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ARTICLE 29—SETTLEMENT OR OTHER REASONS FOR TERMINATION

Article 29

1. If the parties settle the dispute before an award is made, the tribunal shall terminate the arbitration and, if requested by all parties, may record the settlement in the form of an award on agreed terms. The tribunal is not obliged to give reasons for such an award.

2. If the continuation of the proceedings becomes unnecessary or impossible for any other reason, the tribunal shall inform the parties of its intention to terminate the proceedings. The tribunal shall thereafter issue an order terminating the arbitration, unless a party raises justifiable grounds for objection.

I. Introduction

Of course, not all arbitrations proceed to a hearing on the merits and final award. **29.01**
Article 29 of the ICDR Rules addresses within its two paragraphs at least three situations in which the arbitration may be terminated other than by provision of a final award: termination upon settlement; termination upon settlement, but where the parties request that a 'consent award' be issued; and termination because the continuation of the proceeding has become unnecessary or impossible for any reason. The first scenario is probably the most typical, but in all three, the tribunal is likely to terminate the proceeding subject to payment of any outstanding fees or costs. Article 29 is closely modelled on the equivalent provision in the UNCITRAL

Rules[1] and the other institutional rules differ in only minor respects.[2] The AAA Commercial Rules contain an equivalent provision addressing consent awards,[3] as well as a power to suspend or terminate a proceeding, but only for default on payment of fees.[4]

29.02 As discussed further below, if a tribunal has been appointed, the decision on whether or not to terminate rests with the arbitrators. This is so even when the grounds for termination arise out of non-payment of fees.[5] Note that, according to ICDR practice, once an arbitrator has been appointed, no refund of filing fees is available, even if the arbitration is terminated pursuant to Article 29.[6]

II. Textual commentary

A. Termination upon settlement (Article 29(1))

Article 29(1)

If the parties settle the dispute before an award is made, the tribunal shall terminate the arbitration and, if requested by all parties, may record the settlement in the form of an award on agreed terms. The tribunal is not obliged to give reasons for such an award.

29.03 Article 29(1) provides that the tribunal *shall* terminate the arbitration if the parties settle the dispute before an award is made. If the parties so request, the tribunal *may* record the settlement in the form of an award on agreed terms. While commentators have pointed out that the equivalent Article 26 of the ICC Rules is more explicit in stating that the tribunal must agree to make such a consent award, the best interpretation of Article 29(1) is that the tribunal also has discretion to decide whether or not to agree to issue such an award.[7] In practice, it is unlikely that

[1] *See* 1976 UNCITRAL Rules, Art 34; 2010 UNCITRAL Rules, Art 36.

[2] For a discussion of consent awards, *see* GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 2,436–39; E Gaillard and J Savage (eds) *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International, The Hague, 1999) 1,364; N Blackaby, C Partasides, A Redfern, and M Hunter, *Redfern and Hunter on Law and Practice of International Commercial Arbitration* (5th edn, Oxford University Press, Oxford, 2009) paras 9-33–9-38. For a discussion of the tribunal's residual power to terminate proceedings, *see* Born, op cit, 1,865, 2,441–42.

[3] *See* AAA Commercial Rules, s R-44 ('Award upon Settlement').

[4] *See* AAA Commercial Rules, s R-54 ('Suspension for Non-payment').

[5] *See* discussion of Art 33(3) (addressing suspension or termination for non-payment of deposit of costs) at paras 33.06 ff below.

[6] Based on a discussion with ICDR senior management (October 2010).

[7] *See* P Turner and R Mohtashami, *A Guide to the LCIA Arbitration Rules* (Oxford University Press, Oxford, 2009) para 7-30 (referring to a 'potential ambiguity' in Art 26.8 of the LCIA Rules, but concluding that the tribunal has discretion).

a tribunal would refuse to do so[8]—particularly where, as is made explicit in other rules, the award is specifically described as being a consent award.

29.04 The key advantage of a 'consent award' is that, in most jurisdictions, this will be treated as any other arbitration award and will be enforceable as such.[9] Having the tribunal involved may also present a useful opportunity to review and offer suggestions on the terms of the settlement, although care must be taken in making such a disclosure if the settlement is not yet final and binding.[10] More likely, the tribunal may have useful suggestions on the form and content of the consent award that may assist in avoiding enforcement complications. Of course, as with any award, even a consent award is subject to challenge on the usual grounds available under the New York Convention or the law of the seat or place of enforcement.

29.05 Given the unique nature of an 'award on agreed terms', Article 29(1) makes clear that the tribunal need not give reasons for such an award. This mirrors language in Article 34(1) of the 1976 UNCITRAL Rules (Article 36(1) of the 2010 UNCITRAL Rules), as well as in Article 26.8 of the LCIA Rules.[11] Otherwise, the consent award should be subject to the same requirements of form and have the same effect as any other award under the Rules.[12] Article 29(1) does not contain the same language as that in Article 34(3) of the 1976 UNCITRAL Rules cross-referring to Article 32 (form of effect of the award), but it is implicit that other equivalent provisions of the ICDR Rules should apply, in particular, but not exclusively, Article 27.[13]

29.06 The equivalent section R-44 ('Award upon Settlement') of the AAA Commercial Rules makes explicit that 'a consent award must include an allocation of arbitration costs, including administrative fees and expenses as well as arbitrator fees and

[8] *See* D Caron, L Caplan, and M Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary* (Oxford University Press, Oxford, 2006) 857–59 (discussing the limited circumstances in which it may be appropriate for a tribunal to refuse to record a settlement).

[9] *See eg* UNCITRAL Model Law, Art 30(2) ('The award on agreed terms has the status of any other award on the merits').

[10] The ICDR Rules take no position on the controversial topic of whether arbitrators are permitted to get involved in settlement negotiations and, where they do so and the matter does not settle, what the consequences are for their continued involvement in the proceeding. On the topic generally, *see* AM Zack, 'The Quest for Finality in Airline Disputes: A Case for Arb-Med', Disp Resol J 34 (Nov 2003/Jan 2004). Of course, included within the ICDR International Dispute Resolution Procedures is a separate set of rules covering mediation: *see* para 1.47 above.

[11] But note that Art 26 of the ICC Rules and Art 28.8 of the SIAC Rules do not explicitly state that the tribunal is not obliged to give reasons.

[12] In the absence of special form requirements, the tribunal will likely assist the parties in deciding whether the consent award should incorporate by reference the terms of the settlement agreement, annex a copy of the agreement, or only summarize those terms relevant to the arbitration. This decision may be driven by practical considerations such as confidentiality, where the award may be enforced, and whether third parties are involved. *See generally* JM Lew, LA Mistelis et al, *Comparative International Commercial Arbitration* (Kluwer Law International, The Hague, 2003) 634; C Newmark and R Hill, 'Can a Mediated Settlement Become an Enforceable Arbitration Award?', 16(1) Arb Intl (2000).

[13] *See* discussion of Art 27 in Chapter 27 above.

expenses'. No such provision exists in Article 29 of the ICDR Rules, but any settlement agreement is likely to address these issues, and where the tribunal is being asked for a consent award, it will obviously be in a good position to ensure that they are fully addressed.

29.07 Note that the ICDR Rules do not provide any mechanism for 'suspending' the arbitration to allow implementation of settlement, where withdrawal of the claims is conditional on certain terms being performed. Settlement on such terms is not uncommon. Nevertheless, the tribunal may be willing to remain constituted and to order an 'adjournment' of the proceedings (or to keep the proceedings 'in abeyance') for some period of time, probably with regular reporting periods to check on implementation of the settlement. As a practical matter, arbitrators are likely to be reticent to agree to such a plan for other than a fairly short period of time.

B. Termination where continuation unnecessary or impossible (Article 29(2))

Article 29(2)

If the continuation of the proceedings becomes unnecessary or impossible for any other reason, the tribunal shall inform the parties of its intention to terminate the proceedings. The tribunal shall thereafter issue an order terminating the arbitration, unless a party raises justifiable grounds for objection.

29.08 Article 29(2) addresses the situation in which the continuation of the arbitration becomes 'unnecessary or impossible for any other reason'. This catch-all provision provides a mechanism for the tribunal to terminate a proceeding prior to the final award in all situations other than an agreed 'settlement' of the sort contemplated in Article 29(1). Perhaps the most common reason for termination would be where a claimant unilaterally withdraws its claims for whatever reason.[14] Other reasons might include where the claimant fails to prosecute its case,[15] where the costs of the arbitration are not being paid, or where the subject matter of the arbitration becomes moot.

29.09 Once the tribunal has concluded that there is a prima facie case that justifies termination, it must inform the parties of its intention to terminate the proceeding. Unless a party raises 'justifiable grounds for objection', it may thereafter issue an order

[14] *See* D Caron, L Caplan, and M Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary* (Oxford University Press, Oxford, 2006) 862.

[15] In this respect, *see* discussion on Art 23 ('Default') at para 23.04 above. (Article 23 did not incorporate the equivalent UNCITRAL Rules provision on a defaulting claimant. Accordingly, a tribunal wishing to terminate in this scenario is left with resort to Art 29(2).)

terminating the arbitration.[16] This language mirrors that of Article 34(2) of the 1976 UNCITRAL Rules. The drafting history of Article 34(2) makes clear that this is not intended to be a 'veto power' for any party.[17] Moreover, the 2010 revisions to Article 34(2) further strengthened the tribunal's autonomy by deleting the language referring to 'justifiable grounds for objection' and providing that the tribunal has the power to order termination 'unless there are remaining matters that may need to be decided and the arbitral tribunal considers it appropriate to do so'.[18] As suggested by this new text, whether under the ICDR or UNCITRAL Rules, termination may not be appropriate if there are still unresolved issues regarding costs, counterclaims, or other matters. As part of this exchange with the tribunal, there may well be discussion of whether or not the termination is intended to be 'with prejudice' to the claimant's right to re-file the claim later.[19] It is important that these issues are aired at this stage, because once the termination becomes effective, depending on applicable laws, the tribunal will likely be *functus officio*.[20]

29.10 Neither the ICC Rules nor the LCIA Rules have a similarly explicit default rule on termination, except in relation to failure to pay the advance on costs. Under ICC Rules, Article 22(1), after each party has had a reasonable opportunity to present its case, the tribunal has the power to declare the proceedings closed. Thereafter, no further evidence or argument may be introduced unless requested by the tribunal. However, a tribunal's inherent powers to manage the proceeding must extend to the power to terminate the arbitration in appropriate situations.

[16] The ICDR Rules do not give any guidance on what might constitute 'justifiable grounds'. But *see* discussion of Art 34(2) in Caron, Caplan, and Pellonpää, op cit, 864–66.

[17] *See* ibid, 864 (noting that the earlier drafts referred to termination 'unless a party objects').

[18] *See* 2010 UNCITRAL Rules, Art 36(2), and discussion in UNCITRAL, *Report of the Working Group II*, UN Doc No A/CN.9/688 (19 February 2010), para 112.

[19] For a general discussion of the preclusive effect of a terminated proceeding, *see generally* GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 2,887–2,915.

[20] *See* discussion in P Turner and R Mohtashami, *A Guide to the LCIA Rules* (Oxford University Press, Oxford, 2009) para 7-31 (arguing that where the arbitration is terminated under Art 26.8, the tribunal does not become *functus officio* until such time as the costs have been paid).

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