

**Commentary****The New (1998) Rules Of Arbitration  
Of The International Chamber Of Commerce**

By

Stephen R. Bond

and

Christopher R. Seppala

[Editor's Note: Stephen R. Bond is a partner, White & Case, Paris, U.S. member of the ICC International Court of Arbitration (1997-99) and a former Secretary General of the ICC Court who served as Vice Chairman of the ICC Working Group on Revision of the ICC Rules of Arbitration. Christopher R. Seppala is a partner, White & Case, Paris, who has been involved as a practitioner in ICC arbitrations for over 20 years. The views expressed are those of the authors. Copyright by Stephen R. Bond and Christopher R. Seppala. Replies to this commentary are welcome. The ICC Rules are located in Section E of this publication.]

**I. Introduction**

The International Chamber of Commerce (the "ICC") will soon issue the first major revision of its Rules of Arbitration (the "ICC Rules") in more than twenty years. The revised Rules, which are due to enter into effect as from January 1, 1998, were adopted by the ICC Council on April 8, 1997, at its Congress in Shanghai. The 1998 ICC Rules will govern any arbitrations commenced on or after January 1, 1998, unless the parties have agreed to submit to the ICC Rules in effect on the date of their arbitration agreement (Article 6(1) of the new ICC Rules). This paper will review briefly the principal amendments that will result from this revision.<sup>1</sup>

\* \* \*

Arbitrations under the ICC Rules are overseen by the International Court of Arbitration of the ICC (the "Court") which was founded in 1923. The Court does not itself settle disputes brought before it. This is done by arbitrators, who are appointed on a case-by-case basis. Rather, the Court ensures the application of the ICC Rules and administers and supervises arbitrations conducted under the Rules by, among other things, appointing arbitrators, fixing the place of arbitration if the parties have not agreed on this matter, scrutinizing draft arbitration awards, and determining the fees of arbitrators and certain other costs of the arbitration. The Court is assisted in its task by a Secretariat which deals directly with the parties and arbitrators.

The ICC Rules are probably the most widely used rules for the arbitration of international business disputes. At any given moment, the amounts in dispute in ICC arbitrations total about US\$ 20 billion. Almost 900 arbitrations are currently in progress under the ICC Rules. In 1996 alone, a record of 433 new ICC cases were filed, involving 1,145 parties from some 95 countries.

The ICC revises its Rules of Arbitration from time to time so as to adapt them to the current needs of the international business community. Thus, the ICC Rules were revised in 1955, 1975,

and 1988. The 1998 Rules will be the first major revision of the Rules since 1975, the 1988 amendments having been of a relatively limited nature.

## II. The Principal Amendments To The ICC Rules

Recognizing the importance both of stability in such a widely used set of Rules and the need for evolution to take account of changing commercial and legal realities, the ICC decided that the new revision of the Rules should have among its objectives:

- (1) reducing delays in the conduct of ICC arbitrations,
- (2) reducing uncertainties in the conduct of the arbitration procedure, and
- (3) eliminating certain perceived lacunae in the current Rules,

while at the same time maintaining the fundamental characteristics of ICC arbitration, such as the "universality" of ICC arbitration (i.e. the Rules being accessible to parties from every legal culture), the role of the ICC Court, Terms of Reference and the scrutiny of draft arbitration awards by the Court.

The approach of the ICC Working Group on Revision of the ICC Rules was to take a middle path between what may be termed the "common law" approach of attempting to have rules which would explicitly cover virtually every conceivable contingency and the "civil law" approach of setting down broad principles so as to allow for the greatest possible flexibility in the handling of specific situations.

The changes made in the ICC Rules are numerous and extensive. The principal amendments shall be discussed by reference to the three purposes or objectives described above.

### (1) Reduction Of Delays In The Conduct Of ICC Arbitrations

To reduce delays in arbitration, the ICC Rules are being amended in the following respects, among others:

- (a) Certain limited responsibilities of the Court in the constitution of an arbitral tribunal are delegated to the Secretary General of the Court so that decisions in these areas need not await sessions of the Court. Thus, the Secretary General may now confirm the appointment of arbitrators in cases where no issue has been raised as to their independence (Article 9(2)).
- (b) The requirements for the initial submissions in an ICC arbitration, namely, the Request for Arbitration and the Answer, have been relaxed to enable the file in the case to be sent to the arbitrators more quickly. It is no longer necessary for the Request to include "a statement of the Claimant's case" (which parties frequently considered to mean a complete expose of all elements of the case). The new ICC Rules now require that there be "a description of the nature and circumstances of the dispute giving rise to the claims" and the relief sought. (Articles 4(3)(b) and (c)). Similarly, the Answer no longer must contain the "defense" of the Defendant (called the "Respondent" in the new ICC Rules), but rather its "comments as to the nature and circumstances of the dispute giving rise to the claims" and its "position as to the relief sought" (Arti-

cle 5(1)(b) and (c)). On the other hand, the parties are now required to comment in the Request and the Answer on the applicable rules of law, the place of arbitration and the language of the arbitration (Articles 4 and 5).

- (c) The arbitration may now proceed once the Claimant has paid a provisional advance on costs in an amount fixed by the Secretary General (Article 30(1)). Under the current ICC Rules, the advance on costs has, in principle, to be paid in equal shares by both parties before the arbitration file may be sent to the arbitral tribunal, which results in delay where one party is late in paying, or fails to pay, its share.
- (d) The obligation to define in the Terms of Reference "the issues to be determined" by the Arbitral tribunal, which has sometimes been disregarded in practice because it is often a time-consuming exercise, is no longer absolutely mandatory (Article 18(1)(d)).
- (e) When drawing up the Terms of Reference, or as soon as possible thereafter, the arbitrators are required to prepare a provisional timetable for the proceedings and to communicate it to the Court and the parties (Article 18(4)). This requirement is designed to encourage arbitrators to give more attention to organizing the procedure from the outset and thus to limit the risk of delay later in the proceedings.
- (f) There is no longer an absolute requirement that the advance on costs fixed by the ICC Court be paid in full before the Terms of Reference become operative and the arbitrators authorized to proceed.
- (g) When the arbitral tribunal is satisfied that the parties have had a reasonable opportunity to be heard, the tribunal will be obliged to declare the proceedings closed. Thereafter, no further submissions may be made unless authorized by the arbitral tribunal (Article 22(1)). The introduction of the notion of closing the proceedings, which is borrowed from procedure in civil law countries, is intended to limit delays in the completion of a case.
- (h) Once the arbitral tribunal has declared the proceedings closed, it will be required to give an indication of the approximate date by which the draft award will be submitted to the ICC Court (Article 22(2)).

## **(2) Reduction In Uncertainties In The Conduct Of The Procedure**

The current ICC Rules contain only a very few provisions which deal with the arbitration procedure. In order to reduce ambiguities in, and the unpredictability of, ICC arbitration procedure, it was felt desirable to elaborate to a certain extent on procedural matters in the ICC Rules. Accordingly, the new Rules have been amended to deal with the following matters, among others:

- (a) To allow the Court to decide, without prejudice to the admissibility or merits of a plea concerning the existence, validity or scope of the arbitration agreement, that the arbitration shall proceed if it is *prima facie* satisfied that an arbitration agreement under the ICC Rules "may" exist (Article 6(2)). (The current ICC Rules provide as a standard "where there is no *prima facie* agreement . . .") This change will make it very difficult in future to convince the Court not to submit questions of jurisdiction to the arbitral tribunal itself for decision.

- (b) To grant explicitly to the arbitral tribunal the authority, after consultation with the parties, to conduct hearings and meetings elsewhere than at the place of arbitration, provided the parties do not agree otherwise (Article 14(2)). This is, arguably, a significant enlargement in the arbitral tribunal's power as the parties will have to agree in order to prevent the arbitral tribunal from holding hearings or meetings elsewhere. The arbitral tribunal may also conduct its deliberations at any location it considers appropriate, without even having to consult the parties (Article 14(3)). These new additions may be especially useful when the place of arbitration is, for example, in a country where the security situation is rather uncertain.
- (c) To explicitly authorize the arbitral tribunal to order any interim or conservatory measure it deems appropriate, subject to appropriate security being furnished (Article 23(1)). Under the existing rules, the arbitral tribunal has no explicit power to order, for example, that one party (typically, the claimant) provide security for the payment of the other party's legal and other costs in an arbitral procedure, a situation which led the House of Lords in the *Ken-Ren*<sup>2</sup> case to decide that the English courts could, in certain circumstances, make an order for "security for costs" in regard to an ICC arbitration. English law on the point has now been changed by the 1996 Arbitration Act, and the new ICC Rules should prevent a Ken-Ren-type situation from arising elsewhere. On the other hand, this change is likely to increase the requests for such measures from ICC arbitral tribunals.
- (d) To authorize the arbitral tribunal, in the absence of any agreement by the parties as to the law to be applied to the merits, to apply such "rules of law" as it determines to be appropriate, without being required to refer to any conflict of laws rules or being limited to selecting the law of any national legal system (Article 17(1)). This will make it more important, in certain cases, for parties to specify the law to be applied to the merits in their agreements containing ICC arbitration clauses.
- (e) To explicitly require the arbitral tribunal to act fairly and impartially and ensure that each party has a "reasonable opportunity" to present its case (Article 15(2)). It is appropriate to set out this rule explicitly so that it can readily be referred to when necessary. (The UNCITRAL Model Law (Article 18) calls for each party to be given a "full opportunity" of presenting his case, a formulation which was considered to be subject to abuse by parties wishing to set aside an arbitral award.)
- (f) To authorize the arbitral tribunal, in its discretion, to admit new claims and counter-claims after the signing of the Terms of Reference even if the new claims or counter-claims fall outside of the limits of the Terms of Reference (Article 19). This is a major change in the ICC Rules which may especially affect the conduct of large, factually complex arbitrations, such as those which may arise in the construction field. The relevant Article of the current ICC Rules on the subject has often been criticized as being overly rigid and antithetical to the efficient administration of justice. The new formulation should help to mute criticism about retaining the Terms of Reference as an obligatory element of ICC arbitration.
- (g) To authorize the arbitral tribunal to summon any party to provide additional evidence (Article 20(5)). Under the present Rules, it is not clear that the arbitral tribunal has such inquisitorial power.

- (h) To provide satisfactory procedures for the appointment of arbitrators where there are multiple parties, whether claimant(s) or respondent(s) (Article 10). Traditionally, the ICC Rules, like other rules of international arbitration, have been drafted on the assumption that there is a single claimant and a single respondent. (Article 2(ii) eliminates this assumption in the new ICC Rules.) This has given rise to problems where there are multiple parties. In such cases, it may be difficult to ensure that the parties are treated equally in the appointment of arbitrators. The alleged denial of equality of treatment in the appointment of arbitrators was the basis for the well-known Dutco<sup>3</sup> decision by the French Cour de Cassation (Supreme Court) which set aside a Paris Court of Appeal's decision that had upheld the ICC practice of requiring multiple respondents to nominate, or have appointed on their behalf, one arbitrator when the arbitral tribunal consisted of three arbitrators. To address these problems under the new ICC Rules, the Court has the discretion (not the obligation) to appoint all members of the arbitral tribunal in multi-party cases. The Court would certainly exercise this discretion, for example, where the place of arbitration is France and probably whenever there is a French Respondent.
- (i) To provide greater transparency in the event an arbitrator is challenged, by having the comments of such arbitrator, as well as those of any other arbitrator and the other party communicated to the parties and to the arbitrators.

### **(3) Making Up For Certain Perceived Lacunae In The Current Rules**

To make up for certain perceived lacunae in the current Rules, new provisions are added which deal with the following matters, among others:

- (a) To provide expressly that business disputes which are not of an international character shall be settled by arbitration under the ICC Rules (Article 1(1)) if the parties so agree. According to Appendix II of the current Rules, the ICC was not obliged to accept such cases. This change is designed to ensure, for example, that companies of the same nationality may engage in arbitration against each other in the case of perceived difficulties with the courts of their own country (apparently, not an uncommon problem) and to eliminate jurisdictional disputes about whether, for example, an arbitration between two companies of the same nationality, where at least one is under foreign control, may be submitted to ICC arbitration.
- (b) The arbitral tribunal may take measures to protect trade secrets and confidentiality (Article 20(7)). Although confidentiality is often assumed to exist in arbitration, in the absence of such measure, it is uncertain to what extent, if at all, the arbitral tribunal and the parties are bound by an obligation of confidentiality. The decision of the Australian High Court in Esso Australia Resources Ltd. v. Plowman in 1995,<sup>4</sup> which concluded that parties are not bound by an implied duty of absolute confidentiality regarding document and information obtained in private arbitration, has sent both arbitral institutions and the drafters of arbitration clauses scurrying to secure a greater degree of confidentiality.
- (c) After the closing of the proceedings, instead of replacing an arbitrator who has died, resigned or been removed, the Court may decide that the remaining arbitrators shall continue the arbitration, forming what has been termed a "truncated tribunal" (Ar-

title 12(5)). While this innovative procedure is unlikely to be resorted to frequently, its availability should reduce the risk of unjustified delay caused by the willful failure of an arbitrator to fulfill his responsibilities.

- (d) To provide that decisions by the arbitral tribunal about the allocation between the parties and assessment of legal fees and other costs which are not to be fixed by the Court may be taken at any time during the proceedings (Article 31(2)). Under the current Rules, decisions as to such costs can be made only in the final award. One purpose of the new procedure is to allow the arbitral tribunal, by making partial awards as to such costs, to discourage frivolous claims and defenses.
- (e) To provide for waiver of a party's right to object to the arbitrators' conduct of the proceedings, or various other relevant rules or requirements, if the party has thereafter proceeded with the arbitration without raising an objection (Article 33).
- (f) To grant the arbitral tribunal the power, for a limited time, to correct and interpret any award (Article 29). Under the present Rules, an arbitral tribunal has not explicitly had this power.
- (g) To relieve the arbitrators and the Court from liability for any act or omission in connection with an arbitration (Article 34). While the absolute immunity accorded by the text of this article may appear extreme, it is anticipated that, in practice, this provision will be subject to qualification under the applicable national law.

### III. Conclusion

In general, the amendments are those which have seemed necessary or advisable in light of the Court's extensive experience (some 3500 cases over the past 10 years) and evolving commercial and legal realities. They will make the ICC Rules among the most modern and advanced rules of international arbitration, thereby representing the "state of the art" in the field. As the ICC Rules are so widely used and respected, these changes can be expected to influence the drafting of other international arbitration rules and the conduct of international arbitration generally.

### ENDNOTES

1. The three appendices to the ICC Rules; *i.e.* the Statutes of the ICC International Court of Arbitration, the Internal Rules of the Court and the Schedule of Costs, are not yet in final form and are therefore not discussed.
2. Coppee-Lavalin SA/NV v. Ken-Ren Chemicals and Fertilizers Ltd. and Voest-Alpine v. Ken-Ren Chemicals and Fertilizers Ltd., H.L., [1994] 2 All E.R. 449.
3. BKMI Industrienlagen GmbH - against - Dutco Construction Co. (Pvt.) Ltd., No 89-28.708Y; Siemens AG - against - Dutco Construction Co. (Pvt.) Ltd., No. 89-18.726Y combined, Cour de Cassation 1 Civil Chamber, January 7, 1992.
4. Esso Australia Resources Ltd. v. Plowman, High Court of Australia, 7 April 1995, No. 95/014, XXI Y.B.Com.Arb. 137 (1996). ■

**ICC RULES****RULES OF ARBITRATION OF THE  
INTERNATIONAL CHAMBER OF COMMERCE****Table of Contents**

<b>A. INTRODUCTORY PROVISIONS .....</b>	<b>1</b>
Article 1 International Court of Arbitration .....	1
Article 2 Definitions .....	1
Article 3 Written Notifications and Communications; Time-Limits .....	1
<b>B. COMMENCING THE ARBITRATION .....</b>	<b>2</b>
Article 4 Request for Arbitration .....	2
Article 5 Answer to the Request; Counterclaims .....	3
Article 6 Effect of the Arbitration Agreement .....	4
<b>C. THE ARBITRAL TRIBUNAL .....</b>	<b>5</b>
Article 7 General Provisions .....	5
Article 8 Number of Arbitrators .....	5
Article 9 Appointment and Confirmation of the Arbitrators .....	6
Article 10 Multiple Parties .....	6
Article 11 Challenge of Arbitrators .....	7
Article 12 Replacement of Arbitrators .....	7
<b>D. THE ARBITRAL PROCEEDINGS .....</b>	<b>8</b>
Article 13 Transmission of the File to the Arbitral Tribunal .....	8
Article 14 Place of the Arbitration .....	8
Article 15 Rules Governing the Proceedings .....	9
Article 16 Language of the Arbitration .....	9
Article 17 Applicable Rules of Law .....	9
Article 18 Terms of Reference; Procedural Timetable .....	9
Article 19 New Claims .....	10
Article 20 Establishing the Facts of the Case .....	11
Article 21 Hearings .....	11
Article 22 Closing of the Proceedings .....	12
Article 23 Conservatory and Interim Measures .....	12
<b>E. AWARDS .....</b>	<b>12</b>
Article 24 Time-Limit for the Award .....	12
Article 25 Making of the Award .....	13
Article 26 Award by Consent .....	13

**RULES OF ARBITRATION OF THE  
INTERNATIONAL CHAMBER OF COMMERCE**

**Article 3**

**Written Notifications or Communications**

**A. INTRODUCTORY PROVISIONS**

**Article 1.**

**International Court of Arbitration**

(1) The International Court of Arbitration (the «Court») of the International Chamber of Commerce (the «ICC») is the arbitration body attached to the ICC. The statutes of the Court are set forth in Appendix I. Members of the Court are appointed by the Council of the ICC. The function of the Court is to provide for the settlement by arbitration of business disputes of an international character in accordance with these Rules. If so empowered by an arbitration agreement, the Court shall also provide for the settlement by arbitration in accordance with these Rules of business disputes not of an international character.

(2) The Court does not itself settle disputes. It has the function of ensuring the application of these Rules. It draws up its own Internal Rules (Appendix II).

(3) The Chairman of the Court, or in the Chairman's absence or otherwise at his request, one of its Vice Chairmen shall have the power to take urgent decisions on behalf of the Court, provided that any such decision shall be reported to the Court at its next session.

(4) As provided for in its Internal Rules, the Court may delegate to one or more committees composed of its members the power to take certain decisions, provided that any such decision shall be reported to the Court at its next session.

(5) The Secretariat of the Court (the «Secretariat») under the direction of its Secretary General (the «Secretary General») shall have its seat at the headquarters of the ICC.

**Article 2**

**Definitions**

In these Rules :

- i) «Arbitral Tribunal» includes one or more arbitrators, as the case may be.
- ii) «Claimant» includes one or more claimants and «Respondent» includes one or more respondents, as the case may be.
- iii) «Award» includes, *Inter alia*, an interim, partial or final award, as the case may be.

E-2

- (1) All pleadings and written communications submitted by any party, as well as all documents annexed thereto shall be supplied in a number of copies sufficient to provide one copy for each party, plus one for each arbitrator, and one for the Secretariat. A copy of any communication from the Arbitral Tribunal to the parties shall be sent to the Secretariat.
- (2) All notifications or communications from the Secretariat and the Arbitral Tribunal shall be made to the address or last known address of the party or its representative for whom the same are intended, as notified either by the party in question or by the other party as appropriate. Such notification or communication may be made by delivery against receipt, registered post, courier, facsimile transmission, telex, telegram or any other means of telecommunication that provides a record of the sending thereof.
- (3) A notification or communication shall be deemed to have been effected on the day when it was received by the party itself or by its representative, or would have so been received if made in accordance with the preceding paragraph.
- (4) Periods of time specified in or fixed under the present Rules shall start to run on the day following the date a notification or communication is deemed to have been effected in accordance with the preceding paragraph. When the day next following such date is an official holiday or a non business day in the country where the notification or communication is deemed to have been effected, the period of time shall commence on the first following business day. Official holidays and non business days are included in the calculation of the period of time. If the last day of the relevant period of time granted is an official holiday or a non business day in the country where the notification or communication is deemed to have been effected, the period of time shall expire at the end of the first following business day.

**B. COMMENCING THE ARBITRATION**

**Article 1.**

**Request for Arbitration**

- (1) A party wishing to have recourse to arbitration under these Rules shall submit its Request for Arbitration (the «Request») to the Secretariat, which shall notify the Claimant and Respondent of the receipt of the Request and the date of such receipt.
- (2) The date when the Request is received by the Secretariat shall, for all purposes, be deemed to be the date of the commencement of the arbitral proceedings.
- (3) The Request shall, *inter alia*, contain the following information :
- a) names in full, description and addresses of each of the parties;
  - b) a description of the nature and circumstances of the dispute giving rise to the claims;

- 3 -

- 4 -

- c) a statement of the relief sought including, to the extent possible, an indication of any amounts claimed;

i) the relevant agreements and, in particular, the arbitration agreement;

e) all relevant particulars concerning the number of arbitrators and their choice in accordance with the provisions of Articles 8, 9 and 10, and any nomination of an arbitrator required thereby; and,

f) any comments as to the place of arbitration, the applicable rules of law and the language of the arbitration.

(4) Together with the Request, the Claimant shall submit the number of copies thereof required by Article 3(1) and shall make the advance payment required by the Schedule of Costs (Appendix III) in force on the date the Request is submitted. In the event that the Claimant fails to comply with either of these requirements, the Secretariat may fix a time limit within which the Claimant must comply, failing which the file shall be closed without prejudice to the right of the Claimant to submit the same claims at a later date in another Request.

(5) The Secretariat shall send a copy of the Request and the documents annexed thereto to the Respondent for its Answer once the Secretariat has sufficient copies of the Request to do so and the required advance payment.

(6) When a party submits a Request in connection with a legal relationship in respect of which arbitration proceedings between the same parties are already pending under these Rules, the Court may, at the request of a party, decide to include the claims contained in the Request in the pending proceedings, provided that the Terms of Reference have not yet been signed or approved by the Court. Once the Terms of Reference have been signed or approved by the Court, claims may only be included in the pending proceedings subject to the provisions of Article 19.

#### Article 5

#### Answer to the Request; Counterclaims

(1) Within 30 days from the receipt of the Request from the Secretariat, the Respondent shall file an Answer (the "Answer") which shall, *inter alia*, contain the following information:

- its name in full, description and address;
- its comments as to the nature and circumstances of the dispute giving rise to the claims;
- its position as to the relief sought;
- any comments concerning the number of arbitrators and their choice in light of the Claimant's proposals and in accordance with the provisions of Articles 8, 9 and 10, and any nomination of an arbitrator required thereby; and,

(3) If any of the parties refuses or fails to take part in the arbitration or any stage thereof, the arbitration shall proceed notwithstanding such refusal or failure.

- any comments as to the place of arbitration, the applicable rules of law and the language of the arbitration;
- The Secretariat may grant the Respondent an extension of time for filing the Answer, provided the application for such an extension contains the Respondent's comments concerning the number of arbitrators and their choice, and where required by Articles 8, 9 and 10, the nomination of an arbitrator. If the Respondent fails so to do, the Court shall proceed in accordance with these Rules.

- The Answer shall be supplied to the Secretariat in the number of copies specified by Article 3(1).

- A copy of the Answer and the documents annexed thereto shall be communicated by the Secretariat to the Claimant.

- Any counterclaims made by the Respondent shall be filed with its Answer and shall provide:

- a description of the nature and circumstances of the dispute giving rise to the counterclaims, and,
- a statement of the relief sought including, to the extent possible, an indication of any amounts counterclaimed.

- The Claimant shall file a Reply to any counterclaim within 30 days from the date of receipt of the counterclaims communicated by the Secretariat. The Secretariat may grant the Claimant an extension of time for filing the Reply.

#### Article 6

#### Effect of the Arbitration Agreement

- Where the parties have agreed to submit to arbitration under the Rules of Arbitration of the ICC, they shall be deemed thereby to have submitted *ipso facto* to the Rules in effect on the date of commencement of the arbitration proceedings, unless they have agreed to submit to the Rules in effect on the date of their arbitration agreement.

- If the Respondent does not file an Answer, as provided by Article 5, or if any party raises one or more pleas concerning the existence, validity or scope of the arbitration agreement, the Court may decide, without prejudice to the admissibility or merits of the plea or pleas, that the arbitration shall proceed if it is *prima facie* satisfied that an arbitration agreement under the Rules of Arbitration of the ICC may exist. In such a case, any decision as to the jurisdiction of the Arbitral Tribunal shall be taken by the Arbitral Tribunal itself. If the Court is not so satisfied, the parties shall be notified that the arbitration cannot proceed. In such a case, any party retains the right to ask any court having jurisdiction whether or not there is a binding arbitration agreement.

- If any of the parties refuses or fails to take part in the arbitration or any stage thereof, the arbitration shall proceed notwithstanding such refusal or failure.

(4) Unless otherwise agreed, the Arbitral Tribunal shall not cease to have jurisdiction by reason of any claim that the contract is null and void or allegation that it is non-existent provided that the Arbitral Tribunal upholds the validity of the arbitration agreement. The Arbitral Tribunal shall continue to have jurisdiction to determine the respective rights of the parties and to adjudicate upon their claims and pleas, even though the contract itself may be non-existent or null and void.

### C. THE ARBITRAL TRIBUNAL

#### Article 7

##### General Provisions

- (1) Every arbitrator must be and remain independent of the parties involved in the arbitration.
- (2) Before appointment or confirmation, a prospective arbitrator shall sign a statement of independence and disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties. The Secretariat shall provide such information to the parties in writing and fix a time-limit for any comments from them.
- (3) An arbitrator shall immediately disclose in writing to the Secretariat and to the parties any facts or circumstances of similar nature which may arise during the arbitration.
- (4) The decisions of the Court as to the appointment, confirmation, challenge or replacement of an arbitrator, shall be final and the reasons for such decisions shall not be communicated.
- (5) By accepting to serve, every arbitrator undertakes to carry out his responsibilities in accordance with these Rules.
- (6) Insofar as the parties shall not have provided otherwise, the Arbitral Tribunal shall be constituted in accordance with the provisions of Articles 8 to 10.

#### Article 8

##### Number of Arbitrators

- (1) The disputes shall be decided by a sole arbitrator or by three arbitrators.
- (2) Where the parties have not agreed upon the number of arbitrators, the Court shall appoint a sole arbitrator, save where it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators. In such case, the Claimant shall nominate an arbitrator within a period of 15 days from the receipt of the notification of the decision of the Court, and the Respondent shall nominate an arbitrator within a period of 15 days from the receipt of the notification of the nomination made by the Claimant.
- (3) Where the parties have agreed that the dispute shall be settled by a sole arbitrator, they may, by agreement, nominate the sole arbitrator for confirmation. If the parties fail so to

nominate a sole arbitrator within 30 days from the date when the Claimant's Request for Arbitration has been received by the other party, or within such additional time as may be allowed by the Secretariat, the sole arbitrator shall be appointed by the Court.

(4) Where the dispute is to be referred to three arbitrators, each party shall nominate in the Request and its Answer respectively one arbitrator for confirmation by the Court. If a party fails to nominate an arbitrator, the appointment shall be made by the Court. The third arbitrator, who will act as chairman of the Arbitral Tribunal, shall be appointed by the Court, unless the parties have agreed upon another procedure for such appointment, in which case the appointment will be subject to confirmation pursuant to Article 9. Should such procedure not result in a nomination, within the time-limit fixed by the parties or the Court, the third arbitrator shall be appointed by the Court.

#### Article 2

##### Appointment and Confirmation of the Arbitrators

- (1) In confirming or appointing arbitrators, the Court shall have regard to the prospective arbitrator's nationality, residence and other relationship with the countries of which the parties or the other arbitrators are nationals and the prospective arbitrators' availability and ability to conduct the arbitration in accordance with these Rules. The same shall apply where the Secretary General confirms arbitrators pursuant to Article X(2).
- (2) The Secretary General may confirm as co-arbitrators, sole arbitrators and chairmen of Arbitral Tribunals persons nominated by the parties or pursuant to their particular agreements, provided they have filed a statement of independence without qualification or a qualified statement of independence does not give rise to objections. Such confirmation shall be reported to the Court at its next session. If the Secretary General considers that a co-arbitrator, sole arbitrator or chairman of an Arbitral Tribunal should not be confirmed, the matter shall be submitted to the Court.
- (3) Where the Court is to appoint a sole arbitrator or the chairman of an Arbitral Tribunal, it shall make the appointment upon a proposal of a National Committee of the ICC that it considers to be appropriate. If the Court does not accept the proposal made, or if the National Committee fails to make the proposal requested within the time-limit fixed by the Court, the Court may repeat its request or may request a proposal from another National Committee that it considers to be appropriate.
- (4) Where the Court considers that the circumstances so demand, it may choose the sole arbitrator or the chairman of the Arbitral Tribunal from a country where there is no National Committee, provided that neither of the parties objects within the time-limit fixed by the Court.
- (5) The sole arbitrator or the chairman of the Arbitral Tribunal shall be of a nationality other than those of the parties. However, in suitable circumstances and provided that neither of the parties objects within the time-limit fixed by the Court, the sole arbitrator or the chairman of the Arbitral Tribunal may be chosen from a country of which any of the parties is a national.
- (6) Where the Court is to appoint an arbitrator on behalf of a party which has failed to nominate one, it shall make the appointment upon a proposal of the National Committee of the country of which that party is a national. If the Court does not accept the proposal made, or if

- 7 -

- 8 -

the National Committee fails to make the proposal requested within the time-limit fixed by the Court, or if the country of which the said party is a national has no National Committee, the Court shall be at liberty to choose any person whom it regards as suitable. The Secretariat shall inform the National Committee of the country of which such person is a national, if one exists, of such choice.

#### Article 10

##### Multiple Parties

- (1) Where there are multiple parties, whether as Claimant or as Respondent, and where the dispute is to be referred to three arbitrators, the multiple Claimants, jointly, and the multiple Respondents, jointly, shall nominate an arbitrator for confirmation pursuant to Article 9.
- (2) In the absence of such a joint nomination and where all parties are unable to agree to a method for the constitution of the Arbitral Tribunal, the Court may appoint each member of the Arbitral Tribunal and shall designate one of them to act as chairman. In such case, the Court shall be at liberty to choose any person whom it regards as suitable to act as arbitrator, applying Article 9 when it considers it appropriate.

#### Article 11

##### Challenge of Arbitrators

- (1) A challenge of an arbitrator, whether for an alleged lack of independence or otherwise, shall be made by the submission to the Secretariat of a written statement specifying the facts and circumstances on which the challenge is based.
- (2) For a challenge to be admissible, it must be sent by a party either within 30 days from receipt by that party of the notification of the appointment or confirmation of the Arbitrator, or within 30 days from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based if such date is subsequent to the receipt of such notification.

- (3) The Court shall decide on the admissibility, and, at the same time, if need be, on the merits of a challenge after the Secretariat has afforded an opportunity for the arbitrator concerned, the other party or parties and any other members of the Arbitral Tribunal to comment in writing within a suitable period of time. Such comments shall be communicated to the parties and to the arbitrators.

#### Article 12

##### Replacement of Arbitrators

- (1) An arbitrator shall be replaced upon his death, upon the acceptance by the Court of the arbitrator's resignation, upon acceptance by the Court of a challenge or upon the request of all the parties.
- (2) An arbitrator shall also be replaced on the Court's own initiative when it decides that he is prevented *de jure* or *de facto* from fulfilling his functions, or that he is not fulfilling his functions in accordance with the Rules or within the prescribed time-limits.

- (3) When, on the basis of information that has come to its attention, the Court considers applying Article 12(2), it shall decide on the matter after the arbitrator concerned, the parties and any other members of the Arbitral Tribunal have had an opportunity to comment in writing within a suitable period of time. Such comments shall be communicated to the parties and to the arbitrators.
- (4) When an arbitrator is to be replaced, the Court has discretion to decide whether or not to follow the original nominating process. Once reconstituted, and after having invited the parties to comment, the Arbitral Tribunal shall determine if and to what extent prior proceedings shall be repeated before the reconstituted Arbitral Tribunal.

- (5) Subsequent to the closing of the proceedings, instead of replacing an arbitrator who has died or been removed by the Court pursuant to Articles 12(1) and 12(2), the Court may decide, when it considers it appropriate, that the remaining arbitrators shall continue the arbitration. In making such a determination, the Court shall take into account the views of the remaining arbitrators and of the parties and such other matters that it considers appropriate in the circumstances.

#### D. THE ARBITRAL PROCEEDINGS

##### Article 13

##### Transmission of the File to the Arbitral Tribunal

The Secretariat shall transmit the file to the Arbitral Tribunal as soon as it has been constituted, provided the advances on costs requested by the Secretariat at this stage have been paid.

##### Article 14

##### Place of the Arbitration

- (1) The place of the arbitration shall be fixed by the Court, unless agreed upon by the parties.
- (2) The Arbitral Tribunal may, after consultation with the parties, conduct hearings and meetings at any location if considers appropriate, unless otherwise agreed by the parties.

(3) The Arbitral Tribunal may deliberate at any location it considers appropriate.

#### Article 15

##### Rules Governing the Proceedings

(1) The proceedings before the Arbitral Tribunal shall be governed by these Rules and, where these Rules are silent, any rules which the parties or, failing them, the Arbitral Tribunal may settle, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration.

(2) In all cases, the Arbitral Tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.

#### Article 16

##### Language of the Arbitration

In the absence of an agreement by the parties, the Arbitral Tribunal shall determine the language or languages of the arbitration, due regard being given to all relevant circumstances, including the language of the contract.

#### Article 17

##### Applicable Rules of Law

(1) The parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute. In the absence of any such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate.

(2) In all cases, the Arbitral Tribunal shall take account of the provisions of the contract and the relevant trade usages.

(3) The Arbitral Tribunal shall assume the powers of an amiable compositeur or decide *ex aequo et bono* only if the parties have agreed to give it such powers.

#### Article 18

##### Terms of Reference: Procedural Timetable

(1) As soon as it has received the file from the Secretariat, the Arbitral Tribunal shall draw up, on the basis of documents or in the presence of the parties and in the light of their most recent submissions, a document defining its Terms of Reference. This document shall include the following particulars:

- 1) the full names and descriptions of the parties;

b) the whereabouts of the parties to which notifications and communications arising in the course of the arbitration may be made;

c) a summary of the parties' respective claims and of the relief sought by each party with an indication to the extent possible of the amounts claimed or counterclaimed;

d) unless the Arbitral Tribunal considers it inappropriate, a list of issues to be determined;

e) the full names, descriptions and addresses of the arbitrators;

f) the place of the arbitration; and,

g) particulars of the applicable procedural rules and, if such is the case, reference to the power conferred upon the Arbitral Tribunal to act as amiable compositeur or to decide *ex aequo et bono*.

(2) The Terms of Reference shall be signed by the parties and the Arbitral Tribunal. Within two months of the date when the file has been transmitted to it, the Arbitral Tribunal shall transmit to the Court the Terms of Reference signed by it and by the parties. The Court may extend this time-limit, pursuant to a reasoned request from the Arbitral Tribunal or on its own initiative if it decides it is necessary to do so.

(3) If any of the parties refuses to take part in the drawing up of the Terms of Reference or to sign the same, they shall be submitted to the Court for approval. When the Terms of Reference are approved by the Court, the arbitration shall proceed.

(4) When drawing up the Terms of Reference, or as soon as possible thereafter, the Arbitral Tribunal, after having consulted the parties, shall establish in a separate document a provisional timetable that it intends to follow for the conduct of the arbitration and communicate it to the Court and the parties. Any subsequent modifications of the provisional timetable shall be communicated to the Court and the parties.

#### Article 19

##### New Claims

After the Terms of Reference have been signed or approved by the Court, no party shall make new claims or counter-claims which fall outside the limits of the Terms of Reference unless it has been authorised to do so by the Arbitral Tribunal, which shall have regard to the nature of such new claims or counter-claims, the stage of the arbitration and other relevant circumstances.

• 11 •

• 12 •

**Article 20****Establishing the Facts of the Case**

- (1) The Arbitral Tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means.
- (2) After study of the written submissions of the parties and of all documents relied upon, the Arbitral Tribunal shall hear the parties together in person if any of them so requests or failing such a request, it may of its own motion decide to hear them.
- (3) The Arbitral Tribunal may decide to hear witnesses, experts appointed by the parties or any other person, in the presence of the parties, or in their absence provided they have been duly summoned.

- (4) The Arbitral Tribunal, after having consulted the parties, may appoint one or more experts, define their terms of reference and receive their reports. At the request of a party, the parties shall be given the opportunity to question at a hearing any such expert appointed by the Tribunal.
- (5) At any time during the proceedings, the Arbitral Tribunal may summon any party to provide additional evidence.
- (6) The Arbitral Tribunal may decide the case solely on the documents submitted by the parties unless any of the parties requests a hearing.

- (7) The Arbitral Tribunal may take measures for protecting trade secrets and confidential information.

**Article 21****Hearings**

- (1) When a hearing is to be held, the Arbitral Tribunal, giving reasonable notice, shall summon the parties to appear before it on the day and at the place fixed by it.
- (2) If any of the parties, although duly summoned, fails to appear without valid excuse, the Arbitral Tribunal shall have the power to proceed with the hearing.
- (3) The Arbitral Tribunal shall be in full charge of the hearings, at which all the parties shall be entitled to be present. Save with the approval of the Arbitral Tribunal and the parties, persons not involved in the proceedings shall not be admitted.
- (4) The parties may appear in person or through duly authorised representatives. In addition, they may be assisted by advisers.

**Article 22****Closing of the Proceedings**

- (1) When it is satisfied that the parties have had a reasonable opportunity to present their cases, the Arbitral Tribunal shall declare the proceedings closed. Thereafter, no further submission or argument may be made or evidence produced unless requested or authorised by the Arbitral Tribunal.
- (2) When the Arbitral Tribunal has declared the proceeding closed, it shall indicate to the Secretariat an approximate date by which the draft award will be submitted to the Court for approval pursuant to Article 27. Any postponement of that date shall be communicated to the Secretariat by the Arbitral Tribunal.

**Article 23****Conservatory and Interim Measures**

- (1) Unless the parties have otherwise agreed, as soon as the file has been transmitted to the Arbitral Tribunal, or, at the request of a party, order any interim or conservatory measure it deems appropriate. The Arbitral Tribunal may rule the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form, of, in order giving reason, or an award, as the Arbitral Tribunal considers appropriate.
- (2) Before the file is transmitted to the Arbitral Tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an Arbitral Tribunal shall not be deemed to be an infringement on a waiver of the arbitration agreement and shall not affect the relevant powers referred to the Arbitral Tribunal. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the Arbitral Tribunal thereof.

**E. AWARDS****Article 24****Time-Limit for the Award**

- (1) The time-limit within which the Arbitral Tribunal must render its final award is six months. Such time-limit shall start to run from the date of the last signature by the Arbitral Tribunal or of the signatures of the "Teams of Reference," in the case of application of Article 18(1). The date of the notification to the Arbitral Tribunal by the Secretariat of the approval of the Terms of Reference by the Court.

(2) The Court may extend this time-limit, pursuant to a reasoned request from the Arbitral Tribunal or on its own initiative, if it decides it is necessary to do so.

#### Article 25

##### **Making of the Award**

(1) When the Arbitral Tribunal is composed of more than one arbitrator, an award is given by a majority decision. If there be no majority, the award shall be made by the chairman of the Arbitral Tribunal alone.

(2) The award shall state the reasons upon which it is based.

(3) The award shall be deemed to be made at the place of the arbitration and on the date stated therein.

#### Article 26

##### **Award by Consent**

If the parties reach a settlement after the file has been transmitted to the Arbitral Tribunal in accordance with Article 13, the settlement shall be recorded in the form of an award made by consent of the parties and the Arbitral Tribunal agrees to do so.

#### Article 27

##### **Scrutiny of the Award by the Court**

Before signing any award, the Arbitral Tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the award and, without affecting the Arbitral Tribunal's liberty of decision, may also draw its attention to points of substance. No award shall be rendered by the Arbitral Tribunal until it has been approved by the Court as to its form.

#### Article 28

##### **Notification, Deposit and Enforceability of the Award**

(1) Once an award has been made, the Secretary shall notify to the parties the text signed by the Arbitral Tribunal, provided always that the costs of the arbitration have been fully paid to the ICC by the parties or by one of them.

(2) Additional copies certified true by the Secretary General shall be made available on request and at any time, to the parties but to no one else.

(3) By virtue of the notification made in accordance with Paragraph 1 of this Article, the parties waive any other form of notification or deposit on the part of the Arbitral Tribunal.

(4) An original of each award made in accordance with the present Rules shall be deposited with the Secretary.

(5) The Arbitral Tribunal and the Secretary shall advise the parties in complying with whatever further formalities may be necessary.

(6) Every award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse ~~insofar as~~ such waiver can validly be made.

#### Article 29

##### **Correction and Interpretation of the Award**

(1) On its own initiative, the Arbitral Tribunal may correct a clerical, computational or typographical error, or any error of similar nature contained in an award, provided such correction is submitted for approval to the Court within 30 days of the date of such award.

(2) Any application of a party for the correction of an error of the kind referred to in Article 29(1), or for the interpretation of an award must be made to the Secretariat within 30 days of the receipt of the award by such party. Copies of such application shall be supplied to the Arbitral Tribunal and to the other party in accordance with Article 3(1). The Arbitral Tribunal shall grant the other party a short time limit normally not exceeding 30 days, from the receipt of the application by that party to submit any comments thereon. If the Arbitral Tribunal decides to correct or interpret the award, it shall submit its decision in draft form to the Court not later than 30 days following the expiration of the time limit for the receipt of any comments from the other party or within such other period as the Court may decide.

(3) The decision to correct or to interpret the award shall take the form of an addendum and shall constitute part of the award. The provisions of Articles 25, 27 and 28 shall apply *mutatis mutandis*.

#### E. COSTS

#### Article 30

##### **Advance to Cover the Costs of the Arbitration**

(1) At the receipt of the Request, the Secretary General may request the Claimant to pay a provisional advance in an amount intended to cover the costs of arbitration until the Terms of Reference have been drawn up.

(2) As soon as practicable, the Court shall fix the advance on costs in an amount likely to cover the fees and expenses of the arbitrators and the ICC administrative costs for the claims and counterclaims which have been referred to it by the parties. This amount may be subject to readjustment at any time during the arbitration. Where, apart from the claims, counterclaims

• 15 •

are submitted, the Court may fix separate advances on costs for the claims and the counterclaims.

(3) The advance on costs fixed by the Court shall be payable in equal shares by the Claimant and the Respondent. Any provisional advance paid on the basis of Article 30(1) will be considered as a partial payment thereof. However, any one party shall be free to pay the whole of the advance on costs in respect of the principal claim or the counterclaim, should the other party fail to pay its share. When the Court has set separate advances on costs in accordance with Article 30(2), each of the parties shall pay the advance on costs corresponding to its claims.

(4) When a request for an advance on costs has not been complied with, and after consultation with the Arbitral Tribunal, the Secretary General may direct the Arbitral Tribunal to suspend its work and set a time-limit, which must be not less than 15 days, on the expiry of which the relevant claims, or counterclaims, shall be considered as withdrawn. Should the party in question wish to object to this measure it must make a request within the aforementioned period for the matter to be decided by the Court. Such party shall not be prevented on the ground of such withdrawal from reintroducing the same claims or counterclaims at a later date in another proceeding.

(5) If one of the parties claims a right to a set-off with regard to either claims or counterclaims, such set-off shall be taken into account in determining the advance to cover the costs of arbitration, in the same way as a separate claim, insofar as it may require the Arbitral Tribunal to consider additional matters.

## G. MISCELLANEOUS

### Article 32

#### Modified Time-Limits

(1) The parties may agree to shorten the various time-limits set out in these Rules. Any such agreement entered into subsequent to the constitution of an Arbitral Tribunal shall become effective only upon the approval of the Arbitral Tribunal.

(2) The Court may extend any time-limit which has been modified pursuant to Article 32(1) on its own initiative if it decides that it is necessary to do so in order that the Arbitral Tribunal or the Court may fulfil their responsibilities in accordance with these Rules.

### Article 33

#### Waiver

A party which proceeds with the arbitration without raising its objection to a failure to comply with any provisions of these Rules or any other rules applicable to the proceedings, any direction given by the Arbitral Tribunal or any requirement under the arbitration agreement relating to the constitution of the Arbitral Tribunal or to the conduct of the proceedings, shall be deemed to have waived its right to object.

### Article 34

#### Exclusion of Liability

Neither the arbitrators, nor the Court and its members, nor the ICC and its employees, nor the ICC National Committees shall be liable to any person for any act or omission in connection with the arbitration.

### Article 35

#### General Rule

In all matters not expressly provided for in these Rules, the Court and the Arbitral Tribunal shall act in the spirit of these Rules and shall make every effort to make sure that the award is enforceable at law.

(2) The Court may fix the fees of the arbitrators at a figure higher or lower than that which would result from the application of the relevant scale should this be deemed necessary due to the exceptional circumstances of the case. Decisions on costs other than those fixed by the Court may be taken by the Arbitral Tribunal at any time during the proceedings.

(3) The final award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportions they shall be borne by the parties.