of the procedural order; and award issued within 30 days from final written submissions or closing of the hearing.

As in the case of any other expedited arbitration procedure, parties will want to consider carefully whether the size and nature of the dispute lend themselves to such an expedited treatment, whether the resulting expedited award is likely to be influential in any subsequent conventional arbitration procedure, and whether the expedited award will be susceptible of recognition and enforcement in a reasonable time frame or at all.

3. Mediation

Another notable feature of the revised Rules, not reflected in the same way or at all in other recent rules revisions such as those of the ICC and SCC, is the greater encouragement of a resort to mediation. The new Rules provide that, following the time for submission of an Answer, the ICDR may invite the parties to mediate under the ICDR's International Mediation Rules (Article 5). Unless the parties agree otherwise, any mediation is to be conducted concurrently with the arbitration and the mediator shall not be an arbitrator appointed in the case.

While this new feature has no binding effect on the parties, it could prove useful in cajoling parties toward settlement in situations where they would not have agreed to do so otherwise. At the same time, query whether concurrent mediation and arbitration will often prove useful or efficient. Finally, it will be important to see whether this new provision has any impact on the tendency of certain arbitrators in international arbitration, particularly with a Continental European nexus, to exercise a mediative role in the proceedings themselves.

4. ICDR List Procedure

While parties have been utilizing the ICDR list-based method of appointing arbitrators since the inception of the original rules, the method was not expressly foreseen in the original rules. The new Rules expressly address and explain this feature of ICDR practice (Article 12(6)). Under this procedure, absent party agreement on any other method of appointment of the arbitrators, the Administrator may send simultaneously to each party an identical list of names of persons for consideration as arbitrators. If the parties cannot reach an agreement from such list, each party has 15 days to strike candidates to whom it objects and rank the remaining candidates in order of preference. Based on that ranking, the Administrator then designates the arbitrators.

The additional transparency and clarity created by the express new provision are to be welcomed, especially in the context of first-time users and international users who are frequently

unfamiliar with such a strike-out method, which does not exist in such other leading international regimes as the ICC, SCC or LCIA.

5. Privilege

Another distinguishing feature of the new Rules is the inclusion of a provision addressing applicable rules of legal impediment or privilege. Article 22 provides, in part, that "[w]hen the parties, their counsel, or their documents would be subject under applicable law to different rules, the tribunal should, to the extent possible, apply the same rule to all parties, giving preference to the rule that provides the highest level of protection."

This new provision is notable for several reasons. First, it contrasts with the approach in other leading international regimes by expressly addressing issues of legal privilege, including in the context of taking of evidence. Second, in so doing it creates a hortatory presumption that the arbitral tribunal "should" provide the same and the highest level of privilege protection across the board to parties and counsel from different legal cultures, particularly if they are subject to different legal or ethical rules respecting privilege. Third, it expressly advocates adoption of the "most favored nation" approach to privilege in order to maintain fairness and equality as between the parties or counsel, thereby venturing beyond the scope applied to this issue in the recently revised IBA Rules on the Taking of Evidence in International Arbitration (the "IBA Rules") (Art. 9(3)). Insofar as the "highest level" of privilege is invariably likely to exist under U.S. law and practice, the new provision may be seen as encouraging arbitral tribunals to extend a U.S. level of privilege to non-U.S. parties and counsel whenever both U.S. and non-U.S. parties and counsel are participants in the arbitration.

6. Streamlining Provisions

Also consistent with a recent trend exemplified by the recent revisions to the ICC Rules, the new Rules contain a number of provisions aimed at making ICDR arbitration more efficient. The main changes in this category are the following:

- allowing the tribunal and the parties to consider how technology, including electronic communications, can be used to increase efficiency (Art. 20(2));
- providing the arbitrators with express authority to take action as necessary to protect the efficiency and integrity of the arbitration, including allocating costs and drawing adverse inferences (Art. 20(7));
- mandating that the tribunal manage the exchange of information among the parties with a view to maintaining efficiency and economy (Art. 21(1));
- providing that e-discovery requests should be "narrowly focused and structured to make searching for them as economical as possible" (Art. 21(6));
- stating that U.S. litigation procedures such as depositions, interrogatories and requests to admit are generally inappropriate (Art. 21(10)); and

- requiring the final award to be issued no later than 60 days from the date of the closing of the hearing (Art. 30(1)).

While each of these provisions is constructive and may play a significant role depending on the circumstances, it is likely that by far the most notable of these new changes, especially where both U.S. and non-U.S. parties or counsel are participants, are the ones relating to e-discovery and to U.S. litigation procedures. Art. 21(6) of the Rules is basically consistent with the approach previously elaborated in the recently revised IBA Rules (Arts. 4.3(a) and 4.12(b)), but is nonetheless significant because it expressly incorporates the IBA approach already into the arbitration rules themselves, and thus governs irrespective of whether the IBA Rules apply or are considered. Art. 21(10) of the Rules actually restates an approach already previously enunciated by the ICDR in a separate document, but which was not easily ascertainable especially for first-time and non-U.S. users of the ICDR process.

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If you have any questions about the above, please feel free to contact any of your regular contacts at the firm or any of our partners, counsel and senior attorneys listed under "Litigation and Arbitration" in the "Practices" section of our website at http://www.clearygottlieb.com.

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