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ARTICLE 25—WAIVER OF RULES

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ARTICLE 25

A party who knows that any provision of the rules or requirement under the rules has not been complied with, but proceeds with the arbitration without promptly stating an objection in writing thereto, shall be deemed to have waived the right to object.

I. Introduction

It is not uncommon for a party to raise objections to the arbitration based on non-compliance—sometimes of the most ‘technical’ kind—with the relevant institutional rules. The non-compliance might arise from the parties’ own acts or in relation to an order of the tribunal.¹ When such an objection is raised promptly, it can be considered and, if appropriate, remedial action can be taken. But when not raised promptly, such an objection can derail an arbitral proceeding and/or create potential grounds on which to challenge the award. Therefore, unsurprisingly, the principle has developed that a party must make any such objection promptly or risk being deemed to have waived its right to object. **25.01**

This principle is embodied in Article 25 of the ICDR Rules, which requires that where a party knows of any non-compliance with the ICDR Rules, but instead proceeds with the arbitration without promptly objecting in writing, it will be deemed to have waived the right to object. This general principle is also commonly **25.02**

¹ The parties are free to modify the ICDR Rules, but this must be recorded in writing pursuant to Art 1(1). See discussion at paras 1.91–1.92 above.

identified in international arbitration practice and procedure,² and in some national laws.³ It is also echoed in the ICDR Rules in the specific context of challenges to arbitrators⁴ and objections to jurisdiction.⁵

- 25.03** Article 25 is almost identical to Article 30 of the 1976 UNCITRAL Rules, but the latter provision was substantially redrafted in the 2010 UNCITRAL Rules. As discussed below, the analogous provisions in other institutional rules are similar, but with a potentially broader ambit.

II. Textual commentary

- 25.04** Article 25 is limited to non-compliance with any ‘provision of the rules or requirement under the rules’.⁶ It is not entirely clear what the difference is between a ‘provision’ and a ‘requirement’, but the same terminology is used in Article 30 of the 1976 UNCITRAL Rules and in section R-37 of the AAA Commercial Rules. By comparison, ICC Rules, Article 33, explicitly extends the non-compliance to other instances, including failure to comply with directions given by the tribunal or requirements under the arbitration agreement. LCIA Rules, Article 32, also refers to non-compliance with any provision of the arbitration agreement. This apparent anomaly was addressed in the 2010 UNCITRAL Rules, in which new Article 32 thereof refers to ‘any non-compliance with these Rules or with any requirement of the arbitration agreement’.⁷ Of course, the limitations on the scope in Article 25 do not mean that a party may not be deemed to have waived a right to object under the relevant applicable law or in reliance on general international arbitration practice.
- 25.05** A prerequisite for waiver under Article 25 is that the waiving party must first ‘know’ of the non-compliance. In discussing the same language in the 1976 UNCITRAL Rules, commentators noted that this must be a reference to ‘actual knowledge’, and

² See generally G Petrochilos, *Procedural Law in International Arbitration* (Oxford University Press, Oxford, 2004) paras 4-19–4-35 (in the context of being stopped from challenging an award).

³ See in particular UNCITRAL Model Law, Art 4 (containing language very similar to Art 25 of the ICDR Rules). See also *Avraham v Shigur Express Ltd*, 1991 US Dist LEXIS 12267 (SDNY 1991) (‘A party with an objection to an arbitration panel has an affirmative obligation to raise that objection with the arbitrators or else that objection shall be waived’); see generally GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 2,593–94.

⁴ See discussion of waiver in the context of Art 8 at paras 8.09–8.13 above.

⁵ See discussion of waiver in the context of Art 15 at paras 15.25–15.26 above.

⁶ In earlier versions of the ICDR Rules there were inconsistencies in using the capitalized ‘Rules’ as opposed to lower case. However, there is no doubt that the intention is to refer to non-compliance with the ICDR International Rules.

⁷ See UNCITRAL, *Report of Working Group II on the Work of its 47th Session*, UN Doc A/CN.9/641 (25 September 2007), para.

that it is ‘difficult in practice to prove actual knowledge of a failure and that in some jurisdictions actual knowledge [is] interpreted restrictively’.⁸ The working group charged with revising the 1976 UNCITRAL Rules found broad support for adopting language that included constructive knowledge, but there was a lack of accord on how to do that. In the end, Article 30 was revised to create a new Article 32 that avoids stating a knowledge requirement and shifts the burden to the objecting party to show that ‘under the circumstances, its failure to object was justified’.⁹

Article 25 of the ICDR Rules clearly places the onus on a party to object to any non-compliance without delay. But in order to constitute a waiver, the party still must, first, ‘proceed with the arbitration’, which presumably means move to the next stage despite its knowledge of the non-compliance. Second, it must fail to object ‘promptly’, which will be a highly fact-intensive inquiry.¹⁰ Finally, unlike its UNCITRAL Rules counterpart, the objecting party must state its objection ‘in writing’ in order to prevent waiver. **25.06**

As a practical matter, the willingness of a tribunal, court or other decision-maker to find that a party has waived its right to object is going to be very fact-specific. Despite the lack of an explicit direction in Article 25, the decision-maker is likely to look at all of the circumstances to decide whether waiver is justified. Further, the willingness to hold that a party has waived its rights may diminish depending on the seriousness of the non-compliance and the nature of the procedural right at issue.¹¹ While the ICDR Rules do not identify specific rules that are non-derogable, arbitration commentators have pointed to procedural rights in analogous rules that may be so fundamental that they cannot be waived.¹² Commentators on the 1976 UNCITRAL Rules, relying on the *travaux préparatoires*, also caution against finding waiver in situations other than ‘minor violations’ of the rules.¹³ **25.07**

⁸ See UNCITRAL, *Report of Working Group II on the Work of its 51st Session*, UN Doc. A/CN.9/684 (10 November 2009) para 44.

⁹ Ibid, para 49. See also UNCITRAL, *Report of Working Group II on the Work of its 52nd Session: Settlement of Commercial Disputes—Revision of the UNCITRAL Arbitration Rules*, UN Doc A/CN.9/WG.II/WP.157/Add.1 (10 December 2009), para 43. The full text of Art 32 of the 2010 UNCITRAL Rules reads: ‘A failure by any party to object promptly to any non-compliance with these Rules or with any requirement of the arbitration agreement shall be deemed to be a waiver of the right of such party to make such an objection, unless such party can show that, under the circumstances, its failure to object was justified.’

¹⁰ Note that the analogous Art 4 of the UNCITRAL Model Law was amended to refer to ‘without undue delay’ rather than a stricter ‘promptly’ standard.

¹¹ See D Caron, L Caplan, and M Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary* (Oxford University Press, Oxford, 2006) 741.

¹² See *ibid*, n 5. See also GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 1,775–76 (discussing objections to agreements involving corruption, grossly abusive procedural arrangements, protections aimed at protecting third parties, or public values as not subject to waiver).

¹³ See Caron, Caplan, and Pellonpää, *op cit*, 741, quoting UNCITRAL, *Report of the UNCITRAL on the Work of its Ninth Session* (UN Doc No A/31/17, 1976) para 146, reprinted in (1976) VII UNCITRAL Ybk 66, 77.

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