

36

ARTICLE 36—INTERPRETATION OF RULES

<i>I. Introduction</i>	36.01
<i>II. Textual commentary</i>	36.02

ARTICLE 36

The tribunal shall interpret and apply these rules insofar as they relate to its powers and duties. The administrator shall interpret and apply all other rules.

I. Introduction

Article 36 provides a bright-line rule that seeks to clarify when the arbitrators, as opposed to the institution, are responsible for interpreting and applying the ICDR Rules: to the extent that a rule impacts on the tribunal's powers and duties, then the tribunal is charged with its application; in all other cases, this duty falls on the ICDR. Practically speaking, however, given the ICDR's extensive experience with applying the rules, arbitrators typically will consult with the institution before making such an interpretation. **36.01**

II. Textual commentary

The intention behind the division of responsibilities in Article 36 is self-explanatory. Nevertheless, it may not always be so clear what provisions 'relate **36.02**

to [the tribunal's] powers and duties' and therefore fall to it to be decided. In practice, however, the ICDR is unlikely to interfere with a tribunal's exercise of its power pursuant to the rules. More importantly, the ICDR staff are available to assist arbitrators with questions that may arise about a particular provision.

- 36.03** The analogous provision in the AAA Commercial Rules (and in the other AAA Arbitration Rules) provides the same text as in Article 36, but also states that where there is a dispute between arbitrators over 'the meaning or application of these rules, it shall be decided by a majority vote'. Further, 'if that is not possible, either an arbitrator or a party may refer the question to the AAA for final decision'.¹
- 36.04** The AAA rule on interpretation has been considered by US courts mainly in the context of rejecting challenges to awards. Courts have invoked that provision in dismissing arguments that the tribunal misapplied the rules regarding, for example, scheduling of a hearing after an initial award,² submission of supporting documents to correct an inadvertent omission,³ timeliness of an arbitral award,⁴ the tribunal's decision to hold a hearing following a vacancy,⁵ and suspension of the proceedings following non-payment of costs.⁶
- 36.05** Article 36 of the ICDR Rules was specifically addressed by a US federal appellate court in the *T Co* Case.⁷ The court cited to Article 36 in finding that where the parties had agreed to be bound by the ICDR Rules, a reviewing court must accord 'significant deference to the arbitrator's interpretation' of the rules.⁸ Thus, the court refused to second-guess an arbitrator's interpretation of his powers to correct an award under Article 30 of the ICDR Rules.⁹
- 36.06** The ICC, SIAC, and other institutions issue 'Practice Notes' to 'supplement, regulate and implement these Rules for the purpose of facilitating the administration of arbitrations governed by these Rules'.¹⁰ The ICDR also issues Practice Notes, but, to date, the only current note is the ICDR Guidelines for Arbitrators Concerning Exchanges of Information.¹¹ Practice advisories about amendments to

¹ See AAA Commercial Rules, s R-33 ('Interpretation and Application of Rules').

² See *Lagstein v Certain Underwriters at Lloyd's, London*, 607 F3d 634, 643 (9th Cir 2010).

³ See *Schadrack v KP Burke Builder, LLC*, 970 A2d 368, 378 (NJ Super AD 2009).

⁴ See *Koch Oil and Transocean Gulf Oil Co*, 751 F2d 551, 554 (2d Cir 1985); *Matter of Arbitration No AAA13-161-0511-85 Under Grain Arbitration Rules*, 867 F2d 130, 134 (2d Cir 1989).

⁵ See *CR Klewin Northeast, LLC v City of Bridgeport*, 2005 WL 647830, *5 (Conn Super 2005).

⁶ See *Lifescan, Inc v Premier Diabetic Services, Inc*, 363 F3d 1010, 1011 (9th Cir 2004).

⁷ *T Co Metals, LLC v Dempsey Pipe and Supply, Inc*, 592 F3d 329, 336–37 (2d Cir 2010). See discussion at paras 30.04–30.07 above.

⁸ *Ibid*, 345.

⁹ *Ibid*. See also *Contec Corp v Remote Solution, Co Ltd*, 398 F3d 205 (2d Cir 2005) (holding that the parties incorporation of the AAA Commercial Rules manifested intent to have tribunal determine its own jurisdiction to bind non-signatory to the arbitration agreement).

¹⁰ SIAC Rules, Art 36.3.

¹¹ See discussion at paras 1.48–1.50 above.

the rules or the filing fees are also regularly published on the AAA website.¹² The ICDR has also recently inaugurated an email newsletter disseminated to practitioners and other users of ICDR arbitration.

The ICDR Rules do not contain a catch-all ‘General Rule’ of the sort found in ICC Rules, Article 35, and LCIA Rules, Article 32, in which the tribunal and the institution are directed that, in all matters not expressly provided for in the rules, they are to act in the ‘spirit of these Rules’ and to make every effort to ensure that the resulting award is enforceable.¹³ Nevertheless, the ICDR considers that even though not explicitly stated in the ICDR Rules, such principles are intrinsic to the rules as a whole.¹⁴ **36.07**

¹² See <<http://www.adr.org/sp.asp?id=28819>>

¹³ A similar ‘gap-filling provision’ was considered during the debate on revising the UNCITRAL Rules, but ultimately abandoned in the absence of consensus. See UNCITRAL, *Report of Working Group II on the Work of its 52nd Session*, UN Doc A/CN.9/688 (19 February 2010), paras 39–44.

¹⁴ Comment made by ICDR senior management.

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