

A D CONSTRUCTION

Adrian L. Bastianelli, III

—and—

Charles M. Sink



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CHAPTER 3

Arbitration Providers

PHILIP L. BRUNER
ALBERT BATES JR.*

I. Introduction

This chapter profiles some of the world's leading arbitral institutions. While each assists with the resolution of various disputes, including construction claims, the importance of the construction industry to each organization varies dramatically. In addition, there are significant differences in how an arbitration proceeds under the rules of each institution. The key variances are discussed in this chapter.

Among the arbitral institutions profiled, the International Court of Arbitration of the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA) predominantly administer cases between citizens of different countries or cases arising from projects in locations other than the United States. The International Centre for Dispute Resolution (ICDR) is the international division of the American Arbitration Association (AAA). The ICDR administers cases between citizens of different countries or cases arising from projects in locations other than the United States, while the AAA administers domestic United States cases. JAMS and the International Institute for Conflict Prevention and Resolution (CPR) administer both domestic United States cases and international cases.

* Mr. Bates reviewed the American Arbitration Association, the International Centre for Dispute Resolution, the International Institute for Conflict Prevention & Resolution, and the International Court of Arbitration of the International Chamber of Commerce. Mr. Bruner reviewed JAMS and the London Court of International Arbitration.

II. American Arbitration Association

A. History

The AAA was founded in 1926, following enactment of the Federal Arbitration Act (FAA), with the specific goal of implementing arbitration as an out-of-court solution to resolving disputes.¹

The AAA is a not-for-profit, public service organization committed to the resolution of disputes through the use of arbitration, mediation, conciliation, negotiation, and various other voluntary alternative dispute resolution (ADR) mechanisms. With more than 100,000 case filings annually, the AAA administers more claims than any other arbitral institution. These cases cover a full range of matters, including construction claims, of course, but also commercial, finance, real estate, environmental, labor and employment, health care, insurance, mass claims, and technology disputes.

In addition to its training and educational missions, the AAA's role as an arbitral institution in the dispute resolution process is to administer cases from filing to closing. It operates throughout the United States, as well as abroad through its International Centre for Dispute Resolution (ICDR). The AAA's administrative services include assisting in the appointment of mediators and arbitrators, setting hearings, and providing users with information on dispute resolution options, including settlement through mediation.

Additional AAA services include the design and development of ADR systems for corporations, unions, government agencies, law firms, and the courts. The AAA also provides elections services as well as education, training, and publications for those seeking a broader or deeper understanding of ADR.

B. The AAA Organization

The AAA is headquartered in New York City, and it maintains offices throughout the United States. For its construction and commercial caseloads, the AAA maintains case management centers in Providence, Atlanta, Dallas, and Fresno. Organizationally, in addition to the ICDR the AAA has four divisions: (1) Labor, Employment, and Elections Division; (2) Insurance Division; (3) Commercial Division; and (4) Construction Division.

The AAA's National Roster of Arbitrators and Mediators consists of almost 8,000 highly accomplished and respected experts from the legal and business communities, who offer diverse experiences across a wide range of fields. Former federal and state judges, attorneys with exceptional subject-matter expertise, and business owners who understand the essence of the dispute are trained in a comprehensive program by the AAA to manage the dispute

1. Much of the background information is adapted from the website of the American Arbitration Association, <http://www.adr.org>.

resolution process with fairness and skill, and an eye toward time- and cost-efficiency. The Commercial, Labor, Employment, Construction, Insurance, and International panels each have their own requirements. In addition, the AAA maintains separate industry panels with even more specialized criteria that may be sought by parties in particular industries.

In addition to case administration, the AAA is an industry leader in ADR training and education, providing information to clients, training to law firms, corporations, other users, advocates and arbitrators, and providing a variety of other training and educational services, including clause drafting assistance and the first smart phone app designated to provide access to vital information concerning arbitration and mediation.²

On April 4, 2013, the AAA launched a new division, Mediation.org, to further expand the AAA's focus on the mediation component of the ADR field.³ Mediation.org is a web-based tool that will serve the mediation community via an array of specialized services, including a database of best-practice knowledge, an extensive listing of mediation experts, and a comprehensive educational module. The directory will feature both AAA and non-AAA mediators from around the country, so that those in need of mediation services can find a mediation professional with the precise background and needed skills to handle their cases.⁴

C. Philosophy

As set forth in its by-laws, the objectives of the AAA are the education of the general public and interested parties in ADR, to study, research, promote, establish, and administer procedures for the management of disputes through the use of arbitration, mediation, conciliation, negotiation, democratic elections, and other voluntary procedures, together with such other objectives and purposes as are set forth in the AAA's governing documents.⁵

2. The AAA provides a wealth of information to law firms and potential users concerning the drafting of mediation and arbitration clauses. For example, the AAA publishes *Drafting Disputes Resolution Clauses: A Practical Guide*, which is available on its website at <http://www.adr.org>. The AAA has recently launched an online clause drafting tool called "ClauseBuilder," which is designed to assist individuals and organizations develop clear and effective arbitration and mediation agreements. ClauseBuilder is available at <http://www.clausebuilder.org>. In 2012, the AAA launched a mobile app providing easy reference to AAA Rules, Codes & Protocols, AAA Contact information, and various other ADR information. The app is available free in iTunes and the Android Play Store.

3. 2012 Annual Report of the American Arbitration Association, <http://www.adr.org>.

4. *Id.* at 15.

5. By-Laws of the American Arbitration Association, <http://www.adr.org>.

D. Involvement in and Service to the Construction Industry

Since its inception, the AAA has provided alternative dispute resolution services in the construction industry. As a provider of choice for dispute resolution services, the AAA, through its National Construction Dispute Resolution Committee (NCDRC), has worked closely with the construction industry to develop the Construction Industry Arbitration Rules and Mediation Procedures and other project specific approaches to prevent and manage conflict.⁶

The AAA has been named as a provider of mediation and arbitration services in the American Institute of Architects (AIA) standard contracts for over 40 years. The AAA is also included in the ConsensusDocs, and other form contracts as a provider of ADR services. When parties name the AAA or ICDR in their contract documents, they have the ability to plan early for possible disputes and the flexibility to customize the most time- and cost-effective resolution process for their project. The AAA and ICDR provide a spectrum of dispute resolution services to help the construction industry avoid conflicts on the work site, and to resolve disputes quickly to avoid project delays and costly litigation fees. AAA construction ADR services include:

- Arbitration
- Mediation
- Partnering
- Dispute Resolution Board (DRB)
- Project Neutrals
- Early Neutral Evaluation (ENE)
- Initial Decision Maker (IDM)

Responding to industry input and evolving market trends, the AAA has reshaped its processes and carefully selected arbitrators and mediators to efficiently and cost-effectively help resolve many types and sizes of construction industry disputes.

E. Office Locations

The American Arbitration Association is headquartered in New York and has 22 offices in the United States, Mexico, Bahrain, and Singapore.

6. Founded in 1966, the NCDRC is composed of representatives from more than 30 prominent construction industry professional organizations that advise and consult with the AAA/ICDR on conflict management and dispute resolution practices, processes and procedures for the construction industry. The NCDRC serves to improve all ADR processes by providing guidance to the AAA in creating and refining ADR procedures and rules, recruiting qualified neutrals for panels, providing input on training requirements and program content and faculty. Additional information on the NCDRC, including a list of the professional organizations that are members of the NCDRC, is available at <http://www.adr.org>.

F. Websites

A wealth of information can be found on the websites of the AAA at <http://www.adr.org> and <http://www.mediation.org>. AAA's ClauseBuilder Tool is available at <http://www.clausebuilder.com>, and the AAA's smart phone app is available at iTunes or the Android Play Store.

G. AAA Construction Neutrals

The AAA Panel of Construction Arbitrators has approximately 1,800 construction neutrals with a variety of industry expertise, including industry professionals such as architects, engineers, contractors, construction managers, construction lawyers, and other industry experts. The AAA Construction Panel is composed of approximately 65 percent construction attorneys, and 35 percent construction industry professionals. The AAA also maintains a Large and Complex Construction Panel of approximately 500 construction neutrals who handle the larger AAA cases administered under the LLC Construction Rules.⁷

H. AAA Distinguishing Characteristics

The AAA administers far more construction arbitrations than any other arbitral institution. Some of its distinguishing characteristics are the following:

- Neutrality, integrity and transparency of the Organization.
- Oversight and strictly enforced Codes of Ethics for neutrals and employees.
- *ADR Service Continuum*. AAA delivers a full menu of ADR services (including Partnering, Dispute Resolution Boards, Fact Finding, Early Neutral Evaluation, Mediation and Arbitration) with expert panelists available for each process.
- *Case Management Expertise*. Nationwide network of experienced professionals in their Case Management Centers, with dedicated teams (i.e., Construction Teams) to provide uniform coverage for administrative services.
- *Quality Neutrals*. Mandatory training and continuing education (e.g. Award Writing, Ethics, and a host of other training modules) and a diverse panel of neutrals including industry professionals with discrete subject-matter expertise. Further, the vast majority of AAA

7. The qualification criteria for the AAA Panel of Construction Arbitrators are available at http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_003872. The qualification criteria for the AAA Panel of Construction Mediators are available at: http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_003882.

neutrals are practicing attorneys or industry professionals, rather than full-time neutrals.

- *Tested Rules.* Time and court tested uniform rules and procedures that provide for finality of process and enforcement of awards. Industry specific rules, including Fast Track and Large, Complex Case procedures for construction, providing flexibility and responsiveness on individual cases. Detailed refund schedule and published fees.
- *Online Case Management and Resources.* Electronic filing and case management ability, including document filing and sharing, arbitrator selection, case tracking (24/7) and online billing.
- *Advisory Groups.* Works with industry specific advisory groups on rules, policies, procedures, and panel quality. In the construction industry, the NCDRC has assisted in the development and revision of the Construction Industry Arbitration Rules and Mediation Procedures and other specific rules that affect the construction industry.
- *Development of ADR Processes.* The development of all ADR processes through research, education, and training programs and publication of materials including the scholarly *Dispute Resolution Journal*. The AAA also maintains the world's most comprehensive library on ADR.

I. AAA Construction Industry Rules and Procedures

1. *AAA Rules and Procedures.* AAA Construction Rules and Mediation Procedures, including Procedures for Resolution of Disputes Through Document Submission, Fast Track Procedures, Procedures for Large, Complex Construction Disputes, and the Administrative Fee Schedules, are available at <http://www.adr.org>.
2. *Filing Fees and Arbitrator Compensation.* The administrative fees of the ICDR are significantly lower than other arbitral institutions. In 2012, the AAA responded to increasing interest for additional pricing options and economic challenges affecting businesses and organizations worldwide by offering parties to arbitrations the choice of two fee schedules to initiate these cases. The options—the standard fee schedule and the flexible fee schedule—are available for claims using the AAA's Commercial or Construction Rules (among others). To provide parties with further choices, each party to a case may file claims and counterclaims under the same or different fee schedules: one party may use the flexible fee schedule while the other utilizes the standard fee schedule, or both may opt for the same schedule.

The differences: under the standard fee schedule, the filing party pays a large share of the administrative fee at the time the demand is filed, and a smaller additional fee near the time that the hearing takes place. With the flexible fee schedule, a party is permitted to file for

arbitration with a reduced filing fee, followed by two additional payment stages.⁸ In general, the administrative fees of the AAA are significantly lower than the administrative fees charged by other arbitral institutions.

Arbitrators are compensated at the rate set forth on their panel card, which is provided to the parties during the arbitrator selection process. Arbitrator compensation and reimbursable expenses are billed to the parties at the stated rates, without any markup or other charge added by the AAA. The charges for most AAA arbitrators are based upon an hourly or daily rate and are not dependent upon the amount in controversy in the particular case.

3. *Commencing an AAA Arbitration.* AAA arbitration is commenced by filing a demand for arbitration, together with the filing fee and a copy of the applicable arbitration agreement. The requirements for the notice are set forth in Rule 4 of the Construction Rules. The claimant has the option of filing the case either through WebFile, located at <http://www.adr.org>, or at any of the AAA's offices. The demand for arbitration must be sent simultaneously to the respondent in compliance with Rule 4(a)(ii).
4. *Neutral Selection.* As set forth in Rules 14 through 18, the AAA will administer the appointment process in accordance with the agreement of the parties. Unless an alternative method is specified in the contract or agreed among the parties, the AAA list appointment method is the default method. *See* Rule 14. If the parties have not agreed on a number, one arbitrator will be appointed unless the AAA determines that three arbitrators are appropriate. *See* Rule 18. LCC Rule 3(a) provides that three arbitrators shall hear cases subject to those rules, unless the parties agree to one arbitrator. In practice, a general rule of thumb is that three arbitrators will generally be appointed by the AAA in cases where the amount in controversy exceeds \$1 million USD, unless the parties agree to proceed with one arbitrator.⁹

AAA list appointment proceeds as follows. After consultation with the parties as to desired arbitrator qualifications, the AAA sends an identical list of names along with curriculum vitae to the parties. Parties strike unacceptable arbitrators, rank the remaining arbitrators in order of preference, and return the list to the AAA. The AAA then appoints the arbitrators based upon the rankings of the parties. If the parties fail to agree on any of the arbitrators named, or if acceptable

8. For more information on fee schedules, visit www.adr.org or visit the AAA's fee calculator at <http://www.adr.org/tools/faces/feecalculator>.

9. As set forth in Rule 18, this is discretionary with the AAA, and may be revised from time to time. This rule of thumb is based upon the experience of the author and informal communications with the AAA, as well as LCC Rule 1.

arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted list, the AAA has the authority to appoint from the Construction Panel without submission of additional lists. *See* Rule 14(c). In practice, depending upon the circumstances of the case, the AAA may issue an additional list at the joint request of the parties.

The process of clearing conflicts and challenges to arbitral appointments is stringent. Prior to accepting an appointment, the arbitrator must disclose any circumstances likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence. *See* Rule 19(a). The disclosures are made when arbitrators are invited to serve, although the disclosure obligations continue throughout the matter. *Id.*

5. *Information Exchange.* The AAA Construction Rules do not expressly provide for "discovery." Rule 24 expressly provides for production of documents and other information, and the identification of witnesses to be called at the hearings. There "shall be no other discovery... unless so ordered by the arbitrator in exceptional cases." Rule 24(d). However, it is generally accepted that the arbitrators have the authority to permit reasonable discovery, particularly when the parties agree as to the scope of discovery to be conducted in the arbitration.

Information exchange in LCC cases is governed by LCC Rule 5. LCC Rule 5 contemplates the exchange of documents, exhibits, and information within a party's control, *see* LCC Rule 5(b), and such other discovery as may be agreed by all the parties, provided that the arbitrators may place appropriate limitations on the nature, extent, and type of discovery. *See* LCC Rule 5(c). The overriding goal is for the arbitrator to take such steps as necessary or desirable to avoid delay and to achieve a just, efficient, and cost-effective resolution of LCC cases. *See* LCC Rule 5(a).

While not binding in AAA matters, the ICDR has promulgated Guidelines for Arbitrators Concerning Exchanges of Information, which reflect the institution's policy and expectations for the cases administered pursuant to its rules. The purpose of these guidelines is to make it clear to arbitrators that they have the authority, the responsibility and, in certain jurisdictions, the mandatory duty to manage arbitration proceedings so as to achieve the goal of providing a simpler, less expensive, and more expeditious process. The arbitrators are advised against accepting overly broad discovery requests that conflict with the guidelines.¹⁰

6. *Hearings.* Rule 13 and Rules 25 through 38 of the AAA Construction Rules govern the conduct of the hearings, which are private unless the

10. ICDR AWARDS AND COMMENTARIES at 26. The Guidelines are available at <http://www.adr.org>, and are summarized in tabular form in ICDR AWARDS AND COMMENTARIES at 27.

law provides to the contrary. *See* Rule 25. International Arbitration Rules (IAR) Rules 32 and 33 grant the arbitrators broad discretion to control the hearings, including admissibility, relevance, materiality, and weight to be given to evidence, presentation of lay and expert testimony, presentation of evidence by alternative means including video conferencing, Internet communication, or taking of testimony by declaration or affidavit, order of proof, and all other procedural matters.

7. *Award.* The requirements for the award are set forth in Construction Industry Rules 42 through 47. The rules require that the award be made in writing promptly by the arbitrators, and unless agreed otherwise by the parties or specified by law, the award shall be made no more than 30 days after the closing of the hearings. *See* Rule 43. Unless the parties agree otherwise, the award will contain a concise written financial breakdown of the award (an itemization), and a line item description of each nonmonetary claim or counterclaim. *See* Rule 44(b). In addition to final awards, the tribunal has the authority to issue interim or partial awards. *See* Rule 45(b).
8. *Post-Award.* Rule 48 allows parties within 20 days after receipt of the award to request the arbitrators to correct any clerical, typographical, technical, or computational errors in the award. The arbitrators are not empowered to redetermine the merits of any claim already decided.
9. *Appellate Process.* The AAA does not currently have an appellate process. However, the AAA is considering offering an optional appellate procedure which could be utilized with advance agreement of the parties. Any such appellate procedure would not be part of the construction or commercial rules, but would solely be an optional procedure to be utilized by parties that want an appellate review by appellate arbitrators of final awards issued in commercial, construction, or other cases administered by the AAA.

III. International Centre for Dispute Resolution

A. History

The ICDR is the international division of the AAA. It officially opened in New York City on June 1, 1996.¹¹

Since its creation, the focus of the ICDR has been on providing international conflict management services for the global business and legal communities. These services include a full range of international ADR processes administered by a multilingual staff applying well tested international

11. Much of the background information is adapted from the ICDR website, <http://www.icdr.org>, and from chapter 1 of *ICDR AWARDS AND COMMENTARIES* (JurisNet 2012).

arbitration and mediation rules. The ICDR administrators are divided into regionally specialized teams where their knowledge of local culture, different legal traditions, and linguistic capabilities are important components of the administrative regime. The ICDR Case Management Team is located in New York, and is staffed by professionals from throughout the world, most of whom are licensed to practice law in various countries. Countries currently represented include Brazil, Colombia, Mexico, Italy, Germany, Romania, and Russia.¹² This framework provides a level of procedural predictability under the ICDR system and creates an expectation of a quick, efficient, and economical international ADR process.

The ICDR's caseload has grown dramatically over the past 17 years. At approximately 1,000 new international arbitration case filings per year, the ICDR has the largest international caseload in the world.¹³ The fastest growing segment of the ICDR's international arbitration caseload is construction disputes.¹⁴

The ICDR's international administrative system is premised on its ability to perform a number of different tasks, including moving the matter forward at an efficient and predictable pace, ensuring the timely appointment of qualified and neutral, unbiased arbitrators, acting as a buffer between the parties and the arbitrators on billing, collection, and other financial arrangements, monitoring and controlling costs, understanding cultural sensitivities, resolving procedural impasses, and performing various other administrative functions. The ICDR system has been developed with the benefit of extensive user feedback and has evolved to offer a proactive and flexible administrative process with less formality and unnecessary procedural steps. Parties can customize the ICDR arbitral regime for their particular needs, subject to applicable law and to the institutional requirements of due process.¹⁵

B. The ICDR Organization

In addition to its headquarters in New York, the ICDR has an office in Mexico City and joint facilities with regional arbitration centers in Singapore and Bahrain.¹⁶ It has a panel of more than 600 international arbitrators and mediators and a network of important cooperative agreements with arbitral institutions around the world, which gives the ICDR access to additional hearing facilities and infrastructure along with local expertise on culture and legal framework

12. *See id.* at 3.

13. The ICDR administered 994 new arbitration cases in 2011. In prior years, the ICDR administered 888 (2010), 836 (2009), and 703 (2008) new arbitration cases. *See id.* at 4–5 & 4 n.5.

14. During 2011 and 2012, nearly 15 percent of the ICDR case filings have been construction disputes.

15. *See id.* at 8; ICDR Rule 1(b).

16. *See id.* at 8.

to provide administrative services as needed globally.¹⁷ The ICDR has a full-time business development team, which provides information to clients, training to law firms, corporations, other users, advocates and arbitrators, as well as a variety of other training and educational services.¹⁸

C. Philosophy

As set forth in its by-laws, the objectives of the ICDR are the education of the general public on ADR, to study, research, promote, establish, and administer procedures for the management of disputes through the use of arbitration, mediation, conciliation, negotiation, democratic elections, and other voluntary procedures, together with such other objectives and purposes as are set forth in the AAA/ICDR's governing documents.¹⁹

ICDR's vision is to be the leader in international ADR by exceeding the expectations of the growing number of ADR users in a variety of fields, and infusing all of its actions with the steadfast drive to provide its clients with the highest level of service in a cost-effective and time-effective manner.²⁰

D. Websites

A wealth of information can be found on the websites of the ICDR and the AAA at <http://www.ICDR.org> and <http://www.adr.org>. Additional information on the ICDR is available at these specific pages or websites:

ICDR International Dispute Resolution Procedures: <http://www.adr.org/ICDRRulesEnglish>

ICDR Guidelines for Arbitrators Concerning Exchanges of Information: <http://www.adr.org/ICDRGuidelinesEnglish>

ICDR Guide to Drafting International Dispute Resolution

Clauses: <http://www.adr.org/ICDRClauseDrafting>

ICDR WebFile: <https://apps.adr.org/webfile>

ICDR Contacts: <http://www.adr.org/ICDRcontacts>

ICDR Newsletter: <http://www.adr.org/ICDRnewsletter>

How to apply to be an international neutral: <http://www.adr.org/ICDRneutralinfo>

17. *Id.*

18. The ICDR provides a wealth of information to law firms and potential users concerning the drafting of mediation and arbitration clauses. For example, the ICDR publishes the *ICDR Guide to Drafting International Dispute Resolution Clauses*, which is available on its website at <http://www.ICDR.org>. The ICDR has also launched, jointly with the AAA, an online clause drafting tool called ClauseBuilder, which is designed to assist individuals and organizations develop clear and effective arbitration and mediation agreements. ClauseBuilder is available at <http://www.clausebuilder.org>.

19. By-Laws of the American Arbitration Association, <http://www.adr.org>.

20. 2012 Annual Report of the Am. Arbitration Ass'n, <http://www.adr.org>.

ICDR Young and International: <http://www.adr.org/YandI>
 Convention on the Recognition and Enforcement of Foreign Arbitral
 Awards (The New York Convention): http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf.
 Inter-American Convention on International Commercial Arbitration (The
 Panama Convention): http://www.oas.org/dil/CIDIPI_convention_arbitration.htm
 International Mediation Institute: <http://www.imimediation.org>

E. ICDR Neutrals

The ICDR has a panel of approximately 600 international arbitrators and mediators. The ICDR Panel is composed of specialists in international dispute resolution from around the world.²¹ This geographically diverse group is made up of highly regarded professionals from the business and legal communities. Admission to the ICDR Panel is highly selective. Both internal (ICDR Executive Staff) and external review committees screen candidates for their case management skills, substantive expertise, commitment, ethics, training, and suitability to the case. Panel members are required to have achieved academic and professional honors that mark them as leaders in their respective fields in order to gain admission to the panel. Further, ICDR arbitrators must participate in rigorous continuing education and training programs pursuant to ICDR Guidelines.²²

The ICDR stresses the importance of the arbitral tribunal in the management of the case and in its authority to make an expert decision in the award. To this end, the ICDR puts extraordinary care into the selection and management of its arbitrators and mediator panels:

- ICDR arbitration and mediation panels are sculpted through years of extensive annual reviews. Existing and potential candidates are evaluated by criteria including international expertise, reputation, demonstrated ability to manage the process, user preferences, caseload needs, and diversity.
- The ICDR provides ongoing educational and administrative support, including detailed instruction on advanced case management practices within the ICDR case management system.

21. See ICDR AWARDS AND COMMENTARIES at 8. Approximately 50 percent of the ICDR Panel of Arbitrators are U.S. nationals, and 50 percent are nationals of other countries.

22. The Qualifications Criteria for Admittance to the ICDR International Roster of Neutrals is available at <http://www.adr.org/ICDRneutralinfo>.

F. ICDR Distinguishing Characteristics

The distinguishing characteristics of the ICDR include the following:

- Neutrality, integrity and transparency of the Organization.
- Oversight and strictly enforced Codes of Ethics for neutrals and employees.
- *Familiarity*. While, as discussed below, there are a number of differences between the ICDR and AAA rules, the ICDR forum generally feels more familiar to construction practitioners that have arbitrated matters under the auspices of the AAA than other international arbitral institutions, such as the ICC or LCIA.
- *ADR Service Continuum*. ICDR provides a full menu of ADR services (including Partnering, Dispute Resolution Boards, Fact Finding, Early Neutral Evaluation, Mediation and Arbitration) with expert panelists available for each process. It has knowledgeable experts on staff to assist the parties in using these options.
- *Case Management Expertise*. Staffed by multilingual professionals from around the world, many of whom are licensed to practice law in the United States and/or other jurisdictions, the ICDR has a very experienced case management staff that ensures high-quality case administration.
- *Quality Neutrals*. Mandatory training and continuing education in ADR for all neutrals, and a diverse panel including both attorneys and other industry professionals with strong subject-matter expertise in construction.
- *Trusted Rules*. The ICDR administers cases pursuant to various sets of the AAA's rules, as well as its own international arbitration and mediation rules. If the parties have selected a specific set of rules in their arbitration agreement, those rules will be applied; otherwise, the case will be administered in accordance with the ICDR International Arbitration Rules.²³
- *Online Case Management and Resources*. Electronic filing and case management ability, including document filing and sharing, arbitrator selection, case tracking, and online billing.
- *Advisory Groups*. ICDR is guided by industry specific advisory groups on rules, policies, procedures, and panel quality.
- *Development of ADR Processes*. Commitment to the development of all ADR processes through research, education, and training programs

23. In 2011 the ICDR administered 477 cases pursuant to the AAA's Commercial Arbitration Rules and Mediation Procedures, 96 cases pursuant to the Construction Industry Arbitration Rules and Mediation Procedures, 71 cases pursuant to the ICDR's Procedures for Cases under the UNCITRAL Arbitration Rules and 75 cases pursuant to the Employment Arbitration Rules and Mediation Procedures in addition to its 251 cases under the ICDR's International Arbitration Rules. ICDR Cases and Commentaries at 9, n.19.

and publication of materials including the scholarly *Dispute Resolution Journal*. The AAA/ICDR also maintains the world's most comprehensive library on ADR.

G. ICDR Rules and Procedures

1. *ICDR Rules and Procedures.* As set forth above, the ICDR administers cases pursuant to various sets of the AAA's rules, as well as its own international arbitration and mediation rules. If the parties have selected a specific set of rules in their arbitration agreement, those rules will be applied; otherwise, the case will be administered in accordance with the ICDR International Arbitration Rules (IAR).

The ICDR's IAR were specifically designed for international disputes and incorporate the latest provisions that are expected in an international arbitration today. They provide the arbitrators with the framework to be able to consider different legal traditions and cultural differences along with the powers to render all necessary procedural determinations to bring the process to its conclusion with awards that will be recognized and enforced pursuant to the enforcement treaties. The IAR were modeled on the UNCITRAL Arbitration Rules and have undergone a number of revisions. The IAR contain all the necessary default mechanisms to ensure that the arbitration moves forward to its completion and is not frustrated by the failure of a party to perform or in the event of an impasse, and contain all the necessary gap fillers so that the parties need not worry about addressing every element individually in their arbitration agreement. They can then focus their attention on any particular elements they may wish to include in their customized process.²⁴

2. *Administrative Fees and Arbitrator Compensation.* The administrative fees to be charged by the ICDR for its services are clearly set forth in its rules, including a standard fee schedule and a flexible fee schedule, along with its refund schedule. The administrative fees of the ICDR are significantly lower than other arbitral institutions. Arbitrators are compensated at the rate set forth on their panel card, which is provided to the parties during the arbitrator selection process. Arbitrator compensation and reimbursable expenses are billed to the parties at the stated rates, without any markup or other charge added by the ICDR. The charges for most ICDR arbitrators are based upon an hourly or daily rate and are not dependent upon the amount in controversy in the particular case.

24. See generally ICDR AWARDS AND COMMENTARIES at 8–10.

3. *Commencing an ICDR Arbitration.* An ICDR arbitration is commenced by filing a notice of arbitration.²⁵ The requirements for the notice are set forth in Article 2 of the IAR.²⁶ All initial case filings are handled by the AAA/ICDR's specialized intake office. The claimant has the option of filing the case with either the intake office directly or at any of the AAA's offices including the ICDR in New York. The case may also be filed electronically online. The notice of arbitration must be sent simultaneously to the respondent in compliance with Article 18 of the IAR.²⁷
4. *Neutral Selection.* As set forth in IAR 5 and 6, the ICDR will administer the appointment process in accordance with the agreement of the parties. Unless an alternative method is specified in the contract or agreed among the parties, the ICDR list appointment method is the default method. If the parties have not agreed on a number of arbitrators, one will be appointed unless the ICDR determines that three arbitrators are appropriate because of the size of the case, complexity, or other circumstances. *See* IAR 5. In practice, a general rule of thumb is that three arbitrators will be appointed by the ICDR in cases where the amount in controversy exceeds \$1,500,000 USD, unless the parties agree to proceed with one arbitrator.²⁸ While parties may use the party-appointed selection process in ICDR cases, list appointment eliminates the need for any ex parte contact between parties and arbitrators, in turn reinforcing the tribunal's independence and impartiality. Any inferred connection between any member of the arbitration tribunal and any of the parties is removed.²⁹

ICDR list appointment proceeds as follows. After consultation with the parties as to desired arbitrator qualifications, the ICDR sends an identical list of names along with curriculum vitae to the parties. Parties strike unacceptable arbitrators, rank the remaining arbitrators in order of preference, and return the list to the ICDR. The ICDR then

25. Chapter 1 of *ICDR Awards and Commentaries*, titled "A Guide to ICDR Case Management," was written by Luis Martinez, a vice president with the ICDR, and contains an excellent summary of the ICDR case management process, including the commencement of the ICDR arbitration.

26. The Notice of Arbitration form and the submission form as well as a link to the AAA's Webfile can be found on the ICDR's website at <http://www.ICDR.org>.

27. *See id.* at 10–11. Note the importance of the notice requirements for serving documents. *Id.* at 10, n.26.

28. As set forth in IAR 5, this is discretionary with the ICDR, and may be revised from time to time. This rule of thumb is based upon the experience of the author and informal communications with the ICDR case management staff.

29. *See* ICDR's RESOURCE GUIDE FOR INTERNATIONAL CONFLICT MANAGEMENT STRATEGIES, <http://www.adr.org>. *See also* ICDR AWARDS AND COMMENTARIES at 14–18.

appoints the presiding arbitrator or tribunal from the closest mutual preference of the parties.³⁰

The process of clearing conflicts and challenges to arbitral appointments is stringent. The IAR 7 requires that all arbitrators be impartial and independent. Prior to accepting an appointment, the arbitrator must disclose any circumstances likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence. The disclosures are made when arbitrators are invited to serve, although the disclosure obligations continue throughout the matter.³¹

The ICDR plays a critical role in the disclosure and challenge process. The ICDR does not follow the International Bar Association (IBA) Guidelines on Conflict of Interest in International Arbitration; rather, the ICDR disclosure process is much broader, and requires disclosure of various items that are "green" under the IBA guidelines.³² The ICDR disclosure policy is similar to the AAA disclosure process, and is fundamentally different from the IBA guidelines or the mores that predated the IBA guidelines. Impartiality and independence are core values in the ICDR process.

5. *Information Exchange*. The ICDR IAR do not expressly provide for "discovery."³³ IAR Article 19 provides the arbitrators with the authority to order a party to deliver "a summary of the documents and other evidence that party intends to present in support of its claim, counterclaim, or defense," and to order a party "to produce other documents, exhibits, or other evidence it deems necessary or appropriate." It is generally accepted that the arbitrators have the authority to permit reasonable discovery. Document exchange is now widely accepted in international commercial arbitration, and the taking of depositions is not unusual in larger international construction cases.³⁴

The ICDR has promulgated Guidelines for Arbitrators Concerning Exchanges of Information, which reflect the institution's policy and expectations for cases administered pursuant to its rules. The purpose of these guidelines is to make clear to arbitrators that they have the authority, the responsibility and, in certain jurisdictions, the duty to

30. *Id.*

31. *See id.* at 18–19.

32. *See id.* at 18–19. *See also* IAR arts. 8 and 9.

33. For a comparison of the ICDR, ICC, and LCIA rules relating to the exchange of information among parties in international arbitration matters, see BATES, *ARBITRATION IN A GLOBAL ECONOMY: MANAGING INFORMATION EXCHANGE TO EXPEDITE INTERNATIONAL COMMERCIAL ARBITRATION HEARINGS* (2005), http://apps.americanbar.org/intlaw/calendar/spring2006/papers/THURS815930BATES_110.pdf.

34. *Id.* at 8. The IBA Rules for the Taking of Evidence, initially issued in 1999 and revised in 2010, are often relied upon by experienced arbitrators in determining the nature, extent, and scope of information exchange; they are available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#takingevidence.

manage arbitration proceedings so as to achieve the goal of providing a simpler, less expensive, and more expeditious process. The arbitrators are advised against accepting overly broad discovery requests that conflict with the guidelines. The ICDR Guidelines are required to be applied by all arbitrators serving on ICDR cases.³⁵

6. *Hearings.* IAR Article 20 governs the conduct of the hearings, which are private unless the parties agree otherwise or the law provides to the contrary. IAR Article 20 grants the arbitrators broad discretion to control the hearings, including admissibility, relevance, materiality, and weight to be given to evidence, use of written witness statements, presentation of lay and expert testimony, order of proof, and all other procedural matters.
7. *Award.* The requirements for the award are set forth in IAR Articles 26 and 27. The ICDR IAR require that the award be made in writing promptly by the tribunal and set forth the reason upon which the award is based, unless the parties have agreed that no reasons need be given. In addition to final awards, the tribunal has the authority to issue interim or partial awards. The ICDR also has the authority, unless otherwise agreed by the parties, to make selected awards publicly available, after editing the award to conceal the names of the parties and other identifying details.

It is also important to note that the tribunal “shall apply” the applicable law, IAR 28(1), and that in contract matters, the tribunal “shall decide in accordance with the terms of the contract and shall take into account usages of the trade applicable to the contract.” IAR 28(2). The tribunal is expressly prohibited from acting as *amicable compositeur* or *ex aequo bono* unless the parties have expressly authorized it to do so.³⁶

8. *Post-Award.* IAR 30 allows parties within 30 days after receipt of the award to request the tribunal to interpret the award, or to correct any clerical, typographical or computational error in the award, or to make an additional award as to claims presented but omitted from the award.
9. *Appellate Process.* The ICDR does not have an appellate process. The Award is intended to be “final and binding” on the parties, and the parties are directed to “undertake to carry out [the] Award without delay.” IAR 27(1).

35. ICDR AWARDS AND COMMENTARIES at 26. The Guidelines are available at <http://www.adr.org>, and are summarized in tabular form in ICDR AWARDS AND COMMENTARIES at 27.

36. *Amicable compositeur* means to permit the arbitrators to decide the dispute according to the legal principles they believe to be just, without being limited to any particular national law. *Ex aequo et bono* means a case may be decided on grounds of equity and reason rather than specific points of law. The ICDR IAR make clear that the tribunal is follow the law and the contract, not equitable principles, unless expressly authorized to do so.

IV. JAMS, the Resolution Experts

A. History

JAMS was founded in 1979 by the Honorable H. Warren Knight (Ret.) and a small group of former judges who recognized the great need for arbitrators and mediators sufficiently competent and experienced to resolve the most complex commercial disputes. The JAMS name is an acronym derived from the organization's original (and no longer used) title: Judicial Arbitration and Mediation Service. The organization now formally is known as JAMS, The Resolution Experts.

In the more than three decades since its founding, JAMS has grown into a highly respected national and international ADR provider. Case types include antitrust, bankruptcy, business, class action, commercial, construction, construction defects, e-discovery, education, employment, engineering and architecture, entertainment and sports, environment, family, federal, financial markets, franchise, government, healthcare, insurance/reinsurance, intellectual property, landlord/tenant, lender liability, professional malpractice, marital dissolution, mass tort, partnership, personal injury, probate, product liability, public policy, real estate, securities, toxic tort, and trusts and estates.

JAMS provides the full range of ADR services. In the construction field those services include assisting parties in selecting ADR procedures appropriate to resolution of their disputes, participating in structured negotiations as evaluative neutrals, serving as evaluative project neutrals, mediating multi-party disputes, accepting appointments to dispute review boards and dispute adjudication boards, and serving as arbitrators rendering nonbinding or binding awards and as appellate arbitrators.

JAMS handles an average of more than 10,000 cases per year in hearing locations throughout the world. In North America, JAMS has offices in 26 U.S. cities and in Toronto. JAMS International, formed in 2011, offers global dispute resolution services through offices in London with additional locations in Amsterdam, Milan, Rome, Toronto, and New York. JAMS panelists resolve complex cases in all areas of the law, many having multiple parties.

In 2002, JAMS established the JAMS Foundation and the JAMS Society as ways of giving back to local, national, and international communities. The JAMS Society supports volunteer work and community involvement by JAMS Associates. The JAMS Foundation, funded entirely by generous contributions from JAMS neutrals and associates, provides grants for conflict resolution initiatives having national and international impact. Two such initiatives are the Weinstein International Fellowship Program, which provides individuals from outside the United States with opportunities to observe JAMS's dispute resolution processes and then to pursue ADR projects of their own design to advance resolution of disputes in their own countries; and the Warren Knight Awards, which provide \$25,000 grants to organizations that promote conflict

resolution. Since its inception, the JAMS Foundation has provided more than \$4 million in grant funding.

B. Makeup of the JAMS Organization

JAMS neutrals serving all commercial specialties include more than 300 full-time dispute resolution experts with distinguished backgrounds as former federal and state court judges and magistrates, or highly qualified and experienced lawyers. The panel of neutrals is supported by more than 200 associates who serve as case managers and administrators.

C. Philosophy

The philosophy of service of JAMS and its neutrals and associates is dedication to maintaining the highest ethical and moral standards, and holding to values of uncompromising neutrality, integrity, honesty, accountability, and mutual respect in all interactions. Together JAMS neutrals and associates aim to provide the highest quality dispute resolution services in the local, national, and global communities, and to achieving the best possible resolution of disputes brought to them.

JAMS's vision is to lead the ADR industry as the foremost resolution experts, to set a standard for excellence by which all dispute resolution services will be measured, and to be chosen by the world's most respected lawyers and their clients for the resolution of disputes, particularly when the stakes are high, the matters are complex, and the parties appear unyielding.

D. Involvement in and Service to the Construction Industry

On January 1, 2008, JAMS formed the JAMS Global Engineering and Construction (GEC) panel of neutrals devoted exclusively to conflict resolution in the construction industry, composed of nationally and internationally recognized construction lawyers and judges with expertise both in construction law and in the efficient management of ADR processes. JAMS perceived that disputes arising in the construction industry were too specialized and often too complex for resolution by arbitrators and mediators without extensive backgrounds in construction law and the construction industry.

The JAMS GEC panel is headed by Philip L. Bruner, and is composed of neutrals with exceptional construction law backgrounds and extensive industry and professional recognition. GEC neutrals have been elected fellows and presidents of the American College of Construction Lawyers and the Canadian College of Construction Lawyers, and fellows of the College of Commercial Arbitrators, the Chartered Institute of Arbitrators, and the American Bar Foundation. They also have been recognized for their leadership as chairs

of other American and international professional groups, such as the ABA Forum on the Construction Industry, ABA Fidelity and Surety Law Committee, and ABA Public Contract Law Section. GEC neutrals' expertise in construction dispute resolution also is demonstrated through their extensive professional writing and speaking. JAMS GEC neutrals regularly publish articles addressing current ADR topics in *JAMS Global Construction Solutions* and the JAMS GEC newsletter, copies of which may be found on the JAMS website at <http://www.jamsadr.com> under "Construction Practice."

The 35 neutrals on the JAMS United States GEC panel, and the 19 neutrals on the JAMS International GEC panel devote themselves to resolution of construction disputes arising anywhere in the United States and globally.³⁷

E. JAMS Resolution Center Locations

JAMS has 26 United States Resolution Centers located in Atlanta, Boston, Chicago, Dallas, Denver, Greenbelt (MD), Inland Empire (CA), Irvine, Las Vegas, Los Angeles, Miami, Minneapolis, New York, Orange (CA), Philadelphia, Sacramento, San Diego, San Francisco, Santa Monica, Santa Rosa, Seattle, Silicon Valley (CA), Walnut Creek (CA), and Washington D.C.

JAMS International has Resolution Centers in London, New York and Toronto, with additional locations in Amsterdam, Milan, and Rome.

F. Websites

JAMS websites are <http://www.jamsadr.com> and <http://www.jamsinternational.com>.

G. Where JAMS GEC Neutrals Come From and How One Becomes a JAMS GEC Neutral

JAMS GEC neutrals come from distinguished careers specializing in construction law, where they are recognized widely as having expertise in both the construction law and the efficient management of ADR processes, extensive experience with construction industry practice, expertise and experience specifically in construction ADR processes, and the desire to devote themselves full-time to the construction ADR practice at JAMS. Careers of JAMS GEC neutrals have been principally in the private practice of construction law, in senior corporate legal positions in the construction industry, and in the judiciary. JAMS GEC seeks neutrals with those qualifications. JAMS GEC

37. For a current list of GEC panelists, see "Neutrals" under "Construction Practice" at <http://www.jamsadr.com>, and "Panelist Specialties" under "Panelists" at <http://www.jamsinternational.com>.

panelists usually are full-time neutrals exclusive to JAMS, thus making it easier for them to schedule hearings with attorneys and their clients and to avoid conflicts.

H. JAMS Distinguishing Characteristics

JAMS's distinguishing characteristics include the following:

1. *JAMS Neutrals.* JAMS neutrals have an uncompromising commitment to neutrality and integrity, dual professional expertise and extensive experience both in the construction law field and in the efficient management of construction dispute resolution processes, and a full-time commitment to ADR. These qualities have led to JAMS's excellent record in resolving even the most complex construction disputes, and parties' acceptance of arbitration awards rendered by JAMS neutrals. JAMS arbitration awards are uniformly well written and supported with authorities, and reject the practice of "splitting the baby."
2. *JAMS Case Managers.* JAMS case managers are noted for their competence, which is derived from recruitment of high-quality personnel, from extensive continuing training, and from enlightened management that promotes longevity in employment with JAMS. As JAMS's "front line" in dealing with party representatives and their clients, and in coordinating administrative fees and scheduling matters incident to efficient management of the various ADR processes, JAMS case managers are highly valued associates.
3. *JAMS Resolution Centers.* JAMS Resolution Centers uniformly are located in high-end downtown business district office buildings with adequate parking and building security, well-appointed soundproof meeting and hearing rooms, refreshment centers where lunch can be provided, and facilities for copying and e-mailing documents.
4. *JAMS Arbitration Rules.* As noted below, JAMS arbitration rules are geared for efficient management of the arbitration process, and also allow the parties to select an optional appellate arbitration review of any arbitration award rendered by JAMS or another ADR provider. JAMS also will administer arbitrations pursuant to parties' agreement to have the arbitration conducted under other rules.
5. *JAMS Arbitration and Mediation Fees.* JAMS fee structure is centered on services rendered, not amounts in controversy. For arbitrations, JAMS charges an initial case management fee (currently \$400 per party) to commence the matter. Thereafter, the case management fee is increased by the number of days of hearing and the arbitrator's compensation. Before the hearing, parties deposit with JAMS their respective shares of the estimated case management fee through the hearing, subject to

return after the conclusion of the matter of any unused portion of the fee. For mediations, JAMS charges a case management fee based on the matter's duration and the parties involved.

I. JAMS Rules and Procedures

1. *Domestic and International Rules and Procedures*

All JAMS rules and procedures are available for review on its websites at <http://www.jamsadr.com> and <http://www.jamsinternational.com>. The following rules are of particular application to domestic and international construction arbitration:

1. *Domestic Construction Arbitration.* JAMS rules and procedures applicable to domestic construction arbitration include Engineering and Construction Arbitration Rules & Procedures (2009) (GEC Arbitration Rules); Engineering and Construction Arbitration Rules & Procedures for Expedited Arbitration (2009) (GEC Expedited Rules); JAMS Recommended Arbitration Discovery Protocols for Domestic Commercial Cases (2010); and, JAMS Optional Arbitration Appeal Procedure (2003).
2. *International Construction Arbitration.* JAMS rules and procedures applicable to international construction arbitration include JAMS International Arbitration Rules (2011) and JAMS Efficiency Guidelines for the Pre-Hearing Phase of International Arbitrations (2011). In addition, parties may choose JAMS Optional Appellate Appeal Procedure (2003).

2. *Filing and Fees*

A JAMS arbitration is commenced by filing with JAMS a commencement letter confirming that the parties are subject to an agreement to arbitrate before JAMS as the arbitration administrator or to be governed by JAMS rules, and enclosing fees required by JAMS, the contact information for the parties, evidence that the demand for arbitration has been served on all parties, and a copy (if any) of any court order compelling arbitration at JAMS. The date of commencement is the date of the commencement letter, rather than the date of the demand for arbitration. See Rule 5 of the GEC Arbitration Rules and the GEC Expedited Rules.

Rule 31 of the GEC Rules provides that JAMS fees will be paid pro rata among the parties, unless the parties agree to a different allocation. To determine the amount of required fees to accompany the commencement letter, contact the JAMS Resolution Center at the location to which the commencement letter is to be directed.

3. Neutral Selection

The parties may select their own arbitrators. The “default” number absent party agreement is three arbitrators under Rule 15 of the GEC Arbitration Rules, and one arbitrator under Rule 15 of the GEC Expedited Rules. JAMS will appoint the arbitrators selected by the parties, and, where the parties cannot agree, may appoint one or more arbitrators from the JAMS panel of neutrals.

4. Discovery

Rule 17 of the GEC Arbitration Rules requires an exchange of information, and allows two depositions without the consent of the arbitrators. Rule 17 of the GEC Expedited Rules also requires an exchange of information, but the taking of any deposition is subject to the arbitrator’s approval. Parties are encouraged to consider JAMS Recommended Arbitration Discovery Protocols for Domestic Commercial Cases (2010).

5. Hearings

Detailed prehearing submissions are required by Rule 20 of the GEC Arbitration Rules and GEC Expedited Rules. Prehearing motions for summary disposition of a claim or issue are allowed under Rule 18 of both GEC Rules. Conduct of the hearing is addressed in Rule 22 of both GEC Rules, which grant arbitrators broad discretion to control hearing presentations, orders of proof, admissibility of evidence, and other matters.

6. Award

Rule 24 of the JAMS GEC Rules require a “reasoned award” unless the parties agree otherwise. This has been a major difference with the rules of other providers.

7. Post-Award

Rule 31 of the JAMS GEC Rules allows parties within seven days after service of the award by JAMS to request that the arbitrators correct any computation, typographical, or similar clerical error in the award.

8. Appellate Process

The JAMS Optional Arbitration Appeal Procedure (2003), when agreed to by the parties, authorizes JAMS to appoint an appeal panel of three neutral members recommended by JAMS and not objected to by any party within seven days. Once the appeal has been timely filed, the arbitration award is no longer considered final for purposes of seeking judicial enforcement or vacation under JAMS arbitration rules. Rule (D) of the Procedure provides that in conducting its appellate review, “The Appeal Panel will apply the same standard

of review that the first-level appellate court in the jurisdiction would apply to an appeal from the trial court decision.” This standard allows for correction of errors of law and errors in rulings on admissibility of evidence, both of which the appeal panel may correct in its appeal award.

V. International Institute for Conflict Prevention and Resolution

A. History

Originally founded in 1979 as CPR Institute for Dispute Resolution, the organization changed its name to International Institute for Conflict Prevention & Resolution in 2005. It is still known colloquially as CPR Institute (CPR). CPR is a nonprofit organization whose mission is to help global business and their lawyers resolve complex commercial disputes more cost effectively and efficiently. The CPR was founded to bring together corporate counsel to find a way to lower the costs of litigation. It remains headquartered in New York City. In 1982, CPR formed its first panel of distinguished neutrals, and in 1984 introduced its first “Corporate Policy on ADR,” informally known as its “Pledge.” In 1989, CPR issued its Rules and Commentary for Non-Traditional Arbitration of Business Disputes, and issued its Rules for Non-Administered Arbitration of International Disputes in 1992. In 2002, CPR introduced its Arbitration Appeals Procedures. Since 2002, CPR has issued several “protocols,” including a Protocol on the Disclosure of Documents and Presentation of Witnesses and Protocol on Determination of Damages in Arbitration.³⁸

Since its creation, CPR has been a membership-based, not-for-profit organization. CPR membership is composed of corporations, law firms, and neutrals from around the world. Membership provides unlimited access to CPR’s knowledge and information database, opportunities to serve on its committees and working groups, and access to its panels of neutrals. There are five types of memberships available: corporate, law firm, individual corporate counsel, individual law firm, and panelist. Access to most of CPR resources is limited to CPR members.

Another distinguishing feature of CPR is the “pledge” that it asks corporations and law firms to sign. Corporations “pledge” that they are prepared to explore resolution of a dispute through negotiation or ADR techniques before pursuing full-scale litigation. Law firms “pledge” that the lawyers within the firm will be knowledgeable about ADR, and will discuss ADR options with their client so that the client can make an informed choice concerning resolution of the dispute. More than 4,000 companies have signed the CPR Corporate Pledge, and more than 1,500 law firms have signed the CPR Law Firm Pledge.

38. Much of the background information is adapted from the 2011/2012 Annual Report of CPR, http://issuu.com/csdesignworks/docs/cpr_2012_annualreport?e=2550004/2629180.

Throughout its history, CPR traditionally provided rules and panels for parties to engage in “self-administered” arbitration. Over time it also began to provide a la carte administrative services, such as assistance with arbitrator selection, handling the arbitrator selection and challenge process, review of arbitration awards, or other a la carte administrative services. Effective July 1, 2013, CPR issued Administered Arbitration Rules, and began offering administered arbitration in addition to its traditional “self-administered” process. With the entry into this segment of the arbitration world, CPR is now competing more directly with AAA and JAMS in the domestic marketplace, and ICDR, JAMS, ICC, and others globally.

B. Philosophy

As CPR is a membership organization, CPR Non-Administered Rules tend to be used by fairly sophisticated commercial ADR users. CPR attempts to provide the ADR tools that are sought by its membership, including multiple sets of arbitration rules, a large number of specialized panels, and specific industry based initiatives. In many ways, its self-administered arbitration is more akin to a trade organization offering guidance and services to its members (including its non-administered approach to arbitration and mediation) than an arbitral institution such as AAA, ICDR, JAMS, or ICC. As set forth in its Mission Statement, the objective of CPR is to help global businesses and their lawyers resolve complex commercial disputes more cost effectively and efficiently. CPR recently stated its four strategic goals: (1) develop a 21st-century CPR Pledge that creates sustainable dispute resolution processes beyond a bilateral agreement; (2) enhance CPR’s panels of neutrals; (3) invest in Brazil, Europe, and Asia; and (4) explore strategic alliances to provide enhanced opportunities for CPR member organizations.³⁹

CPR characterizes itself as bringing a distinct viewpoint to the field of domestic and international dispute resolution. CPR’s basic tenets are as follows:

1. Most disputes are best resolved privately and by agreement.
2. Principals should play a key role in dispute resolution and should approach a dispute as a problem to be solved, not a contest to be won.
3. A skilled and respected neutral third party can play a critical role in bringing about agreement.
4. Efforts should first be made to reach agreement by unaided negotiation.
5. If such efforts are unsuccessful, resolution by a non-adjudicative procedure, such as mediation, should next be pursued. These procedures remain available even while litigation or arbitration is pending.

39. *See id.* at 4.

6. If adjudication by a neutral third party is required, a well-conducted arbitration proceeding usually is preferable to litigation.
7. During an arbitration proceeding the door to settlement should remain open. Arbitrators may suggest that the parties explore settlement, employing a mediator if appropriate.
8. Arbitration proceedings often can be conducted efficiently by the arbitral tribunal without administration by a neutral organization, or limiting the role of such an organization to assistance in arbitrator selection or ruling on challenges to arbitrators, if necessary.⁴⁰

C. Involvement in and Service to the Construction Industry

CPR has a Construction Advisory Panel that is currently chaired by Bob Rubin of McCarter & English, LLP, and a panel of construction neutrals that is composed of construction lawyers and a limited number of construction industry professionals. While the majority of CPR construction cases are arbitrated under its Non-Administered Arbitration Rules, CPR developed optional Rules for Expedited Arbitration of Construction Disputes in 2006.⁴¹ These rules are loosely based upon the United Kingdom's "construction adjudication process" and are designed to assure expeditious and economical conduct of arbitral proceedings and prompt resolution of construction disputes. The rules contemplate detailed pleadings, three-arbitrator tribunals, limited discovery, and compressed time frames to assure that the arbitral proceedings be completed within 100 days of the Prehearing Conference.

While empirical data is not publically available, experience suggests that far more domestic construction cases are arbitrated under the auspices of AAA and JAMS than under CPR rules. Similarly, significantly more international construction cases are arbitrated under the auspices of ICDR and ICC than under CPR rules.

D. Locations

CPR is located at 757 Lexington Avenue, New York, New York. It maintains hearings rooms at that location. CPR has ADR initiatives pending in Europe, the Asian Pacific, and emerging markets throughout the world.

40. Principles, CPR Non-Administered Arbitration Rules at 27, <http://www.cpradr.org/Portals/0/Resources/ADR%20Tools/Clauses%20&%20Rules/2007%20CPR%20Rules%20for%20Non-Administered%20Arbitration.pdf>.

41. The Rules for Expedited Arbitration of Construction Disputes are at <http://www.cpradr.org/Portals/0/Resources/ADR%20Tools/Clauses%20&%20Rules/CPR%20Rules%20for%20Expedited%20Arbitration%20of%20Construction%20Disputes.pdf>.

E. Websites

Information concerning CPR can be found on its website: <http://www.cpradr.org>.

F. CPR Neutrals

More than 1,000 neutrals comprise more than 20 specialized panels of CPR neutrals. In addition to its Construction and Arbitration Appeals panels, the CPR has a National Panel, a Global Panel, and a General Counsel Panel, among others.⁴² Neutrals may be qualified as arbitrators, mediators, or both, and neutrals may be members of one or more panels.

Admission to the various CPR panels is highly selective. Both internal and external review committees screen candidates for their experience with complex commercial matters, ADR training, ADR experience, references and, where appropriate, substantive experience in a given field. CPR strives for geographic and other diversity. All CPR neutrals are expected to maintain the highest ethical standards as set out by the governing ethical codes and rules.⁴³

G. CPR Distinguishing Characteristics

The distinguishing characteristics of CPR include the following:

- CPR is a membership-based, not-for-profit organization
- CPR's membership is composed of corporations, law firms, and neutrals.
- Members sign the CPR Pledge.
- CPR traditionally provides rules and panels for parties to engage in "self-administered" arbitration or mediation.
- CPR arbitrators must be neutral, however appointed.
- CPR rules require reasoned awards unless the parties agree otherwise.
- In addition to "self-administered" arbitration, CPR will provide a la carte administrative services.
- As of July 1, 2013, CPR also provides administered arbitration.

H. CPR Non-Administered Arbitration Rules

1. *CPR Non-Administered Arbitration Rules.* As set forth above, CPR arbitration is not administered by CPR, but rather is self-administered by

42. The list of specialty panels of neutrals is available at <http://www.cpradr.org/FileaCase/CPRsNeutrals/SpecialtyPanelsofNeutrals.aspx>.

43. The Qualifications Criteria for Admittance to the CPR Panel is available at <http://www.cpradr.org/FileaCase/ForNeutralsOnly/ApplytoBeaCPRNeutral.aspx>.

the parties. CPR provides Non-Administered Arbitration Rules, and provides its members access to panels of neutral arbitrators.⁴⁴

2. *Administrative Fees and Arbitrator Compensation.* Since CPR arbitration is self-administered, there are no administrative fees charged by CPR unless the parties request specified administrative services, such as assistance with arbitrator selection, handling the arbitrator disclosure and challenge process, nonsubstantive review of arbitration award, or other a la carte services.⁴⁵ The compensation of the arbitrators is handled directly with each arbitrator at the time of their appointment. The compensation for each arbitrator should be disclosed to all parties and the other arbitrators. *See* Rule 17.1. The charges for most arbitrators are based upon an hourly or daily rate and are not dependent upon the amount in controversy in the case.
3. *Commencing Arbitration.* A CPR arbitration is commenced by sending a notice of arbitration to the opposing party or parties. The requirements for the notice are set forth in Rule 3.3. Within 20 days after receipt of the notice of arbitration, respondent must send its statement of defense. *See* Rules 3.4–3.5. Respondent may also assert any counterclaim that is within the scope of the arbitration clause. *See* Rule 3.6.
4. *Neutral Selection.* As set forth in Rule 5, unless an alternative method is specified in the contract or agreed among the parties, the default is a three-person panel, with one arbitrator selected in the notice of arbitration, and one selected in the statement of defense. Within 30 days of the selection of the second arbitrator, the two party-appointed neutral arbitrators shall appoint a third arbitrator, who shall chair the tribunal. *See* Rule 5.2. An alternative appointment process in which the neutrals are not told which party selected them is set forth in Rule 5.4. CPR Rule 6 sets forth the procedures and circumstances under which the CPR would select, or facilitate the selection of, the tribunal. CPR Rule 7 governs the qualifications, challenges, and replacement of arbitrators.
5. *Information Exchange.* CPR Rule 11 expressly governs discovery. The tribunal “may require and facilitate such discovery as it shall determine is appropriate in the circumstances, taking into account the needs of the parties and the desirability of making discovery expeditious and cost-effective.”

44. CPR Rules for Non-Administered Arbitration are available at <http://www.cpradr.org/Portals/0/Resources/ADR%20Tools/Clauses%20&%20Rules/2007%20CPR%20Rules%20for%20Non-Administered%20Arbitration.pdf>.

45. A schedule of a CPR’s non-administered arbitration fees is available at <http://www.cpradr.org/FileaCase/NonAdministeredArbitrationFees.aspx>.

In 2009, CPR issued its Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration.⁴⁶ The protocol provides recommendations as to practices that arbitrators may follow in administering proceedings before them. Recognizing that there may be different interests and expectations on the part of arbitration users and their counsel, the protocol offers various “modes” of disclosure and presentation of witnesses, ranging from minimal to extensive, so that the parties to an agreement to arbitrate may choose, at the time of entering into their agreement or thereafter, the general way in which the arbitration proceedings will be conducted with respect to document disclosure and witness presentation.

6. *Hearings.* CPR Rule 12 addresses the conduct of the hearings. Under Rule 12, the arbitrators have broad discretion to control all procedural aspects of the hearings.
7. *Award.* The requirements for the award are set forth in Rule 15. The rules require that the award be made in writing and set forth the reasoning on which the award rests, unless the parties agree otherwise. *See* Rule 15.2. In addition to final awards, the tribunal has the authority to issue interim or partial awards. *See* Rule 15.1. The tribunal is also directed to fix the costs of the arbitration in its award. *Id.* at 17.2.

The dispute “should in most circumstances” be submitted to the tribunal for decision within six months of the initial prehearing conference, and the final award “should in most circumstances” be rendered “within one month thereafter.” Rule 15.7. The parties and the tribunal “shall use their best efforts” to comply with this schedule. *Id.*

8. *Post-Award.* Rule 15.5 allows parties within 15 days after receipt of the award to request the tribunal to clarify the award, correct any computational typographical, or clerical errors, or to make an award as to any claim or counterclaim submitted to the arbitration that was not addressed in the award. The rules of many arbitral institutions do not permit the parties to request a clarification of the award.
9. *Appellate Process.* The award is intended to be “final and binding on the parties,” and the parties are directed to “undertake to carry out [the] Award without delay.” Rule 15.6. While CPR recognizes that most users of arbitration find finality to “be appealing, some parties are concerned about the possibility of an aberrant award and would like to be able to appeal from such an award to a tribunal of outstanding appellate arbitrators.” CPR Arbitration Appeal Procedures, Introduction. In response, CPR implemented supplementary Arbitration

46. The CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration is available at <http://www.cpradr.org/Portals/0/Resources/ADR%20Tools/Clauses%20&%20Rules/CPR%20Protocol%20on%20Disclosure%20of%20Documents%20and%20Witnesses.pdf>.

Appeal Procedures in 1999, and has an panel of neutrals for arbitration appeals.⁴⁷ The Appeal Procedure (Appeal Rule 8.2) establishes relatively narrow grounds for appeal beyond the statutory grounds under Section 10 of the FAA. While the Appeals Panel may modify, set aside, or affirm the original award, it does not have authority to remand the original award. In addition, an unsuccessful appellant is required to reimburse the appellee's legal fees and other costs of the appeal, unless the tribunal orders otherwise. Appeal Rule 12.

VI. International Court of Arbitration, International Chamber of Commerce

A. History

The International Chamber of Commerce (ICC) was founded in 1919 under the leadership of President Etienne Clementel, a former French minister of commerce. It is a not-for-profit association that provides various services, including arbitration and ADR services. More than 160 permanent staff members, representing 25 nationalities, work at ICC headquarters in Paris, which houses a number of different departments and divisions, including dispute resolution services.

Established in 1923 as the arbitration body of the ICC, the International Court of Arbitration (ICC Court) pioneered international commercial arbitration, leading the movement that culminated in the adoption of the New York Convention, the most important multilateral treaty on international arbitration. The ICC Court has also developed various resolution mechanisms specifically conceived for business disputes in an international context. Such disputes pose unique challenges, because the parties typically will be of different nationalities, implying varied linguistic, legal, and cultural backgrounds. Difficulties can be further compounded by distance and the perceived or actual inequality for one party to submit to the courts of another party's home ground.⁴⁸

The ICC Court provides parties with a flexible and neutral setting for dispute resolution. It offers confidentiality and extraordinary freedom for parties to choose the framework for how and where they want to resolve their dispute. While the dispute itself is resolved by independent arbitrators, the ICC Court supervises the process from beginning to end, increasing the quality of the process and enforceability of the awards.

47. The CPR Arbitration Appeal Procedure and Commentary is available at <http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ArticleType/ArticleView/ArticleID/604/Default.aspx>.

48. Much of the background information is adapted from the ICC website, <http://www.iccwbo.org>, and from ICC DISPUTE RESOLUTION (2012), <http://www.iccwbo.org/news/brochures>.

The ICC Court secretariat consists of a secretary general, a deputy secretary general, a general counsel, seven counsel, and a support staff. The secretariat has a permanent staff of over 80 professionals and support personnel, approximately half of which are lawyers. Although English and French are the ICC Court's official working languages, the court can administer cases in all major languages including Arabic, Chinese, German, Italian, Portuguese, Russian, and Spanish.⁴⁹

Since its creation in 1923, the ICC Court has administered more than 19,000 disputes involving parties and arbitrators from 180 countries and independent territories.⁵⁰ Over the past three years, an average of 873 requests for arbitration per year were filed with the ICC Court.⁵¹

The secretariat assists the ICC Court in performing its functions as well as performing various day-to-day administrative functions in accordance with the ICC Arbitration Rules⁵² and the ICC Court's practices. There are currently eight case management teams, with each case assigned principally on the basis of geographic region or language. Seven of the teams are based in Paris, while the eighth team is based in Hong Kong and operates under the same management structure and procedures as the other teams. Each case management team, directed by a counsel and at least two deputies, has the regional experience, insights into cultural sensitivities, legal expertise, and linguistic skills to provide quality administration to that case. The secretariat considers such factors as the parties' nationalities, place of arbitration, and the languages and laws involved in assigning the case management team for a given case. This case management team becomes the main point of contact for all participants in the arbitration process. It advises parties, counsel, and arbitrators on applying the rules and briefs the ICC Court on its decisions.

Over the years, the ICC also launched additional complementary services, now gathered within the ICC's International Centre for ADR. They include mediation and other forms of amicable dispute settlement; sourcing experts to provide opinions on technical, legal, and financial matters; and helping to

49. See ICC Dispute Resolution at 3.

50. See Introduction to ICC Arbitration, <http://www.iccwbo.org>.

51. 759 requests for arbitration were filed with the ICC in 2012. Statistics on ICC Arbitration, <http://www.iccwbo.org>. In prior years, the following number of requests for arbitration were filed: 796 (2011), 793 (2010), 817 (2009), 663 (2008), 599 (2007), and 593 (2006). *Id.* Statistical information on case filings, nationality of the parties, hearing locale, nationality of arbitrators, amount in dispute, and number of awards rendered are provided in Statistics on ICC Arbitration, <http://www.iccwbo.org>.

52. References are to the current ICC Rules of Arbitration, which went into effect on January 1, 2012. The 2012 rules amended the prior 1998 rules, and added new provisions to address issues such as multiple contracts and multiple parties, updated case management procedures, appointment of an emergency arbitrator, and specialized disputes. The Rules are available at <http://www.iccwbo.org>.

set up and run dispute boards. The ICC Court's marketing activities are supported by marketing officers covering North America, Asia and the Pacific, Eastern Mediterranean, the Middle East and Africa, Latin America and the United Kingdom.

B. The International Court of Arbitration

The ICC Court is a unique feature of the ICC arbitration process. Working closely with its secretariat, the ICC Court's primary role is to administer ICC arbitrations. The ICC Court has more than 100 members from approximately 90 countries.⁵³ It performs the functions entrusted to it under the ICC Rules of Arbitration, including ensuring that arbitrators are mindful of all procedural requirements of the ICC Rules. One of the ICC Court's duties is to make every effort to ensure that awards are enforceable.⁵⁴

The ICC Court is not a "court" in the judicial sense. It does not itself resolve disputes or decide the outcome of an arbitration. It does not award damages or costs. Those are all functions reserved for the arbitrators. The ICC Court's specific functions under the ICC rules include the following:⁵⁵

- Determining the fees and expenses of the arbitrators
- Fixing the place of arbitration
- Assessing whether there is a prima facie ICC arbitration agreement
- Making certain necessary decisions in complex multiparty or multi-contract arbitrations
- Determining the number of arbitrators, and confirming, appointing and replacing arbitrators
- Deciding on any challenges filed against arbitrators
- Monitoring the arbitral process from the filing of the request for arbitration to the notification of the final award to ensure that it proceeds in accordance with the rules and with the required commitment to diligence and efficiency
- Scrutinizing and approving all arbitral awards, in the interests of improving their quality and enforceability
- Setting, managing and, if necessary, adjusting costs of the arbitration, including the ICC administrative expenses and the arbitrators' fees and expenses
- Overseeing emergency arbitrator proceedings

53. A list of the current members of the ICC Court is available at <http://www.iccwbo.org>. Members are appointed for three-year terms.

54. See Introduction to ICC International Court of Arbitration, <http://www.iccwbo.org>.

55. A more robust description of the functions of the ICC Court is set forth in Functions of the ICC International Court of Arbitration, <http://www.iccwbo.org>.

The ICC Court's official working languages are English and French. In recent years, however, the ICC Court has begun to hold special sessions for the scrutiny of arbitral awards in German and Spanish, when the awards themselves are in one of those languages. The ICC Court's official written correspondence is also available for arbitrations in German, Spanish, and Portuguese.

ICC arbitration may take place in any country, in any language and with independent and impartial arbitrators of any nationality.

C. Philosophy

The ICC was established in 1919 out of the ashes of the First World War. A nongovernmental organization, its founders believed that fostering international commerce would promote friendly relations between nations. Central to the ICC philosophy is the belief that a neutral and independent method of dispute resolution is necessary to facilitate international commerce, and that arbitrations may take place in any country, in any language, with independent and impartial arbitrators. This historical philosophy led to the creation of the ICC Court and its secretariat, which actively monitor the proceedings and scrutinize the awards to ensure the resolution of international disputes without the potential risks and biases of national courts. It also led to the ICC Court's control of all financial aspects of the case, buffering the parties and their counsel from such discussions with the arbitrators. This clear demarcation of responsibility between the ICC Court and the arbitrators, together with mandatory application of certain aspects of the ICC rules, was thought to ensure a neutral, independent, and impartial method of resolving international commercial disputes through effective and reasonably predictable procedures.⁵⁶

In addition, and unlike many of the other arbitral institutions, the ICC's approach has been to have one set of arbitration rules aimed at "business disputes." "Business disputes" is broadly defined, and includes services, intellectual property, sale of goods, disputes among partnerships, shareholders, consortia members, and the like, and other disputes.⁵⁷ "Business disputes" does not include inheritance disputes, family law matters, consumer disputes, class actions, and various other contractual disputes.⁵⁸ The purpose of the ICC rules was to provide for arbitration between international businesses, and not as an alternative to the national courts for every dispute.⁵⁹

56. Bond, *The International Arbitrator: From the Perspective of the ICC International Court of Arbitration*, 12 Nw. J. Int'l Law & Bus. 2 (1991).

57. Buhler & Webster, *HANDBOOK OF ICC ARBITRATION: COMMENTARY, PRECEDENTS, MATERIALS* (2005) at 15–16 [hereinafter *HANDBOOK OF ICC ARBITRATION*].

58. *Id.* at 16–19.

59. *Id.* at 19.

D. Involvement with the Construction Industry

Consistent with its philosophy of having a single set of rules for the resolution of “business disputes,” the ICC Court does not have any specific rules or other specialization in construction industry disputes, nor does it have a construction “panel” per se. Nevertheless, the standard forms of contract published by the Federation Internationale des Ingenieurs-Conseils (FIDIC) are widely used contract forms in international construction and infrastructure projects. The FIDIC forms have suggested the referral of unresolved disputes to the ICC Court since their first edition in 1957. ICC arbitration is also often selected as the binding dispute mechanism on other large construction or infrastructure projects, including those built within the United States. Consequently, the ICC Court has experience in administering a broad spectrum of construction disputes, both in the United States and internationally.

E. Website

The ICC website is available at <http://www.iccwbo.org>. The Arbitration and ADR section of the website is located at <http://www.iccwbo.org/products-and-services/arbitration-and-adr>, and the ICC Court’s section of the website is located at <http://www.iccwbo.org/about-icc/organization/dispute-resolution-services/icc-international-court-of-arbitration>.

F. ICC Neutrals and the Appointment Process

Unlike most other arbitral institutions, the ICC does not maintain a “roster” or “panel” of arbitrators, nor a panel of construction arbitrators. The most typical method of arbitrator selection in ICC proceedings is for the claimant to name its arbitrator in its request for arbitration, for respondent to name its arbitrator in its answer, and for the secretariat to confirm the appointments.⁶⁰ The named arbitrators do not need to be on any specific list or roster, or to be members of any particular arbitral organization. The chairperson of the tribunal will be appointed by the ICC Court, unless the parties agree to another procedure for the appointment of the chair.⁶¹ Typically, each party will select its neutral arbitrator, and the two neutral arbitrators, with input from the parties, will attempt to agree upon the chairperson. In the absence of such agreement, the ICC Court will appoint the chair.⁶² The chairperson will typically be of a nationality other than those of the parties.⁶³

60. ICC Rules, arts. 4 and 5. *See also* art. 8(4).

61. *Id.* at art. 12(5).

62. *See* HANDBOOK OF ICC ARBITRATION at 135–137.

63. ICC Rules, art. 13(5). For a discussion of potential chairpersons with dual citizenship or residency, see HANDBOOK OF ICC ARBITRATION at 146.

In terms of becoming an ICC arbitrator, the ICC advises that individuals interested in serving as arbitrators or mediators for ICC should contact the office of their national committee to the ICC. U.S. citizens should contact the U.S. Council for International Business (USCIB), as the United States National Committee to the ICC, to submit their CVs for consideration. The USCIB office in New York City collects CVs from interested individuals. As previously stated, ICC does not maintain a “list” system or a set “panel” of arbitrators. When the ICC Court is asked to make an appointment, it will call upon an appropriate national committee to make a proposal. Occasionally a national committee may receive a request directly from a party, looking for names of prospective arbitrators. In this case, an individual search is performed for that particular dispute.⁶⁴

G. Distinguishing Characteristics of ICC Arbitration

Other than the role of the ICC Court in the administration and supervision process and the mandatory application of certain aspects of the ICC rules, the most distinguishing characteristic of ICC arbitration is the “terms of reference,” defined in and required by Article 23 of the ICC rules. Signed by the arbitrators and the parties, and approved by the ICC Court, the terms of reference provide the framework for the arbitration. The terms of reference are mandatory in an ICC arbitration, and neither the parties nor the arbitral tribunal is permitted to move forward in an ICC arbitration without them.⁶⁵ The document sets forth the names, addresses, and other contact information for each party and their counsel, a summary of each party’s claims and the relief requested by each party, including monetary amounts sought for each claim element, a list of issues to be determined by the tribunal, the place of arbitration, and the particulars of the applicable procedural rules, governing law, and related information.⁶⁶

When preparing the terms of reference, or as soon thereafter as possible, the arbitral tribunal shall convene a case management conference to establish the procedural timetable for the proceedings as set forth in Article 24 of the rules. No party may “make new claims which fall outside the limits of the Terms of Reference unless authorized to do so by the arbitral tribunal.” Article 23(4). Further, the time limit for the issuance of the award is triggered by the date of the terms of reference. Pursuant to Article 30(1), the final award must be rendered within six months of the date of the terms of reference, unless extended pursuant to a reasoned request from the arbitral tribunal to the ICC Court or on the court’s own initiative.

64. See generally FAQs on ICC Arbitration, <http://www.uscib.org>.

65. See HANDBOOK OF ICC ARBITRATION at 226–27.

66. See ICC Rules, art. 23.

While preparing the terms of reference may seem to be a cumbersome, expensive, and unnecessary process to unfamiliar practitioners, they are a useful tool in precisely defining the contours of the dispute and the issues to be determined in the arbitration proceedings. Unlike the generality of the AAA demand for arbitration and the typical AAA case management order, the ICC terms of reference define the dispute with particularity within two months of the date on which the case has been transmitted to the arbitrators.

In addition, there are certain basic principles which underlie ICC arbitration.⁶⁷ While many of these principles are not entirely unique to ICC arbitration, they are important characteristics of the ICC process. Some of these are discussed below:

1. *ICC Arbitration Is Both an Administered Arbitration and a Supervised Arbitration.* In a general sense, ICC arbitration is administered by the secretariat and supervised by the ICC Court. Specified procedures govern nearly every aspects of the process, from the request for arbitration through the constitution of the arbitral tribunal through the terms of reference and procedural timetable to the scrutiny of the award.⁶⁸
2. *ICC Rules Provides Some Flexibility in Their Framework.* Since the application of certain aspects of the ICC Rules is mandatory, the ICC arbitration procedures are not as flexible as those of other arbitral institutions. Nevertheless, the ICC Rules strive to balance the need for flexibility and party autonomy against predictable results and basic international procedural protections.⁶⁹
3. *The ICC Rules Are Largely Based on Party Autonomy.* Closely related to item 2 above, the ICC Rules permit parties to agree on many aspects of the arbitration procedure, provided the arbitration “retains its essential characteristics of the ICC Rules.”⁷⁰ This position is reflected on numerous occasions in the Rules where there is a reference to the effect of “unless the parties have otherwise agreed.”⁷¹
4. *ICC Arbitration Is Based on the Free Choice of Arbitrators by the Parties and the Arbitrator’s Independence of the Parties.* Article 11 of the ICC Rules requires that all members of the arbitral tribunal be “impartial and independent of the parties involved in the arbitration.” This is “one of the thorniest issues in ICC arbitration.”⁷² It is important for U.S. practitioners to understand that the standards applied by the ICC Court in accessing “impartial and independent” are very different from those used in domestic U.S. arbitration, particularly the disclosure stan-

67. See HANDBOOK OF ICC ARBITRATION at 2.

68. *Id.* at 3–4.

69. See generally *id.* at 4–5.

70. See generally *id.* at 5.

71. See generally *id.* at 5–6.

72. *Id.* at 7.

dards imposed by the AAA in domestic commercial and construction cases or the disclosure standards that may be applicable in certain jurisdictions such as California.⁷³ Internationally, disclosure issues are not governed by specific jurisdictional case law, but are based upon a blend of international principles.⁷⁴ The IBA Guidelines on Conflict of Interest in International Arbitration provide guidance on the fundamental issues of arbitrator disclosure and arbitrator conflict of interest in international arbitration.⁷⁵ These requirements are less onerous than the AAA Rules, the American Bar Association Code of Ethics for Arbitrators, or judicial decisions in various jurisdictions in the United States.⁷⁶

5. *ICC Arbitration Is Linked to the Law of the Place of Arbitration As Well As the Place or Places of Enforcement of the Award.* While the law of the place of arbitration has become somewhat less important over time, the arbitration generally must meet the requirements of the laws of the place of arbitration. In particular, the law of the place of arbitration is relevant for providing the minimum procedural requirements for the arbitration, providing the forum in which to challenge arbitrators or arbitral conduct, and the criteria for annulment or remand of arbitral awards.⁷⁷ The object of any international arbitration is an award that meets the requirements of the New York Convention. Consequently, the ICC Court and the arbitrators must also be mindful of the requirements of the place or places in which the award is to be enforced, and the requirements of the New York Convention.⁷⁸

H. ICC Arbitration Rules and Procedures

1. Rules

The current ICC rules went into effect on January 1, 2012 and are available at <http://www.iccwbo.org>. Appendix I to the rules is the Statutes of the International Court of Arbitration, and Appendix II is the Internal Rules of the International Court of Arbitration. Appendix III, discussed below, is Arbitration

73. See also Code of Ethics for Arbitrators in Commercial Disputes, approved by American Bar Association House of Delegates and Executive Committee of the Board of Directors of the American Arbitration Association (2004), http://www.americanbar.org/content/dam/aba/migrated/dispute/commercial_disputes.authcheckdam.pdf.

74. *Id.*

75. For an overview of the IBA Guidelines, see Bates, *Arbitrator Disclosure Guidelines Under 2004 IBA Guidelines on Conflicts of Interest*, in *INTERNATIONAL ARBITRATION AND MEDIATION—FROM THE PROFESSIONAL'S PERSPECTIVE* 185–192 (2007). The IBA Guidelines are available at <http://www.ibanet.org/documents>.

76. *Id.* at 191.

77. *HANDBOOK OF ICC ARBITRATION* at 8.

78. *Id.* at 9–10.

Costs and Fees. Appendix IV is titled Case Management Techniques, and Appendix V is the Emergency Arbitrator Rules. As set forth above, although the ICC Court has experience in administering construction disputes, the ICC does not have any specific rules for construction industry disputes, nor does it maintain a panel or roster of construction industry arbitrators.

2. *Filing and Fees*

The ICC schedule of arbitration costs and fees is set forth in Appendix III to the rules.⁷⁹ The current nonrefundable filing fee to commence an arbitration is \$3,000. The amount of the administrative expenses charged by the ICC is dependent upon a number of factors including the amount in dispute, and ranges from \$3,000 for cases with small amounts in dispute (under \$50,000) to \$113,215 for disputes with amounts in controversy exceeding \$500 million. In addition, the ICC Court sets the arbitrators' fees. Appendix III provides a minimum and maximum for illustrative purposes based upon the amount in dispute, but the actual amount for each case is based upon a number of factors, including the amount in dispute, the complexity of the dispute, the actions of the parties, and the time spent by the tribunal. This is different from other arbitral institutions where arbitrator compensation is based upon an arbitrator's published hourly or daily rate.⁸⁰

3. *Information Exchange*

The ICC rules do not expressly provide for "discovery" or information exchange.⁸¹ The most applicable rule is 25(1), which gives the tribunal authority to "establish the facts of the case by all appropriate means." As a practical matter, the arbitrators have the discretion, but not the obligation, to direct parties to exchange information in an agreed manner in advance of the hearings. Document exchange has become widely accepted in international commercial arbitration, and is generally addressed in Article 24, Case Management Conference.⁸²

79. The ICC website has a cost calculator that enables parties to estimate the likely costs of an ICC Arbitration according to the scales in Appendix III to the Rules. The estimate does not include amounts for the expenses of the arbitrators. The cost calculator is available at <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Cost-and-payment/Cost-calculator>.

80. Many practitioners report that the costs of ICC arbitration (including arbitrator compensation and expenses) are greater, and sometimes significantly greater, than the costs for AAA, ICDR, or CPR arbitrations.

81. For a comparison of the ICDR, ICC, and LCIA rules relating to the exchange of information among parties in international arbitration matters, see Bates, *ARBITRATION IN A GLOBAL ECONOMY: MANAGING INFORMATION EXCHANGE TO EXPEDITE INTERNATIONAL COMMERCIAL ARBITRATION HEARINGS* (2005), http://apps.americanbar.org/intlaw/calendar/spring2006/papers/THURS815930BATES_110.pdf.

82. The IBA Rules for the Taking of Evidence, initially issued in 1999 and revised in 2010, are often relied upon by experienced arbitrators in determining the nature, extent,

4. *Hearings*

Hearings are governed by Article 26 of the rules, and are generally addressed in Article 24, Case Management Conference. The tribunal “shall be in full charge of the hearings.” Art. 24(3). Further, persons not involved with the proceedings are not permitted to attend except with the agreement of all parties and the arbitrators. *Id.*

5. *Award*

The requirements for the award are set forth in Articles 30 to 34 of the rules. As discussed above, the time for rendering the final award is six months from the date of the terms of reference. Art. 30(1). The award shall state the reasons upon which it is based, and shall be deemed to be made at the place of arbitration on the date stated in the award. Art. 31(2)–(3). Before signing any award, the tribunal must submit it to the ICC Court in draft form for review. No award may be rendered by the tribunal until it has been approved by the ICC Court. Art. 33.

6. *Post-Award*

Correction, interpretation, and remission of the award are governed by Article 35. Except as provided there, the parties are deemed to have agreed to promptly carry out the award, and shall be “deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.” Art. 34(6).

7. *Appellate Process*

The ICC does not have an appellate process.

VII. *The London Court of International Arbitration*

A. *History*

LCIA was organized in 1891 following passage of Britain’s Arbitration Act of 1889 as an arbitration tribunal for resolution of domestic and transnational commercial disputes. Under the auspices of the City of London in cooperation with the London Chamber of Commerce, LCIA was inaugurated in 1892 as The City of London Chamber of Arbitration.

Upon the tribunal’s inauguration in 1892, London’s *Law Quarterly Review* reported:

This chamber is to have all the virtues which the law lacks. It is to be expeditious where the law is costly, simple where the law is technical, a peacemaker instead of a stirrer-up of strife. . . . We have the germ of

and scope of information exchange, http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#takingevidence.

it...in the old Court of Pied Poudre [the merchant court established to resolve disputes between merchants at international fairs during the Middle Ages], in the aldermen arbitrators of the fifteenth century, in the committees of the Stock Exchange, Corn Exchange and Coal Exchange.

In 1903, the tribunal's name was changed to the London Court of Arbitration. The tribunal's present name, the London Court of International Arbitration, was adopted in 1981 to reflect the predominately international nature of the tribunal's work. In 1986 LCIA became a privately held not-for-profit company independent of the City of London, London Chamber of Commerce, and the Chartered Institute of Arbitrators. Although LCIA is located in London, 75 percent of the cases referred to LCIA involve no U.K. parties.

B. Makeup of Organization

LCIA, as a private not-for-profit company, is managed by a director general under the oversight of a board of directors made up largely of prominent London-based practitioners. Arbitration and dispute resolution services are provided through the LCIA Court under the day-to-day administration of the court's casework secretariat headed by the registrar located at the LCIA's International Dispute Resolution Centre in London. The LCIA Court consists of 35 arbitrators appointed from the major trading areas of the world to carry out the court's professional responsibilities for drafting and revising LCIA rules, determining the proper application of the LCIA rules, recommending appointment of tribunals, determining challenges to arbitrators, and ruling on cost questions. For a list of current LCIA Court members, see <http://www.lcia.org>.

C. Philosophy

The LCIA's guiding philosophy is the same today as it was when it was founded in 1892: "have all the virtues which the law lacks," "be expeditious where the law is costly," "be simple where the law is technical," and be "a peacemaker."

D. Involvement in and Service to the Construction Industry

LCIA focuses principally on commercial arbitration, and does not offer a specialized panel of arbitrators devoted exclusively to the resolution of construction disputes. Some LCIA members do have such requisite construction dispute resolution experience, and must be sought out by review of individual credentials in the LCIA database of neutrals from over 90 countries.

E. LCIA Location

The LCIA is located at 70 Fleet Street, London EC4Y 1EU, United Kingdom. An entirely independent arbitral institution following LCIA practices is LCIA India, which is located at 301-A World Trade Tower, Barakhamba Lane, New Delhi 110 001, India.

F. Website

The LCIA website is <http://www.lcia.org>.

G. Where LCIA Neutrals Come From, and How One Becomes an LCIA Neutral

The LCIA does not have a panel of neutrals, as such. It has a confidential database of neutrals from more than 90 jurisdictions. To be included on the database, one must submit a CV along with the completed LCIA arbitrators form demonstrating that LCIA criteria for inclusion are met. Nothing further is required for placement on the LCIA database. It is important to understand, however, that appointments are made strictly on the basis of the most appropriate qualification for the specific case. There is no way of predicting if and when an appointment might be forthcoming.

H. LCIA Distinguishing Characteristics

LCIA distinguishing characteristics include the following:

1. *LCIA Neutrals and Appointments.* LCIA does not recruit neutrals based on professional expertise in a particular field of law or specialization by area of commerce. For arbitrations referred to the LCIA, the tribunal is appointed from arbitrators listed in LCIA's confidential database, unless the parties agree on tribunal appointments.
2. *LCIA Reputation.* As one of the world's oldest dispute resolution centers to which British and Commonwealth solicitors and barristers for many generations have referred disputes, LCIA traditions for neutrality have caused it to be favored by most English-speaking men of commerce as a reputable organization to which to refer disputes for resolution.
3. *LCIA Arbitration Rules.* LCIA Arbitration Rules are said by LCIA to combine "the best features of the civil law and common law systems," and thus vary in some respects from rules of U.S. providers.
4. *LCIA Administrative Fees.* LCIA charges a nonrefundable registration fee when the case is filed, and in addition charges hourly rates for time spent by the registrar, other members of the secretariat, and members of the LCIA Court, when working on the case. In addition, a 5 percent general overhead fee is charged on top of the fees of the Arbitral Tribunal.

5. *LCIA Members Pay Individual Annual Dues.* LCIA requires members to pay an annual fee to be maintained in the LCIA database of neutrals.
6. *Governing Statute.* LCIA hearings heard in the United Kingdom are governed by the English Arbitration Act of 1996.

I. LCIA Rules and Procedures

LCIA rules and procedures for arbitration and mediation are available for review on its website at <http://www.lcia.org>.

1. *Filing and Fees*

An LCIA arbitration is commenced by filing with the Registrar of the LCIA Court a written request for arbitration containing the information required in Article 1 of the LCIA Arbitration Rules. For current fee information, review the LCIA website or contact the LCIA secretariat.

2. *Neutral Selection*

Parties may make their own selection of arbitrators to hear their case. LCIA also will suggest neutrals from its neutral database upon request of a party.

3. *Information Exchange*

The LCIA Arbitration Rules do not specifically address “discovery” as known in the United States, and relies on detailed pleadings “accompanied by copies...of all essential documents on which the party concerned relies.” Under Article 22, the tribunal is empowered to manage the arbitration process, and to oversee investigation into the facts, production of undisclosed documents, and the like. The rules themselves say nothing about deposition discovery.

The pleading and information exchange process is described in Article 5 of the LCIA Arbitration Rules, which provide that, in the absence of other agreement of the parties, the claimant within 30 days of the formation of the tribunal shall submit to the registrar a “Statement of Case” detailing the “facts and any contentions of law on which it relies.” Within 30 days thereafter, the respondent must submit to the registrar its statement of defense, setting out in sufficient detail which of the facts and contentions of law in the Statement of Case it admits or denies, on what grounds, and on what other facts and contentions of law it relies,” together with any counterclaims in the same detail as required for the Statement of Case. Within a further 30 days, a reply to the counterclaims must be filed.

4. *Hearings*

Under Article 14 of the LCIA Arbitration Rules, parties may agree on the conduct of the arbitration hearing and, in the absence of such agreement, the tribunal shall adopt suitable procedures. Under Article 19, the parties have

the right to present evidence through oral testimony of witnesses unless they have agreed to a documents-only arbitration. The tribunal has the “fullest authority” to set time limits. Where the tribunal deems it necessary, Article 21 authorizes the tribunal to appoint its own experts.

5. Award

Article 26 of the LCIA Arbitration Rules requires the tribunal to render a reasoned award unless the parties agree otherwise.

6. Post-Award

Article 27 of the LCIA Rules allows any party within 30 days of receipt of the award to request the tribunal to correct “errors in computation, clerical or typographical errors or any errors of a similar nature.”

7. Appellate Process

LCIA rules do not provide for appellate arbitration review.

VIII. Conclusion

This chapter profiles six of the world’s leading arbitral institutions. It is not intended to provide encyclopedic detail on all ADR providers or on all arbitral institutions, or a robust discussion of administered versus non-administered or ad hoc arbitration. These six were selected due to their significance to dispute resolution in the construction industry.

With respect to these arbitral institutions, this chapter provides an overview of the background, history, and philosophy of each organization, and a discussion of the organization’s involvement with and dedication to the construction industry. In addition, this chapter summarizes some of the important differences in the type of case administration provided and in the governing arbitration rules and procedures, including an outline of the distinguishing characteristics of each organization. This information is provided to assist construction practitioners in selecting the appropriate arbitral institution for each construction dispute.

Among the arbitral institutions profiled, the International Court of Arbitration of the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA) predominantly administer cases between citizens of different countries or cases arising from projects in locations other than the United States. The International Centre for Dispute Resolution (ICDR) is the international division of the American Arbitration Association (AAA). The ICDR administers cases between citizens of different countries or cases arising from projects in locations other than the United States, while the AAA administers domestic United States cases. JAMS and the International Institute for Conflict Prevention and Resolution (CPR) administer both domestic United States cases and international cases.

