ICC PRACTICE AND PROCEDURE

The New Assistance ICC Provides to Protect the Confidentiality of a 'Sealed Offer'

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ICC has reissued its Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration. The amendments made in this latest version, dated 1 March 2017, include a section describing the assistance available from the Secretariat of the ICC Court in managing and safeguarding sealed offers. This article explains the mechanism and purpose of sealed offers, their potential value in ICC arbitration proceedings as a means of improving cost-efficiency, and ICC's role as guardian of such offers. In an appendix to the article, the authors provide a model document containing sample wording which parties will find useful when submitting a sealed offer.

I Introduction

International arbitration is accustomed to borrowing procedures from domestic legal systems and, after adapting them, incorporating them into international arbitral practice. Thus, the IBA Rules on the Taking of Evidence in International Arbitration (2010) (the 'IBA Rules'), have borrowed and incorporated the direct examination and cross-examination of witnesses by counsel, party-appointed experts, and document production — though not discovery generally — from the common law system. On the other hand, the generally accepted use in international arbitration of detailed written pleadings, accompanied by documentary evidence, detailed written witness statements and tribunal-appointed experts, is more in keeping with practice in the civil law system.

However, there is an excellent, discrete procedure from the English common law system which has not yet come to be generally accepted in international arbitration. This is known as the 'sealed (settlement) offer' or offer sent on a 'without prejudice save as to costs' basis (herein called 'Sealed Offer'). Regrettably, this procedure has been used in relatively few cases up to now, mainly where English common law lawyers are involved, and it deserves to be much better known and more widely used in international arbitrations, as it will promote the earlier amicable settlement of arbitrations.

While this procedure is described in its English context in section II below, it may be illustrated by a simple example. Let us assume that the claimant ('C') begins an arbitration against a respondent ('R') claiming US$ 10 million. R privately assesses its liability at no more than US$ 2 million. As R wishes to see the claim settled, R offers US$ 2.5 million to C subject to the condition that if the offer is rejected R reserves the right to submit its rejected offer to the relevant arbitral tribunal in such manner that the tribunal will be informed of it only after the tribunal has decided the merits and quantum of the case and is ready to determine how to allocate the costs of the arbitration. If C accepts the offer then that is, naturally, the end of the matter. If C rejects the offer and if C is ultimately awarded significantly more than US$ 2.5 million by the tribunal, then C's rejection of the offer and continued pursuit of the arbitration would have been justified and the offer should have no cost consequences. On the other hand, if C recovers less than US$ 2.5 million, R may legitimately claim that C should have accepted R's offer when it was made as this would have allowed the costs of arbitration which R has incurred since then to have been avoided. Therefore, R may reasonably claim that C should be liable for all of R's arbitration costs since that date. These costs, which are described below, could be substantial if R's offer was made at the outset or early in the arbitration.

Under English procedure, after C had refused to accept R's offer, as explained in section II below, R would submit the unaccepted offer to the tribunal in a sealed envelope. Under English rules of professional ethics, C would be bound not to disclose the contents of the offer to the tribunal and, similarly, an English tribunal would not open the sealed envelope until after the tribunal had decided the merits and quantum and come to decide how costs should be allocated. Variants of this procedure are commonly used in domestic litigation and arbitration in England and certain other common law countries.

One reason why this procedure is likely to help settle more disputes is the frequency of 'inflated claims': a claimant asserts a claim with a substantially inflated quantum and the respondent acknowledges to itself that it has some responsibility (who is perfect?) but believes that it is nothing like as great as that asserted by the claimant. In such a situation, the respondent would have an interest in making a Sealed Offer for the amount of the liability it considers that it has plus perhaps something extra as a further inducement to the claimant to accept the offer. On the other hand, if the claimant concludes that the respondent's assessment is roughly right, the claimant would have an incentive to accept such an offer so as to avoid potential liability for the totality of the respondent's arbitration costs from the date the offer is made.

Another reason why a Sealed Offer may induce settlement is the wide range of costs that the prevailing party may recover and, hence, that the losing party may be forced to bear, in an ICC arbitration. The 'costs of the arbitration' under the ICC Rules of Arbitration of 2012, as amended in 2017 (the 'ICC Rules'), include not just the fees and expenses of the arbitrator(s) and the ICC administrative expenses but — unlike domestic litigation in, for example, France, Japan and the United States[1] — the costs incurred by each party in presenting its case, such as lawyers' fees and expenses. The costs of a party in presenting its case represent 82 per cent of the costs in ICC arbitration cases.[2] Indeed, in some ICC arbitrations the 'costs of the arbitration' may come to represent 20 or 30 or 40 per cent or more of the amount in dispute.

However, the difficulty a party faces if it wishes to resort to this procedure in international arbitration is that it cannot usually be confident that both its adversary and the individual members of the tribunal will respect the confidentiality of the Sealed Offer. As the rules on legal privilege and professional confidentiality vary from country to country, a party cannot be assured that the confidentiality of a Sealed Offer will be respected by lawyers and parties from countries where this procedure is unknown.[3] For example, in France, the only form of settlement offer protected by confidentiality is one made by correspondence exchanged between members of the bar (*avocats*).[4] Accordingly, French lawyers would have no obligation under their rules of professional ethics to keep such offers confidential. The position may not be dissimilar in a number of other Continental European countries.

Thus, it has been understandable that even lawyers from different countries who have been familiar with the Sealed Offer procedure have been unwilling until now to resort to it in international arbitrations.

Can this issue of confidentiality be overcome so as to permit the wider use of Sealed Offers in international arbitration? For example, in the case of an institutional arbitration, can the international arbitral institution help to protect the confidentiality of Sealed Offers until after the merits (including quantum) of an arbitration have been decided?

The ICC apparently believes that it can, as it has developed a procedure which is expressly designed to protect the confidentiality of Sealed Offers in ICC arbitrations. This procedure is set out in paragraphs 193 to 196 of ICC's Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration dated 1 March 2017 (the 'ICC Note').

The purpose of this article will be, therefore, to examine this procedure. However, before doing so, this paper will:

- explain in more detail what is a Sealed Offer,
- recall what the ICC Rules provide regarding the allocation of costs, and
- describe how a Sealed Offer can be used in an ICC arbitration.

This paper will then look at how the ICC Secretariat proposes that the confidentiality of a Sealed Offer can be protected.

II What is a Sealed Offer?

In English law, the Sealed Offer represents a middle ground between an offer made 'without prejudice' (which may never be revealed to a tribunal) and an 'open offer' (which is treated as an ordinary piece of correspondence and may freely be submitted to the tribunal).

When the Sealed Offer is made, the recipient of the offer ('offeree') is informed that it is 'without prejudice save as to costs'.[5] In other words, the offer can only be

disclosed by the party making the offer ('offeror') to the arbitral tribunal in relation to the tribunal's decision to allocate the costs of the arbitration but *not* for the purpose of considering the merits of the underlying dispute.[6]

An offer made on these terms is frequently referred to as a 'sealed offer' because of the traditional means of communicating it to the tribunal. The offer letter is sent by the offeror to the offeree but a copy is also provided to the tribunal in a sealed envelope with a request that it be opened after the substantive decision on liability and quantum has been reached,[7] i.e. at the point in time when the tribunal is ready to consider apportionment of costs under the 'loser pays' or 'costs follow the event' rule which is commonly applied in English arbitration practice.[8]

If the offeree rejects the offer and is subsequently awarded a lower amount by the arbitral tribunal, the tribunal may attach negative costs consequences to the rejection of the offer (i.e. a party who has rejected a reasonable settlement offer may — even if successful on the merits — be ordered to pay some or all of the costs of the arbitration, including the offeror's legal fees and other costs, from the time when the offer was made).

Traditionally, the offeror is the respondent who offers to settle the dispute for a lower amount than the claimant seeks. But precisely the same costs advantages accrue to a claimant who makes an offer to the respondent to settle the case for less than the amount claimed, or who makes an offer in respect of a respondent's counterclaim(s).

A classic statement regarding the effect of a Sealed Offer made by a respondent in English arbitration practice is as follows:

> How should an arbitrator deal with costs where there has been a 'sealed offer'? I think that he should ask himself the question: 'Has the claimant achieved more by rejecting the offer and going on with the arbitration than he would have achieved if he had accepted the offer?' This is a simple question to answer … **If the claimant in the end has achieved no more than he would have achieved by accepting the offer, the continuance of the arbitration after that date has been a waste of time and money. Prima facie, the claimant should recover his costs up to the date of the offer and should be ordered to pay the respondent's costs after that date**. If he has achieved more by going on, the respondent should pay the costs throughout.
>
> Let me stress, however, that whilst this is the general rule, there is an overriding discretion.[9] [Emphasis added]

The Sealed Offer procedure thus provides a useful device by which an offeror can place pressure on an offeree to settle a dispute. The potential costs consequences of refusal give the offeree a tangible financial incentive to make a realistic appraisal of its prospects of success if it chooses to take the matter forward rather than settling for the amount offered.

The Sealed Offer procedure also provides an incentive for the offeror to make a realistic — and even generous — settlement offer rather than a 'low ball' one. This is because the offeror will not ultimately obtain any costs advantage in the proceedings unless the offer is pitched at or above the level which is ultimately awarded by the tribunal. Similarly, the offeror is incentivised to make its offer at an early stage in proceedings because the earlier the offer is made, the greater the possible costs advantage to the offeror.

III The ICC Rules regarding allocation of costs

The ICC Rules of Arbitration provide that an arbitral tribunal may take account of each party's conduct when making decisions as to the allocation of costs of an arbitration. This may naturally include where an arbitration has been prolonged unnecessarily by a party's failure to accept a reasonable settlement offer made by its adversary.[10]

When making its final award, the tribunal is required by Article 38(4) to 'fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties'.

According to Article 38(1), the 'costs of the arbitration' include 'the fees and expenses of the arbitrators and the ICC administrative expenses … as well as the fees and expenses of any experts appointed by the arbitral tribunal and the reasonable legal and other costs incurred by the parties for the arbitration'. Thus, as mentioned above, the costs of an ICC arbitration can be very significant. Accordingly, any procedure that may allow a party better to foresee how a tribunal will allocate such costs between itself and its adversary may induce it to settle a case.

The ICC Rules do not contain a presumption that the losing party should pay the winning party's costs in the arbitration but, in practice, a majority of arbitral tribunals adopt that approach as a starting point.[11]

Irrespective of its starting point, the tribunal is explicitly empowered by Article 38(5) to 'take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner' when making any apportionment of costs.

Accordingly, where a party has made a settlement offer that has been rejected by the opposite party and where the opposite party is awarded less than the amount of the offer, the tribunal may wish to take those circumstances — the rejection by the opposite party of an apparently reasonable settlement offer — into account when considering 'the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner' under Article 38(5).

IV Sealed Offers in ICC arbitration

However, as the lawyers involved in ICC arbitrations are often from different legal cultures, many may be unfamiliar with the Sealed Offer procedure. Moreover, their notions of legal privilege and professional confidentiality may well differ from those in the common law countries where the Sealed Offer is commonly used.[12] Consequently, some parties may, understandably, feel uncomfortable with, and object to, the use of such procedure.

To limit the risk that any party or lawyer who has such an objection (including a tribunal member) could later unexpectedly undermine the Sealed Offer procedure (by disclosing the contents of the Sealed Offer, or opening the envelope containing it, prematurely), the ICC Note provides that the issue of the acceptability of this procedure should be considered by the tribunal and, if appropriate, be discussed and, ideally, be agreed upon by the tribunal and the parties at the outset of an arbitration. According to the ICC Note:

> The arbitral tribunal should consider consulting the parties at an early stage (e.g. at the first case management conference pursuant to Article 24) and inviting them to agree on a procedure for the possible use of Sealed Offer(s) in the arbitration. Absent initiative by the arbitral tribunal in this respect, any party is free to raise this issue.[13]

As promoting early amicable settlement — the purpose of the Sealed Offer procedure — should be in everyone's interest, each party may be under some pressure to subscribe to the procedure once the issue is raised.

When making a Sealed Offer, a party must take care to explain to the offeree in detail in its offer letter how the offeror proposes to use the settlement offer if it is not accepted. Accordingly, the terms of the offer should be described fully in such letter. A party must not assume that by merely marking a letter 'without prejudice save as to costs', which may be understandable to lawyers in certain common law countries, will be sufficient to convey the offeror's intention to provide the letter to the tribunal for the purposes of costs allocation.[14] Indeed, these words may well be meaningless to lawyers from civil law countries.

Ideally, any Sealed Offer should be capable of immediate acceptance by the offeree (even if subject to the conclusion of a formal settlement agreement). Accordingly, it will generally be appropriate for the letter to make clear:

- the scope of the offer (i.e. does it include all claims and counterclaims in the proceedings or some subset of them only?);
- the monetary amount (or other remedy) being offered;
- the time when payment (or completion of the other remedy) will be made;
- the treatment of interest, if appropriate;
- the allocation of the costs of the arbitration incurred until the point in time when the offer is accepted;
- the method by which the offer can be accepted; and
- whether the offer is open for acceptance within a limited time or indefinitely.

A sample letter including possible wording on these points is included in the appendix to this article.

The offeree may wish to make a counter-offer. Any such counter-offer may also be made as a Sealed Offer. In those circumstances, the entire chain of correspondence arising from the initial offer (e.g. counter-offers, withdrawals, etc.) should be kept confidential from the tribunal until it is ready to address the issue of costs allocation.

Section V below describes the practical assistance that the ICC Secretariat can provide to parties to ensure that correspondence relating to a Sealed Offer (or Offers) is kept confidential from the time the original offer has been made and is rejected and is sent in a sealed envelope to ICC until after the tribunal has decided the merits and quantum of the case, when the Sealed Offer (or Offers) can be communicated to the tribunal for it to consider in the allocation of the costs of the arbitration.

V How the ICC protects confidentiality

To obtain the Secretariat's assistance in connection with a Sealed Offer (or Offers), the ICC Note provides for observance of the following procedure:[15]

a. At any point after the Secretariat has transmitted the Request for Arbitration to the respondent(s), any party to the arbitration may send to the Secretariat a copy of an offer of settlement previously made to any other party in the arbitration, but not accepted, that is marked 'without prejudice save as to costs'. The offer should be submitted to the Secretariat in a sealed envelope marked 'without prejudice save as to costs'. An accompanying letter should request the Secretariat to treat the sealed envelope as confidential and not to transmit it to the tribunal until the tribunal has resolved all issues of liability and quantum and is ready to consider the allocation of costs. The sending party should address such correspondence to the Secretariat and simultaneously copy the original recipient of the offer.

b. Following receipt of correspondence pursuant to paragraph (a) above, the Secretariat will inform:

i. the sending party (copying the other party) that the sealed envelope will be held in confidence, and

ii. the original recipient of the offer (copying the other party) of the circumstances in which the sealed envelope may be submitted to the tribunal and solicit any comments.

c. Further correspondence arising from the original offer (including, for example, any counter-offers) which is sent by a party to the Secretariat in a sealed envelope marked 'without prejudice save as to costs' will be held by the Secretariat on the same basis as the original offer.

d. At an appropriate stage in the proceedings, the Secretariat will write to the tribunal to inform it that the Secretariat is holding correspondence exchanged between the parties that is potentially relevant to its determination of costs under Article 38. The Secretariat will request the tribunal to: (i) inform the Secretariat in writing whether it accepts to receive the Sealed Offer(s); and in such case to (ii) inform the Secretariat in writing once it has completed its deliberations on all liability and quantum issues and is ready to apportion costs.

e. If the tribunal accepts to receive the Sealed Offer(s), it should refrain from closing the proceedings pursuant to Article 27 to the extent necessary to allow the parties to make further submissions on costs.

f. Once the tribunal has informed the Secretariat that it is ready to apportion costs under Article 38, the Secretariat will send to the tribunal all the correspondence marked 'without prejudice save as to costs' and held by the Secretariat. Once the tribunal has received this information, it shall open the sealed envelopes and provide copies of any documents contained therein to the parties.

g. The tribunal will decide whether any further procedural steps are necessary or whether it can proceed to allocate costs pursuant to Article 38. For the avoidance of doubt, the tribunal retains discretion to decide what weight, if any, should be given to correspondence marked 'without prejudice save as to costs' and received from the Secretariat.

h. Once the tribunal has completed its deliberations on costs, it will add its decision as to the allocation of costs to the draft final award, which will be submitted to the ICC Court for scrutiny pursuant to Article 34.

The ICC procedure assumes that the parties and the arbitral tribunal will have agreed, expressly or tacitly, to the Sealed Offer procedure, ideally, at the first case management conference pursuant to Article 24 of the ICC Rules. If the procedure has not been agreed, the arbitral tribunal retains the discretion to refuse to receive Sealed Offer(s) held by the Secretariat.[16]

Under the ICC procedure, the tribunal will not receive the sealed envelope(s) until it has informed the ICC that it has completed its deliberations on, and decided, liability and quantum. This protects against the possibility of a rogue tribunal member opening the sealed envelope(s) at an earlier stage of the proceedings.

The tribunal is also required to send copies of the documents contained in the sealed envelope(s) to the parties after opening them. This protects against the (perhaps unlikely) possibility that a party could submit a different settlement offer to the Secretariat than it had made to its opponent.

At the point in time when the tribunal opens the sealed envelope(s), the parties will not have seen the tribunal's ruling on issues of liability and quantum. Accordingly, under the ICC procedure, the tribunal must be trusted not to make a premature request for the sealed

envelope(s) and not to make any amendments to the substantive rulings in the draft award after opening the sealed envelope(s). Of course, if a party is particularly concerned by these risks, it may request the tribunal to deal with costs in a separate phase of the arbitration after issuing a partial award on liability and quantum.

VI Conclusion

While only time will tell how effective the ICC's new procedure will be, the authors believe that, when agreed to by tribunals and parties, it should provide parties with assurance that their Sealed Offers will be kept confidential until the merits and quantum, if any, of the case have been decided and the issue of cost apportionment is addressed. Hopefully, it will lead to much greater use of Sealed Offers in international arbitrations and, thus, to the earlier amicable settlement of disputes.

Notes

1. Christopher Hodges, Stefan Vogenauer and Magdalena Tulibacka (eds),'Costs and Funding of Civil Litigation: A Comparative Study', University of Oxford Legal Research Paper Series, Paper No. 55/2009 (December 2009), §§ 73–76.
2. *Techniques for Controlling Time and Costs in Arbitration*, Report of the ICC Commission on Arbitration & ADR, 2d ed. (2012), Introduction.
3. The IBA Rules merely provide that an arbitral tribunal may exclude evidence on the grounds of 'legal impediment or privilege under the legal or ethical rules' including documents 'for the purpose of settlement negotiations' (Articles 9.2(b) and 9.3(b)). The IBA Rules do not specify how a tribunal should resolve a conflict of legal impediment or privilege rules.
4. The relevant French legal provision is Article 66-5 of Law No. 71-1130 dated 31 December 1971, as amended, which provides that (unofficial translation): 'correspondence … between a lawyer and other [French] lawyers, except for those marked "official" … are covered by professional secrecy'.
5. This type of offer is also sometimes known as a 'Calderbank offer' after an English case in which it was considered (*Calderbank v Calderbank [*1976] Fam. 93). Under English law, the formulation 'without prejudice save as to costs' will generally be effective to convey the intent of the offeror to disclose the offer to the tribunal for the purposes of making its costs determination. However, given that in ICC arbitration all parties may not be familiar with the procedure, it will be advisable to include a more detailed explanation of how the offeror intends to use the letter.
6. English Civil Procedure Rule 36.16 stands for the proposition that 'without prejudice save as to costs' means, as a matter of English law, that an offer must be treated as confidential and withheld from the trial judge until issues of merits and quantum have been decided.
7. See e.g. *Tramountana Armadora SA v Atlantic Shipping Co. SA* [1978] 2 All ER 870, per Donaldson J. at 876 ('A "sealed offer" is the arbitral equivalent of making a payment into court in settlement of the litigation or of particular causes of action in that litigation. Neither the fact, nor the amount, of such a payment into court can be revealed to the judge trying the case until he has given judgment on all matters other than costs. As it is customary for an award to deal at one and the same time both with the parties' claims and with the question of costs, the existence of a sealed offer has to be brought to the attention of the arbitrator before he has reached a decision. However, it should remain sealed at that stage and it would be wholly improper for the arbitrator to look at it before he has reached a final decision on the matters in dispute other than as to costs, or to revise that decision in the light of the terms of the sealed offer when he sees them.').
8. This procedure is sometimes perceived as disadvantageous to the offeror as the tribunal will know that the party that has provided a sealed envelope has made an offer to settle the arbitration and hence has accepted partial liability (in the case of a respondent) or that its quantum is inflated (in the case of a claimant).
9. *Tramountana Armadora SA v Atlantic Shipping Co. SA* [1978] 2 All ER 870, per Donaldson J. at 877–8.
10. See ICC Commission Report Decisions on Costs in International Arbitration [2015:2] ICC Dispute Resolution Bulletin 1, § 100.
11. Ibid., § 13.
12. Ibid., § 96.
13. ICC Note, § 194.
14. See C. Seppälä, 'International Construction Contract Disputes: Second Commentary on ICC Awards Dealing Primarily with FIDIC Contracts' (2008) 19:2 ICC ICArb. Bull. 41 at 68–9; P. Anjomshoaa,' Costs Awards in International Arbitration and the Use of "Sealed Offers" to Limit Liability for Costs', (2007) 10 Int'l Arb. L. Rev. 38; and J. Wood, 'Protection Against Adverse Costs Awards in International Arbitration' (2008) 74:5 Arbitration 129 at 143–6.
15. ICC Note, § 196.
16. Absent an agreement of the tribunal and the parties on the Sealed Offer procedure (or an agreement between the parties to protect the confidentiality of settlement offers), any party wishing to make a settlement offer will need, in theory at least, to consider the various rules relating to legal privilege and professional confidentiality which may potentially apply to the question of confidentiality in an arbitration in light of the (likely) different legal qualifications of the lawyers involved and other relevant factors. As this may well be impracticable, a party will need to proceed with great caution when making any settlement offer, unless the parties can agree that any settlement negotiations or settlement agreement will be inadmissible in any future arbitrations or litigation.

Appendix: Sample of a 'Without Prejudice Save as to Costs' Offer

[DATE]

BY [MODE OF TRANSMISSION]

CONFIDENTIAL AND WITHOUT PREJUDICE SAVE AS TO COSTS

NOT TO BE DISCLOSED TO THE ARBITRAL TRIBUNAL EXCEPT FOR THE PURPOSES OF ALLOCATION OF COSTS UNDER ARTICLE 38 OF THE ICC RULES OF ARBITRATION OF 2012, AS AMENDED IN 2017

[ADDRESS OF OFFEREE/OFFEREE'S LEGAL REPRESENTATIVE]

Re: ICC Case No. [ ]

Dear [ ]:

We ([Offeror's Legal Representatives]) are instructed by [Offeror] to make the following offer to [Offeree]. For the avoidance of doubt, this offer is not to be taken as an admission of liability in the above referenced arbitration (the 'Arbitration').

1. [Offeror] offers:
   a. to pay to [Offeree] the sum of [.....] (the 'Settlement Amount') in full and final settlement of both:
      i. all claims and causes of action in respect of which [Offeree][1] claims in the Arbitration, including all claims for interest up to the date of the offer and during the [45]-day Period (as defined in paragraph 2 below); and
      ii. all counterclaims of [Offeror][2] in the Arbitration, including all claims for interest up to the date of the offer and during the [45]-day Period.
2. If this offer is accepted within [45] days of the date of the offer (the [45]-day Period'), [Offeror] will make payment of the Settlement Amount to a bank account nominated by [Offeree] within a period of [ten business days] from acceptance by [Offeree] and shall be responsible for any bank charges incurred. In addition, [Offeror] shall be responsible for the payment of the totality of the costs of the Arbitration, as defined in Article 38(1) of the ICC Rules of Arbitration (the 'Costs of the Arbitration'), incurred up to and including the [45]th day after the date of the offer, such costs to include:
   a. the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the ICC International Court of Arbitration; and
   b. the reasonable legal and other costs incurred by [Offeree] for the Arbitration, such costs to be determined by the arbitral tribunal as part of the Arbitration, if not agreed;

   it being understood that [Offeror] shall bear the legal and other costs incurred by [Offeror] for the Arbitration.
3. If this offer is not accepted within the [45]-day Period, [Offeror] is free to withdraw it at any time by a letter to [Offeree's Legal Representative]). If it is not withdrawn, it may still be accepted, but only on condition that the parties agree which of them shall bear Costs of the Arbitration incurred from the end of the [45]-day Period or in what proportion such costs shall be borne by the parties.
4. In accordance with paragraphs 193–196 of ICC's Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration dated 1 March 2017 (the 'ICC Note') (a copy of which is enclosed),

1 Note: assuming Offeree is the Claimant in the Arbitration.
2 Note: assuming Offeror is the Respondent in the Arbitration and has counterclaims.

this letter is written on the basis that it is confidential and 'without prejudice save as to costs' and that it may (if not accepted), consequently, be submitted to the tribunal in the Arbitration as a 'Sealed Offer'. Neither this letter, nor the offer contained in it, nor the existence of either, may be brought to the attention of the arbitral tribunal by [Offeree]. However, if the offer is not accepted, [Offeror] reserves the right to bring this letter to the attention of the arbitral tribunal in connection with the tribunal's determination of the Costs of the Arbitration under Article 38 of the ICC Rules, it being understood that the tribunal will not be made aware of the contents of this letter until after the tribunal has decided the merits and quantum, if any, of the case and is about to address the Costs of the Arbitration. The arbitral tribunal would then be invited to make an appropriate award in relation to the Costs of the Arbitration, taking into account the terms of this letter.
For these purposes [Offeror] may (but is not required to) take advantage of the services offered by the ICC Secretariat and described in section XX.C, comprising paragraphs 193–196, of the ICC Note.

5. For the avoidance of doubt:

   a. the date of the offer shall be deemed to be the date of this letter;

   b. acceptance of the offer shall be by letter from [Offeree's Legal Representative]), which letter should be countersigned by an authorised representative of [Offeree] to confirm that the acceptance is authorised by [Offeree], to be sent by [specify mode of transmission] (the 'Acceptance Letter') to [Offeror's Legal Representative]); and

   c. the date of the acceptance of the offer, shall be deemed to be the date of receipt by [Offeror's Legal Representative] of the Acceptance Letter, which date shall be notified by [Offeror's Legal Representative] to [Offeree].

6. This letter and its acceptance shall be governed and construed in accordance with the laws of [.....]
   Once accepted, the arbitration agreement applicable in the Arbitration shall apply *mutatis mutandis* to any dispute arising out of or in connection with this letter.

This letter is countersigned by authorised representatives of [Offeror], to confirm that we have authority to make the offer contained herein, on behalf of [Offeror].

[Sign off],

[Offeror's Legal Representative] [Signature] .....

[Offeror]

By: ..... [Signature]

Name: .....

Title: .....

Enclosure: Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration dated 1 March 2017.