

CEDR Rules for the Facilitation of Settlement in International Arbitration

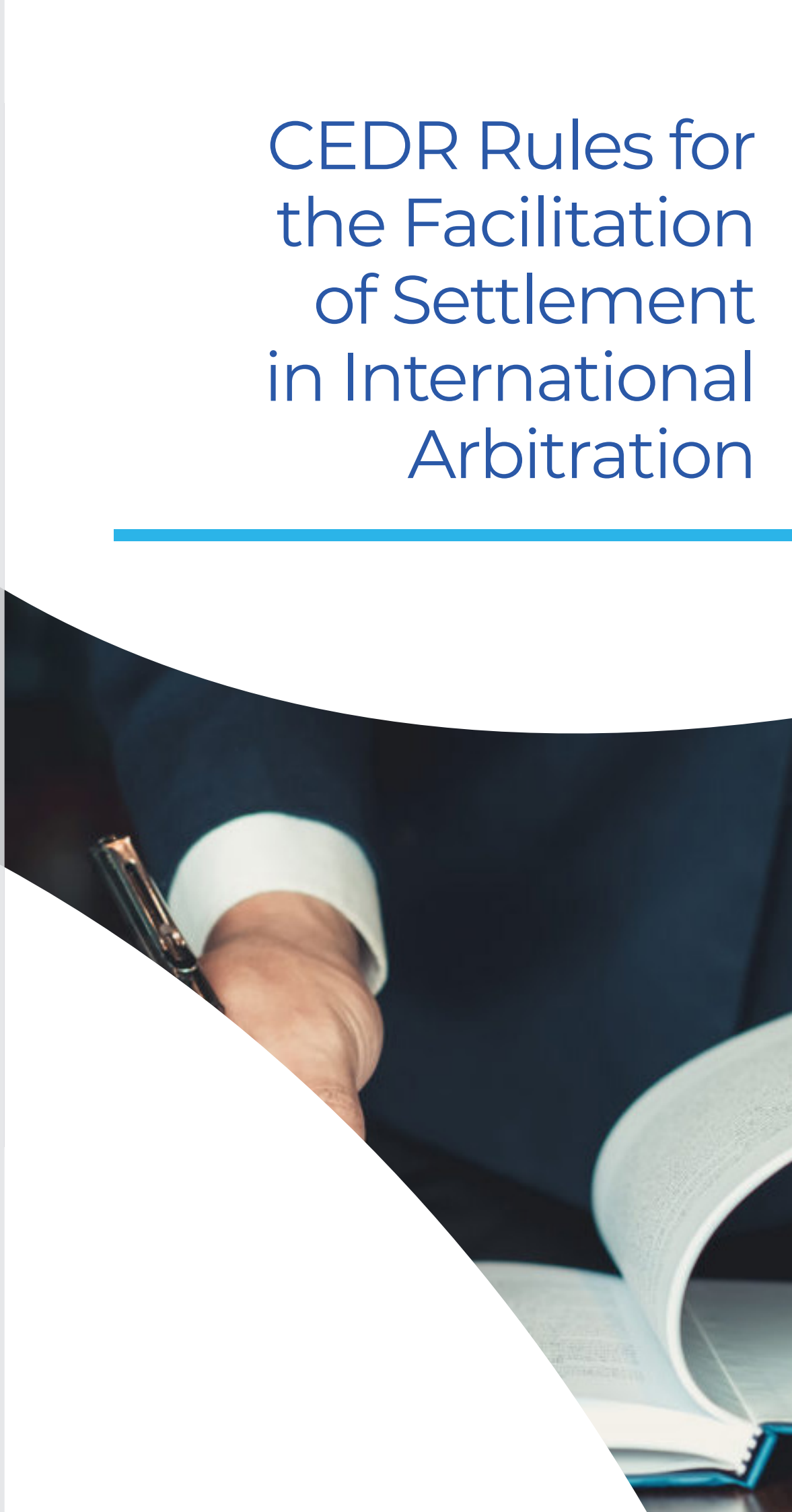
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CEDR Rules for the Facilitation of Settlement in International Arbitration

Introduction

- These CEDR Settlement Rules are designed to increase the prospects of Parties in international arbitration proceedings being able to settle their disputes without the need to proceed through to the conclusion of those proceedings. The Rules outline steps which Arbitral Tribunals are to take (and are not to take) with a view to facilitating settlement by the Parties.
- The CEDR Settlement Rules are designed to supplement the legal provisions and the institutional or ad hoc rules according to which the Parties are conducting their arbitration¹. The Rules can be incorporated on an ad hoc basis by agreement of the Parties, as part of an institution's rules, or within a contract clause requiring arbitration.²
- These Rules were first introduced by The CEDR Commission on Settlement in International Arbitration whose report of November 2009 provides guidance and background information.³

Sample wording for inclusion in a contract clause:

"In the conduct of any arbitration under this [Agreement], the Arbitral Tribunal shall apply the CEDR Rules for the Facilitation of Settlement in International Arbitration".

¹ CEDR would like to thank the International Bar Association for permission to adopt in these Rules some of the terminology from the IBA Rules on the Taking of Evidence in International Commercial Arbitration.

² The following is sample wording for inclusion in a contract clause: "In the conduct of any arbitration under this [Agreement], the Arbitral Tribunal shall apply the CEDR Rules for the Facilitation of Settlement in International Arbitration".

³ The full report is available at www.cedr.com.

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Article 1

Definitions

1. “Arbitral Tribunal” means a sole arbitrator or a panel of arbitrators.
2. “CEDR Settlement Rules” means the CEDR Rules for the Facilitation of Settlement in International Arbitration.
3. “First Procedural Conference” means the first conference between the Arbitral Tribunal and the Parties (whether by meeting or otherwise) at which the procedure for the conduct of the arbitration is discussed and established.
4. “General Rules” mean the institutional or ad hoc rules according to which the Parties are conducting their arbitration.
5. “Mediation Window” means a period of time during an arbitration that is set aside so that mediation can take place and during which there is no other procedural activity.
6. “Party” means a party to the arbitration.

Article 2

Scope of Application

1. Subject to Articles 2.2 and 2.3, whenever the Parties have agreed to apply the CEDR Settlement Rules, the Rules shall govern the steps taken by the Arbitral Tribunal to facilitate settlement of the Parties’ dispute.
2. In case of conflict between any specific provision of the CEDR Settlement Rules and any mandatory provision of law determined to be applicable to the case by the Arbitral Tribunal, the mandatory provision of law shall prevail. The Arbitral Tribunal shall apply the CEDR Settlement Rules in the manner that it determines best in order to accomplish their purpose, without contravention of the conflicting mandatory provision of law.
3. In case of conflict between any provisions of the CEDR Settlement Rules and the General Rules, the Arbitral Tribunal shall apply the CEDR Settlement Rules in the manner that it determines best in order to accomplish the purposes of both the General Rules and the CEDR Settlement Rules, unless the Parties agree to the contrary.
4. In the event of any dispute regarding the meaning of the CEDR Settlement Rules, the Arbitral Tribunal shall interpret them according to their purpose and in the manner most appropriate for the particular arbitration.
5. Insofar as the CEDR Settlement Rules and the General Rules are silent on any matter concerning the facilitation of settlement and the Parties have

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not agreed otherwise, the Arbitral Tribunal may facilitate settlement, as it deems appropriate, in accordance with the general principles of the CEDR Settlement Rules.

Article 3

General Principles

1. In assisting the Parties with settlement, the Arbitral Tribunal shall not knowingly act in such a way as would make its award susceptible to a successful challenge.
2. Subject to Article 3(1), the Arbitral Tribunal will take proactive steps in accordance with these CEDR Settlement Rules to assist the Parties to achieve a negotiated settlement of part or all of their dispute.
3. The Parties agree that the Arbitral Tribunal's facilitation of settlement in accordance with these Rules will not be asserted by any Party as grounds for disqualifying the Arbitral Tribunal (or any member of it) or for challenging any award rendered by the Arbitral Tribunal.
4. Nothing said or done by any Party or its counsel in the course of any settlement discussions, or in the course of any other steps taken by the Arbitral Tribunal to facilitate settlement, shall be used against a Party in the event that the arbitration resumes (save as regards the allocation of costs in accordance with Article 6 of these Rules).
5. The Arbitral Tribunal shall not take into account for the purpose of making an award, any substantive matters discussed in settlement meetings or communications, unless such matter has already been introduced in the arbitration. Further, the Arbitral Tribunal shall not judge the credibility of any witness on the basis of either the witness having been a party representative during settlement discussions, or anything said by or about, or attributed to, the witness during settlement discussions.

Article 4

Discussion at First Procedural Conference

1. The Arbitral Tribunal shall invite the Parties themselves (represented by a member of their management or in-house legal function) to participate in the First Procedural Conference (or such other early hearing or discussion as is used to establish the procedure for the arbitration). The Parties shall be encouraged to speak directly with the Arbitral Tribunal during the First Procedural Conference on matters relating to settlement.
2. At the First Procedural Conference, the Arbitral Tribunal shall:

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- 2.1. ensure that the Parties understand that they can settle their dispute or part of their dispute at any time;
- 2.2. ensure that the Parties are aware of the different dispute resolution processes (such as mediation) which, in the opinion of the Arbitral Tribunal, might assist the Parties in settling their dispute;
- 2.3. where appropriate, discuss with the Parties how other dispute resolution processes used to facilitate settlement might be accommodated at an appropriate time within the procedure for the arbitration (for example by way of a Mediation Window);
- 2.4. discuss and agree with the Parties the steps that the Arbitral Tribunal will be taking in accordance with Article 5 of the CEDR Settlement Rules to facilitate settlement;
- 2.5. discuss and agree with the Parties whether the Arbitral Tribunal, when allocating the costs of the arbitration between the Parties, is to take into account offers to settle in the manner described in Article 6 below; and
- 2.6. discuss and agree with the Parties the points during the course of the arbitration when the topic of settlement will be discussed again between the Parties and the Arbitral Tribunal.

Article 5

Facilitation of Settlement by Arbitral Tribunal

1. Unless otherwise agreed by the Parties in writing, the Arbitral Tribunal may, if it considers it helpful to do so, take one or more of the following steps to facilitate a settlement of part or all of the Parties' dispute:
 - 1.1. provide all Parties with the Arbitral Tribunal's preliminary views on the issues in dispute in the arbitration and what the Arbitral Tribunal considers will be necessary in terms of evidence from each Party in order to prevail on those issues;
 - 1.2. provide all Parties with preliminary non-binding findings on law or fact on key issues in the arbitration;
 - 1.3. where requested by the Parties in writing, offer suggested terms of settlement as a basis for further negotiation;
 - 1.4. where requested by the Parties in writing, chair one or more settlement meetings attended by representatives of the Parties at which possible terms of settlement may be negotiated.
- 2. The Arbitral Tribunal shall not:**
 - 2.1. meet with any Party without all other Parties being present; or
 - 2.2. obtain information from any Party which is not shared with the other Parties.

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3. The Arbitral Tribunal shall:

- 3.1. insert a Mediation Window in the arbitral proceedings when requested to do so by all Parties in order to enable settlement discussions, through mediation or otherwise, to take place;
- 3.2. adjourn the arbitral proceedings for a specified period so as to enable mediation to take place when requested to do so by a Party in circumstances where the contract in dispute contains a mandatory mediation provision which requires the Parties to mediate any relevant dispute, and the Parties have failed to do so before the time the issue is raised in the arbitration (provided that such failure was not due to the action or inaction of the Party requesting the adjournment).

Article 6

Costs

1. When considering the allocation between the Parties of the costs of the arbitration, (including the Parties' own legal and other costs) the Arbitral Tribunal may take into account:
 - 1.1. any offer to settle that has been made by a Party where the Party to whom such an offer has been made has not done better in the award of the Arbitral Tribunal than the terms of the offer to settle;
 - 1.2. any unreasonable refusal by a Party to make use of a Mediation Window;
or
 - 1.3. any failure by a Party to comply with a requirement to mediate or negotiate in the contract between the Parties which is the subject of the arbitration.

Article 7

Arbitrator impartiality and independence

1. If, as a consequence of his or her involvement in the facilitation of settlement, any arbitrator develops doubts as to his or her ability to remain impartial or independent in the future course of the arbitration proceedings, that arbitrator shall resign.

For more information or to make an enquiry please contact us using the below:

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