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ICC ARBITRAL AWARD
Rules and Proceedings

M.A. Thesis in International Law

By

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"The scope of arbitration is expanding. Previously it had been only used in the law of contracts but has now reached into areas such as intellectual property, e-contracts and even competition law. Arbitration is one of the most important fields of law today. It has a very bright future. Every lawyer should have a basic knowledge of the arbitration process."

Serge Lazareff
Chairman of the Institute of World Business Law

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ABSTRACT

For most of this century, the International Chamber of Commerce (ICC) has been the world's leading organization in the field of international commercial dispute resolution. Established in 1923 as the arbitration body of ICC, the International Court of Arbitration has pioneered international commercial arbitration as it is known today. The Court took the lead in securing the worldwide acceptance of arbitration as the most effective way of resolving international commercial disputes. Since its creation, the Court has administered well over 14 000 international arbitration cases involving parties from more than 185 countries and territories and from different entities and sectors, whether private or public.[1] Demand for its services grows year by year in line with the expansion of international trade and the rapid globalization of the world economy. The dispute resolution mechanisms developed by ICC have been conceived specifically for business disputes in an international context. These disputes pose unique difficulties and challenges. Usually, the parties will be of different nationalities, with different linguistic, legal and cultural backgrounds. They may also have very different expectations about how a dispute can be resolved reasonably and fairly. Distrust may be relatively strong, accompanied by uncertainty or a lack of information about the course to follow. These difficulties may be compounded by distance and the disadvantages one party may face in submitting to a procedure on the other's home ground.

For all these reasons, national courts in the country of one of the parties may not appear suitable to the other party. ICC has always led the way in providing international business with alternatives to court litigation. Even in a domestic context, parties

[1] In 2001, 8.6% of the cases submitted to the ICC Court, at least one of the parties was a state or public entity; the corresponding figure was 9.4% in 2002, 11% in 2003, 11. 6% in 2004 and 13.1% in 2005.

ICC arbitration offers these advantages, as well as confidentiality and freedom for the parties to choose the arbitrators, the place of arbitration, the applicable rules of law, and even the language of the proceedings.

The thorough-going revision that led to the 1998 Rules was conducted on a widespread basis. The experience of the ICC International Court of Arbitration in applying the Rules was also taken into account. The resulting Rules and procedures are the fruit of rich exchanges of views between practitioners from many different spheres. Although the basic features of ICC arbitration were not changed by the 1998 Rules, the practice of the ICC International Court of Arbitration and its Secretariat had evolved, as had arbitration proceedings in general, making it necessary to modernize the Rules.

On this ground, our thesis will take the form of a practical study, first by presenting a useful background to the outstanding innovation of the ICC, its role in improving the international business and its different methods of International dispute resolution. Second, by highlighting the role of the ICC International Court of Arbitration as an administrator of the arbitral process and by standing on the importance of the ICC standard clause, third by describing the commencement of the arbitration process and the constitution of the arbitral tribunal starting by a discussion covering from Article 1 of the 1998 ICC Rules to Article 12. Four, by discussing the following process including the choice of the place and the language of arbitration and the rules of law applicable by the parties which are set by Article 13 till 23 of the said Rules, five by analyzing the steps for making the award and those following; the scrutiny, interpretation and the correction of the Award which are covered from Article 24 till 29 of the same Rules and finally an evaluation of those steps will be proved with commentaries on some issued cases studies.

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INTRODUCTION

Throughout history, people have settled their differences by seeking advice or a ruling from a chosen third person or body. In contemporary society, decisions putting an end to legal conflicts are commonly sought from courts, whose rulings may be forcibly executed by the state. The courts rendering such decisions are authorized to hear the dispute, irrespective of the parties' wishes, by the fact that the applicable procedural law gives them jurisdiction territorially and by the fact of the nature of the dispute. The parties have no say in the applicable Rules of Procedure regarding the Court, the language, or the duration of the proceedings.

Like litigation, the purpose of arbitration is to obtain a final and binding ruling on a dispute. The difference with arbitration is that before the dispute arises or after it has arisen the parties make a valid agreement with each other to use arbitration. By doing so, they exclude recourse to state courts and decide that disputes will be settled by an arbitral tribunal. As we shall see from the example of ICC Rules of Arbitration, the arbitral tribunal and the parties may together extensively influence the organization of the arbitral proceedings, so long as they respect certain minimum standards. Arbitration is also distinguished by the fact that in most cases no more than one action is required to obtain a final decision.

When an arbitral tribunal is accepted and carried out by the parties, no state intervention is necessary. This is not to say that arbitration is conducted outside any legal framework. In most legal systems, arbitration is considered to have the same value as Court proceedings. According to Article 8(1) of the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 ('UNCITRAL Model Law'), when a matter which is the subject of an arbitration agreement is brought before a Court, the Court

shall refer the parties to arbitration if one of them requests to do at the start of the proceedings, unless it finds that the agreement is null and void, inoperative or incapable of being performed.

So in the final issue, parties to arbitration are interested in the award which is the final product of a great deal of work both by the arbitrators and by the parties and their legal teams. Before the award can be drafted, the arbitrators have to decide upon what may be a number of important issues, namely those in the reference. They will make their decisions with care, based upon what they have learned from the parties and upon the application of the appropriate law, which may have been researched by the parties or by the arbitrators themselves, but which will have been canvassed either at a hearing or in memorials of some kind. Those decisions, together with the reasons for them, are set out in the Award, which may be declaratory, (i.e. a statement by the tribunal that such-and-such is so) but is more commonly mandatory, that is to say a direction that one or the other party do certain things, usually paying money in respect of the substantive issues decided and usually also pay money in respect of the costs of the arbitration process.

In short, the advantages of agreeing to arbitrate contractual disputes under the rules of one of the recognized arbitral bodies can be substantial and as in all other binding agreements, however, parties must be careful in the drafting to ensure that the desired effect, in confidentiality, is achieved. Similar to selecting a governing law to bring legal certainty, the use of an arbitration provision allows parties to contractually choose the forum and the procedure for settling their dispute in a final and binding manner, to produce an arbitral award that will be widely enforceable around the globe.

CHAPTER 1

The ICC and its different methods of Dispute Resolution

The ICC (International Chamber of Commerce) is the voice of world business which is championing the global financial system as a force for economic growth, job creation and prosperity. The ICC has been distinguished by its prominent activities which cover a broad spectrum, from arbitration and dispute resolution to making the case for open trade, the market economy system and business self-regulation also fighting corruption and combating commercial crime.

Arbitration as an innovation and as the outstanding means of international dispute resolution of the ICC will be discussed broadly in this context. Otherwise, the different ICC creations, economic perspectives and business sectors will be highlighted briefly in the first chapter.

Section I: The ICC as a World Business Organization

A- ICC historical advocacy and strategies

The International Chamber of Commerce was set up in Paris in 1919, shortly after the First World War, on the initiative of a group of businessmen. It is a non-profit-making organization under French law and heads a network of national committees whose members are economic and industrial players. It is not an interstate organization, as it is run by private enterprise. Nor is it an interstate chamber of commerce and industry. In fact, it is much more than this, being a body that represents the interests of the international business community.[2]

1- The Voice of International Business

The ICC has always made representations on behalf of business to governments and intergovernmental organizations. Three prominent ICC members served on the Dawes

[2] International Chamber of Commerce, Constitution of the ICC, Document No. 810-188/5, Article 1.

Commission which forged the international treaty on war reparations in 1924, seen as a breakthrough in international relations at the time. A year after the creation of the UN in 1945, it granted ICC first-class consultative status. The ICC ensures that the international business view receives due weight within the UN system and other intergovernmental bodies and meetings such as the G8 where decisions affecting the conduct of business are made.

After the disintegration of Communism in Eastern Europe, the ICC faced fresh challenges as the free market system won wider acceptance than ever before, and countries that had hitherto relied on state intervention switched to privatization and economic liberalization. In the 21st century, companies look to the ICC as they meet the challenges of globalization and adjust to a world in which the state's role in the economy is no longer pre-eminent. Building on its experience in promoting an open international trade and investment system, the ICC is adapting its rules and codes of conduct to today's business conditions and introducing new ones.

ICC Commissions cover every field of concern to international business from banking and financial services to taxation, competition law and intellectual property, telecommunications, transport, and international trade policy. The conviction that business operates most effectively with a minimum of government intervention inspired ICC's voluntary codes which covers sales promotion, advertising, direct marketing and marketing in cyberspace.[3]

2- Working with the United Nations

Since 1946, ICC has engaged in a broad range of activities with the United Nations and its specialized agencies. In addition, the ICC has actively participated in global UN conferences such as the Conference on Financing for Development, the World Summit on Sustainable Development and the World Summit on the Information

[3] History of the ICC, Introduction, Official websites of the ICC in UK: www.ICC.UK.history.sp.html

Society. Throughout the years the ICC has been actively involved in the work of the Economic and Social Council, the Commission on Sustainable Development, the Commission for Social Development, the UN Information and Communication Task Force, the UN Economic Commission for Europe, the UN Commission on International Trade Law, the UN Conference on Trade and Development (UNCTAD), the UN Development Program (UNDP), the UN Environment Program (UNEP) and the UN World Aids Campaign among others.

3- The fight against commercial crime

In the early 1980s, the ICC set up three London-based services to combat commercial crime: the International Maritime Bureau, dealing with all types of maritime crime; the Counterfeiting Intelligence Bureau; and the Financial Investigation Bureau. A cybercrime unit was added in 1998. An umbrella organization, ICC Commercial Crime Services, coordinates the activities of the specialized anti-crime services.

All these activities fulfill the pledge made in a key article of the ICC's constitution: "to assure effective and consistent action in the economic and legal fields in order to contribute to the harmonious growth and the freedom of international commerce."

B- ICC perspectives and successes

As we have mentioned before, the ICC is the only world business organization, which has promoted the business enterprise and investment as the most effective way of raising principles and promoting the liberalization of trade and investment within the multilateral trading system through the development of business rules and standards and by supporting government tasks, trade associations and individual companies and firms; its basics efforts are pointed below:

1- Setting rules and standards:

- Arbitration under the rules of the ICC International Court of Arbitration is one of the most innovative creations.

- ICC's Uniform Customs and Practice for Documentary Credits (UCP 500) are the rules that banks apply to finance billions of dollars-worth of world trade every year.

- ICC Incoterms and ICC model contracts are standard international trade definitions used every day in countless thousands of contracts.

- The ICC is a pioneer in business self-regulation of e-commerce. ICC codes on advertising and marketing are frequently reflected in national legislation and the codes of professional associations.[4]

2- Promoting growth and prosperity:

- The ICC provides world business recommendations to the WTO.

- ICC speaks for world business when governments take up such issues as intellectual property rights, transport policy, trade law or the environment.

- Every year, the ICC Presidency meets with the leader of the G8 host country to provide business input for the summit.

- The ICC is the main business partner of the United Nations and its agencies.

- At UN summits on sustainable development, financing for development and the information society, the ICC spearheads the business contribution.

- Together with the United Nations Conference on Trade and Development (UNCTAD), the ICC helps some of the world's poorest countries to attract foreign direct investment by setting up a permanent Investment Advisory Council.

- The ICC mobilizes business support for the Partnership for Africa's Development.[5]

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[4] International Chamber of Commerce of Paris, official websites: www.old.ICC.wbo.org/home/intro-icc/membership-eng.asp

[5] What is ICC?, ICC official websites: www.old.iccwbo.org/home/menu-what-is-icc-eng.asp

C- ICC means of work

The ICC is linked with thousands of companies' membership from over 130 countries worldwide. They represent all the various sectors of business activity including manufacturing, trade, services, professions and individuals involved in international business. Those entities count on the prestige and expertise of the ICC to get business views across to governments and intergovernmental organizations whose decisions affect corporate finances and operations worldwide. However, the ICC is administrated by its different internal means and bodies approved by its constitution which are cited below.

a- National committees and groups

They represent the ICC in their respective countries. The national committees and groups make sure that the ICC takes account of their national business concerns in its policy recommendations to governments and international organizations. They organize activities intended to make known the work of the ICC in coordination with the International Headquarters or the Regional Chairman.[6]

b- World Council

The ICC World Council is the equivalent of the general assembly of a major intergovernmental organization. The main difference is that the delegates are business executives and not government officials. There is a federal structure, based on the Council as the ICC's supreme governing body. National committees name delegates to the Council, which normally meets twice a year. Ten direct members - from countries where there is no national committee – may also be invited to participate in the Council's work.[7]

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[6] ICC Constitution: Article 3
[7] *ibid,* Article 5

c- Presidency and Executive Board

The Council elects the President and Vice-President for two-year terms. The Council also elects the Executive Board, responsible for implementing ICC policy, on the President's recommendation. The Executive Board has between 15 and 30 members, who serve for three years, with one third retiring at the end of each year.[8]

d- Secretary General

The Secretary General heads the International Secretariat and works closely with the national committees to carry out the ICC's work programme. The Secretary General is appointed by the Council at the initiative of the Presidency and on the recommendation of the Executive Board.[9]

e- Commissions

Member companies and business associations can shape the ICC stance on any given business issue by participating in the work of ICC commissions. Commissions are the bedrock of the ICC, composed of a total of more than 500 business experts who give freely of their time to formulate ICC policy and elaborate its rules. Commissions scrutinize proposed international and national government initiatives affecting their subject areas and prepare statements of business positions for submission to international organizations and governments.[10]

It was valuable to present an overview concerning the main advocacies and perspectives of the ICC as a World Business Organization to focus relatively on the place of the ICC Court of Arbitration as the prominent international institution for arbitration between others. Either, this starting point is considered the ground to launch a description concerning the different methods of dispute resolution under the ICC Rules in favor to concentrate the study on the arbitration process.

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[8] *ibid,* Article 6
[9] *ibid.* Article 11
[10] *ibid,* Article 12

Section II: Different methods of Dispute Resolution under ICC Rules.

ICC has adopted and updated a number of sets rules for dispute resolution, which can be considered as complementary to the Rules of Arbitration. Since its involvement in the international business field, the ICC has succeeded in promoting the culture of the international dispute resolution by setting various rules and the grounds for their application by the creation of the arbitration process, from its first decades until the recent years when the dispute board rules were established.[11] An overview will be useful to understand the different dispute resolution methods and perspectives; however the arbitration process and the making of the Award under the ICC Rules for arbitration will be dealt with as the main topic in the following chapters.

A- ICC Amicable Dispute Resolution (ADR) Rules

The ICC has over eight decades of experience in devising rules to govern and facilitate the conduct of international business. These include those designed to resolve the conflicts that certainly arise in trading relations. The purpose of ICC ADR Rules is to offer business partners a means of resolving disputes amicably, in the way best suited to their needs. A distinctive feature of the Rules is the freedom, the parties are given, to choose the technique they consider most conducive to settlement.[12]

As an amicable method of dispute resolution, ICC ADR should be distinguished from ICC arbitration. They are two alternative means of resolving disputes, although in certain circumstances they may be complementary. For instance, it is possible for parties to provide for ICC arbitration in the event of failure to reach an amicable settlement.[13]

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[11] Dispute Resolution, Summary of ICC services, websites: www.uscib.org/index.asp.Summary of ICC Services.html

[12] ICC has introduced ADR Rules to replace the former Rules of Optional Conciliation and is currently in the process of adopting Rules relating to Dispute Boards (Dispute Review Boards DRB).

[13] The ICC ADR clause is suggested as follow: 'The parties may at any time, without prejudice to any other proceedings, seek to settle any dispute arising out of or in connection with the present contract in accordance with the ICC ADR Rules.'

As arbitration and other alternatives to litigation, ADR presupposes an agreement by the parties to use this method to resolve their disputes. This agreement will typically be found in an ADR clause contained in the business contract signed by the parties. However, the parties can also agree to ADR later, once a dispute has arisen.[14]

- ADR proceedings

Where an agreement to use ICC ADR already exists, the parties may jointly file a request for ADR and than designate a neutral or indicate the qualifications of a neutral. The request should be accompanied by a copy of the written agreement under which it is made and a non-refundable registration fee of US$ 1 500.[15]

If the parties have not previously agreed to refer their dispute to ICC ADR, the ICC sends the request to the other party, asking them to advise it within 15 days whether they agree or decline to participate in the ADR proceedings. If they refuse to participate or if they fail to respond, the request will be considered to have been declined and consequently the proceedings will not be set in motion.[16]

The Rules allow the parties and, in the event they are unable to agree, the neutral, considerable freedom to conduct the ADR proceedings as they think fit. When the parties have agreed in advance on a particular technique for the conduct of the ADR proceedings, the neutral is required to follow that technique. Failing agreement on the settlement technique, mediation will be used.

An approach typical of mediation may therefore be adopted and this could entail the neutral having separate meetings with each of the parties. The ADR Rules merely state that in all cases the neutral shall be guided by the principles of fairness and impartiality and by the wishes of the parties.[17] It is generally useful for the parties and

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[14] ICC Amicable Dispute Resolution Body, official websites: http://www.iccwbo.org/index_adr.asp
[15] ICC ADR Rules, Article 2.A
[16] *ibid*, Article 2.B
[17] *ibid*, Article 3 and 5.2

the neutral to meet; conversations can also take place by telephone conference, videoconference or any other suitable means.

B- ICC Rules for Expertise

The ICC Rules for Expertise offer users a broad range of options.[18] Experts may be required in a number of different settings. An expert opinion may be required to settle a technical issue, such as the compliance of natural or manufactured products with contractual specifications, trade customs or other standards, as well as legal or financial and accounting issues.[19]

For instance, there may be times when parties agree to have an issue determined urgently during the execution of a contract. It may happen that a party needs an expert opinion to prepare litigation but has difficulty finding a qualified person or wishes to increase the expert's credibility by having him or her selected by an independent institution. In other cases, parties may need a neutral expert opinion during post-contractual amicable settlement negotiations, when they agree on the broad framework but not on the particular issue that they have decided to submit to the expert. [20]

Disputes referred to arbitration often involve technical issues. Arbitrators, who are usually lawyers, may find it necessary to seek an opinion from an expert with specialized technical knowledge. The ICC Rules of Arbitration explicitly allow arbitral tribunals to have recourse to experts in the course of arbitration proceedings.[21]

In the context of arbitration and litigation, experts are generally called upon to provide

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[18] The ICC Rules for Expertise suggests the following clause: 'the parties may at any time, without prejudice to any other proceedings, agree to submit any dispute arising out of or in connection with clause [X] of the present contract to administered expertise proceedings in accordance with the Rules for expertise of the International Chamber of Commerce'.

[19] The ICC Rules for Expertise made in 1976 were amended in 1993 and 2003.

[20] ICC Expertise, official website:http://www.iccwbo.org/drs/english/expertise/all_topics1.asp

[21] ICC Rules of Arbitration, Article 20.4

neutral opinions in civil law countries, whereas in common law countries parties often expect experts to act as witnesses and use experts' opinions to argue their cases.[22]

- Appointment of Experts

Requests for the appointment of an expert by the ICC International Centre for Expertise can be accepted only if the parties have previously agreed to have recourse to the Centre for this purpose or if the Centre is otherwise satisfied that there is a sufficient basis for appointing an expert.[23] The request should therefore contain a copy of the parties' agreement for the appointment of an expert by the Centre and other elements constituting the basis for the request. It must also be accompanied by a non-refundable payment of US$ 2 500 to cover administrative expenses.[24]

If the parties do not act together by jointly requesting the appointment of an expert, or if they fail to agree on the expert's work, the Centre will notify the request to the other side and give it a time-limit within which to submit any comments.[25] As with proposals, prospective experts will first be asked to sign a statement of independence and to reveal to the Centre any facts that could cause the parties to doubt their independence. The Centre in turn notifies the parties of such facts and gives them a time-limit within which to submit comments.[26] The Centre checks the expert's qualifications in the field concerned and verifies his or her linguistic skills and availability for the assignment.[27]

C- ICC Rules for a Pre-Arbitral Referee

During the fulfillment of a contract, problems can arise that need to be attended to immediately through urgent, binding measures. If the factual situation is likely to

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[22] Peter M. Wolrich. The New, Revised ICC Rules for Expertise: A presentation and Commentary, ICC International Court of Arbitration Bulletin, Vol. 13/No. 2- Fall 2002, p. 11
[23] ICC Rules for Expertise, Article 5.1
[24] *ibid, Article* 4.
[25] *Ibid,* Article 5.4 and 5.5
[26] *ibid,* Article 7
[27] P. Wolrich, p. 12

change, it may not be possible or desirable to wait for the matter to be dealt with by an arbitral tribunal once arbitration proceedings have been set in motion. The 1990 ICC Rules for a Pre-Arbitral Referee procedure provide for the appointment of a third person, referred to as a 'referee', who has the power to order provisional measures as a matter of urgency, before the case is heard by a Court or a tribunal to which the case is referred. Parties may use these Rules only if they have agreed in writing to do so.[28]

- Conduct of Pre-Arbitral Referee procedures

The essential features of these Rules are speed and efficacy. After being notified directly by the claimant of the request for the appointment of a referee who is appointed by the Chairman of the ICC International Court of Arbitration and the respondent has eight days in which to file an answer, which is sent directly to the claimant and to any other party, as well as to the Secretariat of the ICC International Court of Arbitration, using the quickest available method of delivery.[29]

Alternatively, the parties may choose a referee by agreement, before or after the filing of the request.[30] The referee has thirty days in which to make an order (art. 6.2). The Secretariat notifies the parties of the order, provided that the full amount of the advance on costs previously fixed by it has been paid. The proceedings are conducted in an adversarial manner and the respondent is given the opportunity to submit comments and produce documents.[31]

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[28] Emmanuel Gaillard, First International Chamber of Commerce Pre-Arbitral-Arbitral Referee Decision, New York Law Journal, February 7, 2002, p. 2

[29] ICC Pre-Arbitral Referee Rules, Article 3.4

[30] *ibid,* Article 4.1

[31] The ICC recommends the following Pre-Arbitral Referee clause: 'Any party to this contract shall have the right to have recourse to and shall be bound by the Pre-Arbitral Referee procedure of the ICC in accordance with its Rules.'

D- ICC DOCDEX Rules

Since 1997, ICC has made available a special set of rules for the international banking community called DOCDEX, which originally stood for Documentary Credit Dispute Resolution Expertise. In 2002, the Rules were revised and are now intended to help settle disputes related to documentary instruments as documentary credits incorporating the ICC Uniform Customs and Practice for Documentary Credits (UCP), and the application of the UCP and the ICC Uniform Rules for Bank-to-Bank Reimbursement under Documentary Credits (URR); the collections incorporating the ICC Uniforms Rules for Collections (URC), and its application.

DOCDEX is a rapid, expert-based procedure, conducted exclusively in writing. The decision is not intended to conform to the same legal requirements as an arbitral award. Although DOCDEX decisions are not binding on the parties, ICC urges banks to respect them on a voluntary basis. The effectiveness of these rules comes upon banks pay irrevocable letters of credit (often granted in the context of shipping documents) on grounds of alleged irregularities. These are due either to misinterpretation or misapplication of the ICC Uniform Customs and Practice for Documentary Credits (UCP) Rules or, worse, to the fabrication of inconsistencies with the sole intent of delaying payment or justifying non-payment by the bank.[32]

- Conduct of DOCDEX proceedings

DOCDEX proceedings may be commenced on a joint request from the parties or an individual request from a single party. The request must contain the names and addresses of the parties, a statement that a DOCDEX decision is requested, a summary of the dispute and the claims, and a copy of the documentary credit,

[32] ICC DOCDEX dispute resolution, website: http://www.iccwbo.org/english/docdex/all_topics.asp

collection or demand guarantee in dispute, together with any amendments thereto and other relevant documents.[33]

When it receives a request to open DOCDEX proceedings, the ICC International Centre for Expertise appoints three experts from an internal list of experts maintained by the ICC Banking Commission and designates one of the three to chair the panel. Each expert must declare that he or she is independent of the parties named in the request and must treat all information related to the case as confidential.[34]

A DOCDEX decision should not be put on a par with an arbitral Award. It is not deemed to be a binding decision that finally decides an issue, unless the parties have specifically stated this to be the case.

E- ICC Rules for Dispute Boards

ICC's latest initiative in the field of alternative dispute resolution is the creation of a set of Rules for Dispute Boards.[35] Conceived to assist parties in the prevention and resolution of disputes in medium and long-term contracts, Dispute Boards are often provided for in standard forms of contracts relating to large-scale international infrastructure projects, such as those used by the World Bank and FIDIC based in Switzerland. They are typically established at the beginning of a contractual relationship as a permanent body to help ensure that the contract is performed as effectively as possible, with the power to issue recommendations which the parties are free to accept or not. Comprising one or three members thoroughly familiar with the contract and its performance, the DB informally assists the parties, if they so desire, in

[33] ICC DOCDEX Rules. Article 2

[34] *ibid,* Article 6

[35] The ICC Rules for Dispute Boards recommends the following clause: ' The Parties hereby agree to establish a Dispute Adjudication Board ('DAB') in accordance with the Dispute Board Rules of the International Chamber of Commerce (the 'Rules'), which are incorporated herein by reference. The DAB shall have [one/three] member[s] appointed in this Contract or appointed pursuant to the Rules.

resolving disagreements arising in the course of the contract and it makes recommendations or decisions regarding disputes referred to it by any of the parties.[36]

-The scope of the Dispute Board Rules

The Dispute Boards are established in accordance with the Dispute Board Rules of the International Chamber of Commerce (the 'Rules') with the role of aiding the parties in resolving their business disagreements and disputes.[37] The Dispute Boards are not arbitral tribunals and their determinations are not enforceable like arbitral awards; it acts as an advisory body. Any one of the parties, by a simple request, may ask for a preliminary written opinion. Generally, the Parties contractually agree to be bound by the determinations under certain specific conditions set forth in the Rules. In application of these Rules, the International Chamber of Commerce, through the ICC Dispute Board Centre, can provide administrative services to the Parties, which include appointing Dispute Board members, deciding upon challenges to Dispute Board Members, and reviewing Decisions.[38]

Following the practical summary given above, related to the ICC structure, role and function till the digest discussion over the different methods of dispute resolution, it is useful to move in the next chapter to the starting point of the ICC arbitration process by pointing the research over the role of the ICC International Court of Arbitration and on the ICC standard clause which is the preliminary step for arbitration.

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[36] Christopher Koch, ICC's New Dispute Board Rules, ICC International Court of Arbitration Bulletin, Vol. 15/No. 2 – Fall 2004, p. 10

[37] ICC Dispute Boards, website: www.iccwbo.org/drs/english/dispute_boards/all_topics.asp

[38] Curtis, Mallet-Prevost, Colt & Mosle LLP, ICC Dispute Boards Rules, Curtis Law Journal, October 2004.

CHAPTER 2

The ICA and its Standard Clause

The ICA and its Secretariat have the focal role in the administration of arbitration process, being responsible for the *bona fide* application of the ICC Rules by supervising all the technical issues in the field of the ICC arbitral institution. These points will be discussed usefully in the following section.

Section I: The ICA and its Secretariat as an independent body within the ICC

The ICC International Court of Arbitration was established in 1923 pursuant to ICC Rules of Arbitration adopted in 1922. According to its statues, the ICC International Court of Arbitration has certain organizational powers, which are conferred upon it by the parties agreeing to submit to ICC arbitration.

The ICC International Court of Arbitration and its Secretariat are in practice run as an independent body from the ICC, which ensures confidentiality. This is clearly stated in the ICC International Court of Arbitration's Statues: 'As an autonomous body, it carries out these functions in complete independence from the ICC and its organs. Its members are independent from the ICC national Committees.[39]

The structure of the ICA and the Secretariat and their role in the performance of the arbitral process with ICC Rules for arbitration will be discussed in the following paragraphs.

A- The ICC International Court of Arbitration as a Dispute Resolution Body

The composition and powers of the ICC International Court of Arbitration and its Secretariat are defined in Article 1 of the ICC Rules of Arbitration, which is found in Appendix I. Appendix II contains the Statues of the International Court of Arbitration and Appendix III its Internal Rules.

[39] Statues of the ICC International Court of Arbitration. Article 1 paragraphs 2 and 3

1- The structure of the ICC International Court of Arbitration

The ICC International Court of Arbitration consists of a chairman, vice-chairman and members. The members, whose term of office lasts three years, are appointed by the ICC World Council upon proposals by national committees. Each national committee proposes one member. Some eighty different nationalities are currently represented within the ICC International Court of Arbitration. The Chairman of the Court is elected by the ICC World Council upon the recommendation of the executive board of the ICC. The Vice-Chairman is appointed by the ICC World Council and may be chosen from amongst the members of the ICC International Court of Arbitration or elsewhere.

The work of the ICC International Court of Arbitration is generally done on a voluntary basis, although there are certain exceptions. The Chairman for instance, receives an allowance which takes account of his duties and responsibilities. The Court members are for the most part lawyers with a business background or from law firms who have experience in the field of international commercial arbitration.[40]

2- The role of the ICC International Court of Arbitration

The ICC International Court of Arbitration is not a judicial body. Its decisions are not equivalent to those of arbitral tribunals or state courts. It does not itself settle disputes; the arbitral tribunals alone do this.[41]

According to the Rules, the ICC International Court of Arbitration's function is to ensure the application of those Rules.[42] When the parties agree upon an arbitration clause referring to the ICC Rules of arbitration, they thereby entrust the ICC International Court of Arbitration with certain decision-making powers assigned to it under the Rules. For instance, the Court is empowered to make decisions regarding arbitrators. This is made possible by the fact that, when agreeing to serve, arbitrators implicitly promise the parties

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[40] *ibid,* Articles 3,4 and 5 of the Statues

[41] ICC Rules of Arbitration, Article 1.2

[42] Article 1.2 of the 1998 ICC Rules states that: 'The Court does not itself settle dispute. It has the function of ensuring the application of these Rules...'

and ICC that they will abide by the Rules of Arbitration.[43] In practice the relations between the different players involved do not cause problems. It may simply be noted that the Court's decision-making powers have a contractual basis. This however raises the question of whether the parties, or the arbitrators with the parties' agreement, are entitled to modify the provisions of the Rules of the arbitration. Although no clear answer has been given to this question, it is likely that the Court will refuse any substantial alteration of its powers. For instance, it may refuse to allow proceedings to go ahead if they are based on Rules which no longer comply with the Rules of Arbitration.

The ICC Court's decision-making powers will be examined in the following pages in connection with the individual provisions of the Rules, notably those concerning the appointment of arbitrators on behalf of parties who fail to nominate one, challenges of arbitrators and approval of arbitral awards.[44]

3- The advantages of international arbitration under the ICA

The success of the ICA arises from the many advantages it may offer to parties over more traditional means of dispute settlement. Dispute resolution mechanisms under the ICA are specially adapted to meet the unique difficulties affecting disputes in an international context.

- Neutrality

In disputes between parties of different nationalities, issues of language, partiality, and dissimilar culture may have a negative impact on the process of resolving controversies in the local forum of any particular nation. Under ICA procedure, parties can ensure fairness in respect of all key aspects of dispute resolution, including place of proceedings, language used, procedures or law applied, nationality of the arbitrators, and legal representation. Since ICA rules permit arbitration to be conducted in any country, in any

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[43] *ibid.* Article 7.5

[44] Philip Beck and Graham Arad, The ICC International Court of Arbitration: A Practical Introduction, International Counselor Publications, June 2004. p.15

language, and with arbitrators of any nationality, it is generally possible to structure proceedings that are acceptable and fair for all parties.

- Expertise

Unlike some other institutions, the ICA does not require that arbitrators be selected from predetermined lists. Parties are free to select their own arbitrators, provided that they are independent and have relevant, specialized competence. In instances where arbitrators are selected by the ICA, national committees in approximately 60 different countries assist in identifying qualified arbitrators from around the world.

- Conclusiveness

The arbitral awards of the ICA are final and binding on all parties. Generally, any judicial recourse directed at overturning such awards that may be available, usually in either the country where the arbitration award is rendered or in the one where its execution is sought, is very limited. Furthermore, the enforceability of international arbitral awards, such as those determined by the ICA, is widely accepted internationally according to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) which facilitates enforcement of awards in more than 100 signatory nations.

- Economy and Expediency

Arbitration is often faster and less expensive than litigation in courts. The limiting of recourse against arbitral awards helps to preclude a prolonged and expensive series of appeals. The flexibility of ICC Rules permits parties to construct arbitral proceedings that will progress as rapidly and economically as possible. Although complex international disputes may sometimes require a great deal of time and money to resolve even by arbitration, the advantages of the arbitral system are illustrated by one recent multi-million dollar ICA arbitration that was completed in just over two months. The ICA closely monitors proceedings to ensure against any unnecessary delay.

- Confidentiality

ICA arbitration hearings are not public. Only the parties themselves receive copies of the awards, and the ICA and its secretariat are bound to respect the confidentiality of all proceedings.[45]

B-The Secretariat

According to the status and the Rules of Arbitration of the ICA; the Secretary General of the ICC International Court of Arbitration is responsible for the day-to-day running of the Secretariat of the Court, which is located at ICC headquarters in Paris (Article 1(5) of the Arbitration Rules). The secretary general is assisted for this purpose by a Deputy Secretary General. Together, with the support of other specialist staff, they plan and oversee operations. The counsel is responsible for relations with the arbitrators and parties in the cases assigned to them. They are assisted by a team comprising two assistant counsel and two secretaries. There are presently seven teams within the Secretariat of the Court.

All counsel and most assistant counsel have full legal training and some of them have also obtained additional qualifications outside their native countries. All members of the Secretariat have a command of at least English and French and sometimes of a third or even more languages.

1- The tasks of the Secretariat

One of the main innovations of the 1998 Rules of Arbitration was to extend the decision-making powers of the Secretary General. The Secretariat power derive from the Rules of Arbitration and their Appendices I and II, and its tasks which are not regulated in detail give the said Secretariat the power and the facility to perform its duties in the course of its relations with the arbitral tribunal, the arbitrators and the parties.

The Secretary General may thus confirm the appointment of arbitrators nominated by the parties by mutual agreement or on the basis of an agreed procedure, if the arbitrators have

[45] *ibid,* p. 22

provided an unqualified statement of independence with respect to the parties. The Secretary General may also confirm an arbitrator who has filed a qualified statement, provided that the parties have not objected to the confirmation of the arbitrator within the time limit fixed by the Secretariat for comments. Failing this, as happened previously, the ICC International Court of Arbitration will decide on the confirmation of arbitrators after receiving the parties' comments.[46] The Secretary General may also fix a provisional advance to cover the costs of the arbitration until the Terms of Reference have been drawn up.[47] If the advance is not paid, the Secretary General may direct the arbitral tribunal to suspend its work and may set a deadline for payment, after which the request will be considered as withdrawn if payment is still outstanding.[48]

It is up to the Secretariat, in the person of the counsel responsible for the file or one of the assistant counsel, to set time limits and to make sure they are respected by the parties, save those which the ICC Court or the arbitrators are responsible for fixing. The Secretariat is expressly empowered to extend time limits for filing an answer to the request for arbitration and a reply to any counterclaim(s).[49]

In short, the ICC International Court of Arbitration's relations with the parties and the arbitrators are conducted through the Secretariat, specifically through the counsel responsible for the file and his or her assistants, who sign correspondence and have telephone contact with the parties and the arbitrators. Each team within the Secretariat is thus the focal point or relay station for the cases it handles.

2- The competences of the Secretariat

The Secretary General gives each new request for arbitration a number in a chronological sequence that began when the institution was first created. The request is than handed to a team, which is identified by the initials of the counsel in charge of the file, mentioned

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[46] ICC Rules of Arbitration; Article 9, paragraphs 1 and 2
[47] *ibid,* Article 30.1
[48] *ibid,* Article 30.4
[49] *ibid,* articles 5 and 6

after the case number. The team cursorily examines the request for arbitration, which is immediately notified to the respondent named therein. The Secretariat sends the respondent an accompanying letter informing it of the steps it is required to take within a period of thirty days.

Until such time as the file is transmitted to the arbitral tribunal, all pleadings and other correspondence are notified through the Secretariat. At this stage of the proceedings, the team's work consists of obtaining all information and explanations required by the Rules or any special agreements between the parties, so as to allow the arbitral tribunal to be constituted without delay. When the Secretariat considers it necessary for a decision relating to case management to be made, it draws up a report following a predefined structure, which is put through the Court's decision-making process in compliance with a strict time table. The report contains basic information relating to the proceedings, a summary of the salient points of the case and characteristics of the dispute, together with explanations and a recommendation as to the decision to be made by the Court. These reports are then distributed to the Secretary General, the Deputy Secretary General, counsel and assistant counsel for discussion at a weekly staff meeting. The Secretariat, through its teams, then informs the parties concerned and/or the arbitrators of the decisions that the Court has made.

The teams also handle payments. They make sure that the advances fixed by the Court are paid within the deadlines laid down. They also scrutinize the arbitrators' records of expenses for the purposes of reimbursement and pay the arbitrators their fees. In addition, the teams will also handle advances on fees and expenses of experts if arbitral tribunals request them to do so.[50]

What have been discussed above are the outstanding functions of the Secretariat, various other will be mentioned hereafter through the arbitral process.

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[50] Beck and Arad, p. 22.

Section II: The standard ICC Arbitration Clause

The ICC arbitration clause is in fact the key or the starting point for the arbitration process before the International Court of Arbitration. As we shall see, this clause is an added value attached to a contract preventing any future dispute from being settled before any local Court or being inconsistent with any arbitral institution. The ICA has recommended a formal and standard arbitration clause, worded as follows:

'All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules'.[51]

A- Arbitration clauses in general

Like any other arbitration proceedings, those conducted under the ICC Rules presuppose that the parties have made a valid agreement to arbitrate. According to Article 7.1 of the UNCITRAL Model Law, an arbitration agreement is 'an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. The second sentence of this Article goes on to indicate that such an agreement may be made within a contract or separately. Once made, it binds the contracting parties and occasionally other parties that are also to be regarded as contracting parties. The arbitration agreement does not mean that any dispute arising between the parties has to be submitted to arbitration, but only those resulting from the specific legal relationship to which the agreement relates. This condition is expressed as follows in the ICC standard clause: 'All disputes arising out of or in connection with the present contract will be finally settled... by one or more arbitrators...'

[51] ICC Arbitration News. Standard ICC Arbitration Clause, ICC International Court of Arbitration Bulletin, Vol. 13/No. 2- Fall 2002.

It is sufficient to include in the arbitration agreement a reference to the institutions' Rules, as found in the ICC Standard Clause ('...shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules'.). The effect of this reference is to make the Rules part of the parties' arbitration agreement, which thereby deals with both the constitution of the arbitral tribunal and the determination of the place of arbitration. This is supported by Article 6.1 of the Rules:

'Where the parties have agreed to submit to arbitration under the Rules, they shall be deemed 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'.

The Standard Clause leaves open the questions of how many arbitrators will comprise the arbitral tribunal in a given case, where the arbitration will be held and in what language it will be conducted. Given that the latter two questions are often a cause of disagreement between the parties when negotiating the arbitration clause, the use of the Standard Clause as it is usually saves time and avoids problems. However, it not should be forgotten that parties need to be able to predict such matters when signing a contract and, for this reason, arbitration agreements usually indicate the number of arbitrators and the place and language of the arbitration. [52]

B- Rules of Law applicable to the arbitration agreement.

The arbitration agreement is subject to the provisions governing contracts contained in the applicable rules of law. Like any contract, the arbitration agreement may be void or voidable. Even if the arbitration agreement takes the form of a clause inserted in the contract rather than in a separate document, it is currently considered by lawyers

[52] Gray Born, International Arbitration and Forum Selection Agreements, The Hague Kluwer Law; 1999, p.14

internationally to be legally independent of the main contract as Article 6.4 of the Rules provide.[53]

Before an arbitration agreement is made, even in the form recommended by ICC in its Standard Clause, some provisions are required under the different law of the country where the agreement is performed as like to check if the parties have the legal capacity to enter into such an agreement. If there is a multiple party, or if one of the parties is a public entity, powers of attorneys necessary for this purpose must be checked, as must the arbitrability of the dispute according to the applicable law.[54]

C- Supplementary provisions in the arbitration agreement.

Various provisions should be mentioned in the arbitration agreement in favor to avoid any latter complications or obstacles and which could hamper or could deter the arbitration process from being established. Those provisions are described as follows:

1- The requirement to attempt amicable dispute resolution first

Arbitration clauses that contain conditions to be fulfilled before a request for arbitration may be filed are often a source of problems. The wording of a well-intentioned clause requiring the parties to attempt to settle their dispute amicably before restoring to arbitration may at the very least be a cause of delay if one of the parties claims that no such attempt has been made by the other party. Attempts to reach amicable settlement, even with the involvement of a neutral third party (mediator) are, of course, usually to be welcomed, provided parties ensure that they are not used to delay any arbitration proceedings that may prove to be necessary.[55]

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[53] Article 6.4 of the Rules state that '... The Arbitral Tribunal shall continue to have jurisdiction to determine the respective rights of the parties and to adjudicate their claims and pleas even though the contract itself may be non-existent or null and void.'

[54] A. Redfern & M. Hunter, Law and Practice of International Commercial Arbitration, Sweet & Maxwell, London 3rd Edition, 1999. p. 76.

[55] *ibid*, p.82

2- Nomination of arbitrators by third parties

An ICC arbitration agreement may provide that a sole arbitrator, the chair of a tribunal or a co-arbitrator that a party has failed to appoint will be nominated by a third party rather than by the ICC International Court of Arbitration. Such third party might be the chair of another chamber of commerce or the presiding judge of a national court. The Court usually accepts this, as long as the conditions relating to the independence of the arbitrator and the process of confirmation, which necessarily apply here too, are met.[56]

3- Items worth including in arbitration agreement

One of the chief points to be included in the arbitration agreement is the law applicable to the contract and the performance thereof, which therefore will be the law applied by the arbitral tribunal when resolving a dispute.

Secondly, the place of arbitration needs to be specified. More often than not, it is located in a country other than the one where the parties are based. It should not be chosen solely for its ease of access for the parties and for the infrastructure it offers for the conduct of the proceedings, but also and above all because its legislation and courts are well-disposed towards arbitration. A further point to check is that in the countries where the Arbitral Award is likely to be performed the recognition and the enforcement of awards are guaranteed through International conventions such as the New York Convention.

Thirdly, the language of the arbitration should be mentioned. Specifying the language of the arbitration will help when selecting arbitrators, as it will be clear what linguistic requirements they will need to satisfy.

[56] In 2002, 51% of the arbitrators appointed to chair a tribunal were proposed by the co-arbitrators and 9% directly by the parties.

Fourthly, the parties may decide whether to submit the dispute to one or to three arbitrators. Parties often prefer to specify three arbitrators in their arbitration agreement, as this gives them a feeling of greater security in the decision-making process. This will usually be appropriate if the amount in dispute is sizable. If the amount in dispute is small, the choice of a three-member tribunal may make the cost of the arbitration disproportionately high.

Other aspects of the procedure – such as the production of evidence – should be mentioned in the arbitration agreement only if absolutely necessary and after first consulting arbitration specialists.[57]

All these issues will be discussed perspectively in the next chapters, including the composition of the arbitral tribunal, the number of the arbitrators and their language, the choice of the applicable Rule and the fixation of the place of arbitration till the making of the awards.

[57] Redfern and Hunter, p. 136

CHAPTER 3

Arbitral Proceedings under the 1998 ICC Rules of Arbitration

The ICC Rules of Arbitration are the specific and strict ground for the arbitration process before the International Court of Arbitration. There have been nine revisions of these Rules since the original version of 1922. The current version, in force since 1st January 1998, contains significant changes, but leaves the structure of the ICC arbitration proceedings unchanged. The purpose of this latest revision was to organize proceedings more efficiently, given the increasing number of cases referred to the ICC and the complexity of the disputes, especially from a procedural point of view.

Section I: Commencing the proceedings

Before starting the arbitral proceedings, it is useful to define the frame of the arbitration and to determine the essential elements in the proceedings and which are established in Article 2 of the Rules, which are cited as follow:

(i) "Arbitral Tribunal" includes one or more arbitrators.
(ii) "Claimant" includes one or more claimants and "Respondent" includes one or more respondents.
(iii) "Award" includes, inter alia, an interim, partial or final Award.
These definitions will apply to the terms as used in the following commentary.

A- The request for arbitration

ICC arbitration proceedings begin with the filling of a request for arbitration. The ICC Rules of Arbitration require more than a mere notification of the commencement of proceedings, as is sometimes provided for in *ad hoc* proceedings and under the Rules of other institutions, where the claimant informs the other party of its intention to resort to arbitration and asks it to nominate an arbitrator.

The ICC Rules, on the other hand, require the initial submission to contain a summary of the main facts of the dispute as well as a statement of the relief sought, so as to

speed up the proceedings. The claimant may of course choose to submit a more detailed request, describing the position both in fact and at law and including supporting documents as well as evidence from witnesses and expert opinions. It may be noted that there are no special Rules determining the style and the structure of a request for arbitration, which, like all other pleadings presented during the proceedings.[58]

1. Submission for the request for arbitration

The claimant does not send its request for arbitration directly to the respondent but to the Secretariat of the ICC International Court of arbitration at its headquarters in Paris, France.[59] Indeed, the claimant can at the same time informs the respondent of its action by sending it a copy of the request for arbitration.

The request must be sent to the ICC Court and can no longer be sent to an ICC national committee, as was possible prior to 1 January 1998. It is advisable for the request to be filed in such a way as to have a record of its receipt for purposes of evidence in the light of Article 4(1). It is possible to submit a request for arbitration by fax, provided that the originals are sent to the Secretariat immediately afterwards. The request may be made by the claimant's lawyer or any other authorized person.

When confirming receipt of the request for arbitration, the Secretary General of the ICC Court informs the claimant and the respondent of the date on which the request was submitted (Article 4.1).

The date on which the request for arbitration is filed with the Secretariat of the ICC International Court of Arbitration marks the point at which the case becomes pending.[60] This date is crucial, for instance, it determines the starting point of any

[58] Christopher Imhoos, Arbitration and Alternative Dispute Resolution, UNCTAD/WTO, International Law series, 2002, p. 27

[59] Article 4.1 of the 1998 ICC Rules for arbitration.

[60] Article 4.2 of the ICC Rules.

interruption or suspension under status of limitation and is also a means of checking that certain other time limits are respected.[61]

2. Information to be included in the request for arbitration

As already mentioned, the request for arbitration is more than a simple command to arbitration proceedings. Article 4.3 of the Rules sets forth the minimum information it must contain. This provision gives the claimant considerable scope to determine how it will present its case, leaving it free to decide for instance which facts and legal issues it will raise in its request.

The request for arbitration must include at least the following information:

a- The claimant is required to state the exact details of the parties, especially the respondent, as a party not named at this stage cannot later join the proceedings without the consent of all those already named.[62]

b- The claimant must present at least a summary of all the facts and legal arguments necessary for a decision to be made in its favor. It is recommended that all documents essential to the dispute be annexed to the request for arbitration. This helps the ICC Court and its Secretariat to understand the dispute and to identify those aspects that will be relevant to the constitution of the arbitral tribunal.[63]

c- A full indication of the relief sought, specifying the amounts, the interest claimed and how the procedural costs are to be borne.

d- The relevant agreement and, in particular, the arbitration agreement which is essential to permit the ICC Court of Arbitration to declare whether or not it is *prima facie* satisfied that an arbitration agreement may exist.

e- Relevant particulars regarding the number and choice of arbitrators.

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[61] In 2001, 566 Requests for Arbitration were filed with the ICC Court; in 2002, 593 Requests; in 2003, 580 requests; in 2004, 561 requests and in 2005, 521 requests.

[62] Article 4.3(a) of the ICC Rules.

[63] Article 4.3(b) of the same Rules.

f- Comments as to the place of arbitration, the applicable Rules of law and the language of the arbitration[64] (those issues will be discussed in the next section).

3- Notification of the request for arbitration

The Secretariat will give notification of a request for arbitration only if the advance on administrative expenses was paid when the request was filed, which are currently set at US$ 2500. Also the number of copies of the request for arbitration and its attachments that are supplied must be sufficient to allow one copy for each party, one for each arbitrator and one for the Secretariat (Article 3(1)), which is responsible for sending this copies to the respondent for an answer, in accordance with the instructions and guidelines for notification given in Article 3(2) of the Rules.

In the letter that the Secretariat sends to the respondent when notifying it of the request for arbitration, the respondent is expressly requested to answer the request for arbitration within thirty days of receiving it. The respondent is also requested to state its position on all points relevant to the setting in motion of the proceedings, beginning with the constitution of the arbitral tribunal.

B- The answer to the Request and Counterclaims

The answer to the request is the first significant communication from the respondent. In it the respondent confronts the request and decides whether to object to all or merely some of the claims submitted by the claimant, and whether to make other pleas in its defence. Like the request, the answer is important for constituting the arbitral tribunal, fixing the place of arbitration and all the other points mentioned above in connection with the request for arbitration and the arbitral tribunal's task of drawing up the Terms of Reference.[65]

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[64] Article 4.4 of the Rules state also that the claimant shall submit the number of copies required in article 3.1 and that he shall make the advance payment of the administrative expenses first of all.

[65] Imhoos. C., p. 33

1- The contents of the Answer to the Request

Article 5(1) contains a list of basic points to be covered in the request. Like the claimant, the respondent is free to decide to what extent and how it will comment on the subject of the dispute and organize its defence.

a- Full details of the parties (Article 5(1) (a)): The requirement to give full details of the parties implicitly allows the respondent to fill in a correction for any factual errors in its details as specified in the request for arbitration. This is generally done in the Terms of Reference. The respondent should also give the name and address of any lawyer it may have engaged to represent it.

b- The respondent's position as to the nature and circumstances of the dispute and the claims submitted by the claimant. Article 5 (1) (b) and (c) clearly indicate that the respondent is under no obligation to give details of its defence and attach essential documents in its answer to the request. Otherwise, Article 4 of the Rules does not require the claimant to produce full evidence in support of its claim.

c- Comments concerning the number and choice of arbitrators, the place of arbitration, the applicable rules of law and the language of the arbitration: To the extent allowed by the arbitration agreement, it is in the respondent's interest to consider carefully the proposals made by the claimant in its request for arbitration concerning the constitution of the arbitral tribunal.

If the parties have not provided otherwise with respect to the number of arbitrators, an arbitral tribunal comprising one or three arbitrators will be set up by the ICC International Court of Arbitration.[66] In this case, the respondent must consider whether or not it is desirable to have a three-member tribunal.

[66] When stating the position on the number of arbitrators, the respondent will also take account of the fact that the Court generally tends to appoint a sole arbitrator when the amount in dispute is less than or equal to US$ 1 500 000, and three arbitrators when it is more.

d- The time-limit for filing the answer to the request for arbitration: The respondent must send its answer to the request for arbitration to the Secretariat within thirty days of receiving from the Secretariat the request for arbitration (Art 5.1). Even if the respondent has already received a copy of the request for arbitration directly from the claimant, this time-limit still remains the same. The Secretariat may extend the time allowed for answering the request for arbitration according to the conditions stated in Article 5.2.[67]

2- Counterclaims

If a respondent wishes to file a counterclaim, the moment to do so is when answering the request for arbitration or when the Terms of Reference are drawn up. It should be noted that, when any counterclaim is raised after the drawing up of the Terms of Reference, it must be expressly authorized by the arbitral tribunal under Article 19. Thus, if a respondent does not adhere to Article 5.5, any counterclaim it presents late is likely to be rejected by the arbitral tribunal. In this case, it may be necessary for the respondent to file a separate request for arbitration. Under Article 4.6, this request could be joined to the pending case, but if in this case the Terms of Reference have already been drawn up, the express authorization of the arbitral tribunal will be required. The claimant may respond to any counterclaim made by the respondent within thirty days of being notified of the counterclaim by the Secretariat.[68]

C- The effect of the arbitration agreement

Article 6 of the Rules paragraph 1 states that when parties refer to the ICC Rules of Arbitration in their arbitration agreement, they are assumed to have agreed to all its

[67] Article 6.3 states that if the respondent fails to file its answer to the request for arbitration. there is a risk that the Court will decide on the constitution of the arbitral tribunal without considering the respondent's position.

[68] Article 5.6 of the ICC arbitration Rules.

provisions and, in the event of any doubt, to the version in force at the time the request for arbitration was filed.

In cases where the parties have made an ICC arbitration agreement before 1 January 1998 but the request for arbitration based on this agreement was filed after that date, the arbitration proceedings are subject to the new Rules. It is only when an arbitration agreement made prior to 1 January 1998 states that disputes will be subject to the Rules of Arbitration 'in effect' when the agreement or the contract was made that the latest version of the Rules will not apply. If need be, the Secretariat may draw the parties' attention to this choice with a view to enquiring whether they would nevertheless like the most recent version of the ICC Rules to be used. If the parties are unable to agree, in such circumstances the earlier version of the Rules will be applied.[69]

1- Objection to ICC Arbitration

May a party against which a request for arbitration under the ICC Rules is directed object to the commencement of proceedings if it believes there are no grounds for jurisdiction?

Normally, a party that has signed an arbitration agreement referring to ICC arbitration cannot prevent proceedings from being commenced.

However, a respondent occasionally tries to prevent the arbitration from taking place by objecting to the existence, validity or scope of the arbitration agreement and sometimes even by bringing proceedings in a state Court.

An objection over the existence, validity or scope of an arbitration agreement does not normally prevent the arbitral proceedings from continuing; for the arbitral tribunal

[69] Redfern and Hunter; p. 136.

will then be required to decide, as it is entitled to do, whether and to what extent it has jurisdiction to hear the dispute.[70]

In the event of an objection to jurisdiction, or if a party fails to answer the request for arbitration, the arbitration will proceed only if the ICC International Court of Arbitration is '*prima facie* satisfied that an arbitration agreement under the Rules may exist' (first sentence of Article 6.2). The Court's *prima facie* decision on jurisdiction is not however a formal ruling with the binding forces of a judicial decision.[71] It is then up to the arbitral tribunal to rule on the objection to jurisdiction raised by the respondent. If, on the other hand, the ICC Court is not satisfied *prima facie* that an arbitration agreement under the ICC Rules of arbitration may exist, it informs the parties that arbitration cannot take place.

2- The autonomy or separability of the arbitration agreement

It should be noted that, unless otherwise agreed, any claim that the contract containing the arbitration agreement is null and void or non-existent does not deprive the arbitral tribunal of its jurisdiction to hear the case, provided that it upholds the validity of the arbitration agreement.

If the arbitral tribunal considers the arbitration agreement to be valid, it has jurisdiction to decide on the parties' respective rights and their claims and pleadings, even if it decides that the contract is non-existent or null and void. This is due to the principle of autonomy or separability of the arbitration agreement, that is to say that it is legally distinct from the contract containing it.[72]

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[70] *ibid*, p. 138
[71] Article 6.2 of ICC Rules for Arbitration
[72] *ibid*, Article 6.4

Section II: The Constitution of the Arbitral Tribunal

One of the most obvious features (and advantages) of arbitration, as opposed to litigation, is that in arbitration the parties may choose their own judge. This comparative advantage is what makes arbitration a real neutral ground for the settlement of disputes, and the choosing of a truly impartial judge is centered on the appointment of the arbitrators.

This section provides an overview of the qualifications required of an arbitrator and the process by which the arbitrators are appointed, challenged, removed, and replaced. More specifically, the following part focuses on the process for the constitution of the arbitral tribunal by nominating the member(s) of the arbitral tribunal, the qualifications that those members should have and the methods to secure the establishment of an arbitral tribunal in the absence of cooperation by one of the parties.

A- Arbitrators Criteria and Tasks

The ICC International Court of Arbitration will take account of any special agreements between the parties relating to the constitution of the arbitral tribunal that may depart from the Rules of Arbitration. For instance, the parties are free to agree that they will appoint the arbitrator(s) themselves, or that the arbitrator(s) will be appointed directly by the ICC Court, or by its chairman (or Secretary General), without the involvement of a national committee.[73]

1- The arbitrator's independence

It is a general principle of international commercial arbitration that arbitrators should be totally independent and neutral when carrying out their duties, regardless of whether they have been appointed by a party or by an arbitration institution.

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[73] Newmark and Hill, p.18

In this connection, Article 7.1 of the Rules provides that every arbitrator must be and must remain independent of the parties to the arbitration. The Rules do not define the notion of 'independence'.

The concept of 'independence' must be construed in each individual case in the light of the geographical and cultural background of the arbitrators and the parties and having regard to the relevant legal systems. The parties therefore have complete freedom in their choice of an independent arbitrator.

To ensure that arbitrators are independent, the ICC International Court of Arbitration requires them to submit a written statement of independence, which it will examine before appointing or confirming them. Prospective arbitrators are thus required to state in writing all the relevant facts and circumstances which might be of such a nature as to call into question their independence in the eyes of the parties (Article 7.2 and 7.3). The arbitrator must consider whether he has, or has had, any direct or indirect relations of a financial, professional or other kind with the parties or their lawyers. On this ground the ICC will not appoint or confirm a prospective arbitrator until it has in its possession a duly completed and signed Declaration of Acceptance and Statement of Independence. The ICC International Court of Arbitration's decision to confirm or appoint an arbitrator is final and the parties are not informed of the reasons for its decision.[74]

Finally, it should be pointed out that the requirement for the arbitrator to be and remain independent does not end with the signing of the Declaration of Acceptance and Statement of Independence. The arbitrator should immediately inform the Secretariat and the parties in writing of any similar facts and circumstances that arise in the course of the ensuing arbitration.[75]

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[74] Christopher Newmark and Richard Hill, Appointment of arbitrators in International Arbitration, International Dispute Resolution Counsel, London 2003, p 13.

[75] Article 7.2 and 7.3 of the ICC Rules of Arbitration.

2- The number of arbitrators

Article 8.1 of the ICC Rules provides that disputes are decided by a sole arbitrator or an arbitral tribunal comprising three arbitrators. In the latter case, the arbitral tribunal consists of two arbitrators designated by the parties (co-arbitrators) and a third arbitrator who chairs the tribunal.

There are three possible scenarios at the outset of the proceedings and the Rules deal with each of these three situations as described below:

a- No agreement between the parties on the number of arbitrators

If there is no agreement between the parties on the number of arbitrators, the decision lies with the ICC International Court of Arbitration. This is also the case when the provisions relating to the number of arbitrators laid down in the parties' agreement are not clear enough and the matter cannot be clarified, as, for instance, when the arbitration agreement provides that the dispute will be decided by one or more arbitrators and one party wants a sole arbitrator and the other party a three-member tribunal.

Article 8.2 of the Rules provides that in such cases the Court will appoint a sole arbitrator unless it considers that the case warrants the appointment of three arbitrators. The Court's decision is generally made on the basis of the following criteria: the legal and factual complexity of the case; any features irregular to the parties, be they natural persons or legal entities; any counterclaim that may have been made; and the amount in dispute.[76] The Court will normally appoint a sole arbitrator when the amount in dispute is less than US$ 1 500 000.[77] It will also consider whether

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[70] The amount in dispute exceeded one million US dollars in 54% of new cases in 2001 and 2002, 55.3% in 2003, 58.8% in 2004 and 54.3% in 2005.

[77] During recent years, parties have agreed on the number of arbitrators in approximately 70% of ICC cases. In half of these cases they did so in their arbitration agreement.

the case involves natural persons, legal entities or a state. If a state is involved, the arbitral tribunal will usually consist of three arbitrators.[78]

b- The parties agree on a sole arbitrator

Here, there is an agreement between the parties to the effect that the dispute will be settled by a sole arbitrator. More often than not the parties will decide so after the dispute has arisen, either spontaneously or after being informed of the financial implications of their choice by the Secretariat of the Court (Article 8.3).

c- The parties agree on a three-member tribunal

Here, the parties have decided in their arbitration agreement that any disputes will be referred to three arbitrators. The agreement may sometimes be made after the dispute has arisen. Article 8.4 provides that each party -the claimant in its request for arbitration and the respondent in its answer to the request- nominates a co-arbitrator for confirmation by the ICC International Court of Arbitration. If either party fails to do so, the appointment is made by the Court. The third arbitrator, who chairs the arbitral tribunal, is appointed by the Court, unless the parties have agreed upon an alternative method of appointment (Article 8.4).[79]

B- Appointment and confirmation of arbitrators

Appointing and confirming arbitrators are amongst the ICC International Court of arbitration's key tasks. The Court will confirm an arbitrator who has been nominated by a party or a third person, whereas it will appoint an arbitrator who has been proposed by a national committee or whom it has itself chosen.[80]

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[78] A. Garro, The Arbitral Tribunal, International Commercial Arbitration, United Nations Conference on Trade and Development, 2003, p.22

[79] The choice of the arbitrator to chair the tribunal may for instance be made directly by the parties, or by another body or a third person. Sometimes, the parties provide that the third arbitrator will be appointed directly by the Chairman or the Secretary General of the Court.

[80] In 2001, 61 arbitrators of different nationalities were appointed or confirmed under the ICC Rules; in 2002, 62 arbitrators; in 2003, 69 arbitrators; in 2004, 61 arbitrators and in 2005, 68 arbitrators.

1- Circumstances to be considered when choosing arbitrators

Article 9.1 of the ICC Rules for arbitration lists several criteria, in addition to the independence laid down in Article 7.1, which the Court or the Secretary General, as the case may be, should take into consideration when confirming or appointing arbitrators: [81]

a- The person's nationality, place of residence and any other connections with the countries of which the parties or the other arbitrators are nationals, and,

b- The person's availability and ability to conduct the arbitration in accordance with the Rules of Arbitration. Although the Rules do not specify that an arbitrator should have had legal training or experience, in most ICC arbitrations the persons appointed as arbitrators are lawyers.

However, given the importance of the parties' right to take part in the constitution of the arbitral tribunal, the Court will exercise control if the arbitrator's independence is not in doubt and use the discretion it has under this provision only when faced with serious infringements. [82]

2- Confirmation of arbitrators

The provision contained in Article 9.2 of the Rules allows the Secretary General of the ICC International Court of Arbitration to confirm arbitrators under certain conditions. This power covers arbitrators nominated by the parties, sole arbitrators and chairs of arbitral tribunals. The purpose of the provision is to allow the arbitral tribunal to be constituted quickly in straightforward cases.

If the prospective arbitrator has (i) submitted a statement of independence without qualification or (ii) a qualified statement of independence that has not given rise to

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[81] Article 9.1 of the ICC Rules states: 'In confirming or appointing arbitrators, the Court shall consider the prospective arbitrator's nationality, residence and other relationships with the countries of which the parties or the other arbitrators are nationals...'

[82] ICC as appointing authority, ICC International Court of Arbitration Bulletin, Vol. 14/No. 2- Fall 2003, p. 7.

any objections from the parties, the Secretary General will confirm the arbitrator and such confirmation will be reported to the Court when it next meets.

It is not within the Secretary General's powers to refuse to confirm an arbitrator. If the Secretary General doubts whether an arbitrator should be confirmed, the matter is referred to the Court. This will be the case, for example, if an arbitrator has submitted a qualified statement of independence to which objections have been made by one of the parties. Should the person concerned not be confirmed as arbitrator, the nominating party will be asked to nominate another arbitrator within a given time limit (usually between 15 and 30 days).[83]

3- Proposals by National Committees

Appointments of sole arbitrators and chairs of tribunals are made by the ICC International Court of Arbitration, if the parties have not provided for an alternative method of appointment and have been unable to agree upon the choice of an individual. This is also the case when parties fail to nominate an arbitrator. Before appointing a sole arbitrator or the chair of a tribunal, the Court invites one of ICC's national committees (currently 88 in numbers) to make a proposal. The parties are never informed of the national committee's choice, so as to avoid any interference in, or pressure on, the choice of candidate. Once the Court has selected a national committee, the Secretariat gives the chosen national committee a time-limit within which to propose an arbitrator for appointment by the Court at one of its future sessions.

In most cases, the choice of the national committee will determine the nationality of the arbitrator, as national committees generally propose citizens of their own country. When selecting a national committee, the ICC International Court of Arbitration takes into account the nationalities of the parties or the countries in which their head offices

[83] Garro. A., p. 26

are situated and the countries from which any other persons involved in the procedure originate or where they are established, including any co-arbitrators[84].

For reasons of neutrality, the Rules provide that a sole arbitrator or the chair of an arbitral tribunal should not have the same nationality as any of the parties. Nonetheless, if justified by the circumstances and none of the parties' objects within the time limit set by the Court, or at the express wish of the parties, the sole arbitrator or the chair of arbitral tribunal may be chosen from a country of which any of the parties is a national.[85]

C- Challenge of arbitrators

Under the 1998 ICC Rules, the power to decide on challenges of arbitrators lays with the ICC International Court of Arbitration, for this a purely administrative procedure concerning the organization and administration of the arbitral proceedings which are probably based on an alleged lack of independence or any other grounds.

1- The possible grounds for arbitrators to be challenged

The ICC Rules for arbitration leave grounds to challenge arbitrators open as to what circumstances may constitute such justifications. In practice, lack of independence and the unfair attitude of an arbitrator are the most common grounds, together with the alleged violation of the obligation to disclose important circumstances relating to the arbitrator's independence. [86]

As far as the violation of the duty of disclosure is concerned, a party may discover during the proceedings that an arbitrator did not include in his statement of independence facts likely to call into question the arbitrators independence in the eyes of the parties (art. 7.2 and 3). This is the case when an arbitrator has relations with a

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[84] Newmark and Hill, p.13

[85] Article 9.5 of the Rules states: 'The sole arbitrator or the chairman of the arbitral tribunal shall be of a nationality other than those of the parties... may be chosen from a country of which any of the parties is a national.'

[86] ICC Rules of Arbitration, Article 11.1

party or its counsel. A person who has failed to disclose something which should reasonably have been disclosed (see art. 7.3) is deemed *prima facie* to have done so intentionally, and this may be considered as evidence of lack of independence. An arbitrator may also be challenged when he has not given any of the parties' sufficient opportunity to present its case during the proceedings (art. 15.2).

2- Challenge procedure

A party wishing to challenge an arbitrator must present in writing the facts and circumstances on which its challenge is based (art 11.1). Its presentation must be credible, reasoned and well documented, as there will usually be no further opportunity to elaborate on it.

As soon as the Secretariat receives the challenge, it forwards it to the other party, the arbitrator concerned and all the members of the tribunal, in compliance with Article 3.1. The Secretariat gives them an appropriate period of time, usually 15 days, in which to submit their comments in writing (art. 11.3).

The 1998 Rules introduced a new provision requiring these comments to be forwarded to the other parties and arbitrators for information, so as to ensure that the procedure is transparent and again in compliance with Article 3(1).

Once comments have been received and the period of time allowed for this purpose has expired, the Court will decide at a plenary session on the admissibility and, if necessary, the merits of the challenge (art. 11.3). The Court will discuss and decide the matter on the basis of this report.

D- Replacement of arbitrators

Article 12 of the Rules specifies the situations in which arbitrators need to be replaced:

a- Replacement following a challenge: in accordance with Article 11, when the challenge has been accepted.

b- Death of an arbitrator.

c- Resignation of an arbitrator: To be effective a resignation must first be accepted by the ICA. If an arbitrator's resignation has reached an advanced stage, it may be refused by the Court.

As a general rule, the Court accepts resignations in the event of serious illness or if arbitrators are no longer able to act in accordance with the Rules due to a change in their professional circumstances.

d- Removal from office by the parties: The 1998 Rules allow parties jointly to remove an arbitrator from office.

e- Replacement on the Court's own initiative: It is possible for the Court itself to replace an arbitrator who is prevented from carrying out his or her responsibilities for legal or factual reasons, or who does not act in accordance with the Rules or within the prescribed time limits.[87]

When on the basis of circumstances brought to its knowledge, the Court contemplates proceeding in accordance with Article 12.2,[88] it first decides at one of its committee sessions whether the arbitrator should be replaced. Parties and other members of the tribunal are given an opportunity to submit written comments within a given time limit normally 15 days. The Court then announces the grounds on which it contemplates replacing the arbitrator and look for the necessary steps which should be taken to appoint another arbitrator.[89]

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[87] *ibid.* Article 12.1 and 2

[88] Article 12.2 of the Rules states clearly that an arbitrator shall 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.

[89] In the situations mentioned in Article 12.2, the procedure is basically the same as in the case of challenges (art. 11.3). The only difference lies in the fact that the procedure is initiated by the ICC Court rather than by one of the parties.

CHAPTER 4

Proceedings before the Arbitral Tribunal

Different steps should be followed in order to start the proceedings before the arbitral tribunal, starting by the transmission of the file from the Secretariat to the arbitral tribunal, choosing the place of arbitration, the rules governing the proceedings, the language of the arbitration and the applicable rules of law, which are all substantial and mandatory steps required by the 1998 Rules and should be achieved by the parties in favor of commencing the arbitral proceedings.

Section I: Application of substantial formalities

In favor to start the arbitration process, several formalities are required on behalf of this route. The 1998 ICC Rules set mandatory conditions which could not be distinguished in their form of those required before the local courts; the lack of these formalities shall be considered a rejection to the arbitral proceedings.

A- Conditions for the transmission of the file to the arbitral tribunal

Article 13 is the first provision in the Rules relating to proceedings before the arbitral tribunal. Under this provision, the file will be transmitted to the arbitral tribunal as soon as two conditions have been fulfilled, namely that the arbitral tribunal has been constituted, i.e. all the arbitrators have been confirmed or appointed by the Court, and the advance requested by the Secretariat has been paid.

The formation of the Arbitral Tribunal as a **first condition** is required in the event of a three-member arbitral tribunal when those three arbitrators have been confirmed or appointed then the file can be transmitted to the arbitral tribunal, which may after that begins its work. Its first task will be to drawn up the Terms of Reference.

In the cases where the arbitrators are named by the parties and they are given the power jointly to nominate a third arbitrator as chair, the Secretariat will normally transmit the request for arbitration and the answer to the request to these two arbitrators for information, so that they may make an appropriate choice in the light of the parties' statements. However, this does not constitute the transmission of the file as referred to in Article 13.[90] At this stage. the two arbitrators can do no more than choose the person to chair the tribunal: they cannot undertake any procedural acts.[91]

The payment of the advance as a **second condition** is also required in the same time and even if the arbitral tribunal is complete, it will not be given the file until the advance requested has been paid. The advance due at this stage is the provisional amount fixed by the Secretary General pursuant to Article 30 (1) of the Rules and Article 1 (2) of Appendix III.

The Secretary General fixes the provisional advance immediately after the request for arbitration has been filed, on the basis of the information it contains. The provisional advance is intended in all cases to cover the costs of the proceedings up to the point at which the Terms of Reference are drawn up in compliance with Article 18. Normally, it is to be paid by the claimant alone. Prompt payment will help to ensure that the file is transmitted to the arbitrators quickly.[92]

B- The place of the arbitration

Article 14 of the 1998 Rules provides the Court a substantial competency to fix the place of arbitration unless this issue has been agreed by the parties. The Arbitral Tribunal may, after consultation with the parties, conduct hearings and meetings at any location it considers appropriate unless otherwise agreed by the parties.

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[90] Article 13 of the 1998 Rules states that the Secretariat shall transmit the file to the Arbitral Tribunal as soon as it has been constituted, provided the advance on costs requested by the Secretariat at this stage has been paid.

[91] Newmark and Hill, p. 23

[92] Erik Schafer, Herman Verbist, Christophe Imhoos, ICC Arbitration in Practice, KLUWER Law, Staempfli Publishers ltd, p. 71.

1- Choice of the place of arbitration

The place of arbitration depends on the will of the parties or on a decision taken by the ICC International Court of Arbitration.[93]

On this ground the Rules gives **the parties the freedom** to choose the place of the arbitration, i.e. the legal seat of the arbitral tribunal. This they may do in their arbitration agreement or later.[94] The ICC International Court of Arbitration does not intervene in any way and respects the parties' choice.[95]

It should be noted that parties often refer in their arbitration clause to 'the Rules of Arbitration of the ICC in Paris' or 'ICC in Paris', without clearly specifying the place of the arbitration. In such cases, it is not clear whether the parties wished the arbitration to be conducted in Paris or whether the reference to Paris simply relates to the International Chamber of Commerce, whose headquarters are in Paris. When this happens, the Secretariat draws the parties' attention to this point when giving notification of the request for arbitration.

From a legal point of view, the parties should ask themselves whether the law applicable at the place of the arbitration allows arbitral awards to be set aside and on what grounds; whether it contains mandatory Rules of procedure, which, if not complied with, could cause the Award to be set aside; or whether it places restrictions on the arbitrability of the subject matter of the dispute. A further matter of importance is whether or not the state in which the place of the arbitration is situated has ratified the New York Convention.[96]

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[93] The place of arbitration was located in 42 different countries throughout the world in 2001; the corresponding figure was 43 in 2002; 47 in 2003; 49 in 2004 and in 50 countries in 2005.

[94] Article 14.1 of the ICC Rules for Arbitration

[95] The parties had agreed on the place of the arbitration in 87% of the cases referred to the Court in 2004. The corresponding figure was 86% in 2003, 84% in 2002, 82% in 2001. This is not surprising, as the ICC introductory brochure on arbitration mentions in relation to the standard ICC arbitration clause that it may be in the parties' interest to agree on the place of arbitration.

[96] Schafer, H. and I., p.73

Another means to fix the place of arbitration is also provided by the Rules and given to the **ICC International Court of Arbitration.** For that, if the parties have not agreed on the place of arbitration, it will be fixed by the ICC Court.[97] In so doing, the Court will take into account any observations from the parties and the recommendations of the Secretariat and give consideration, amongst other things, to whether or not the country in which the place of arbitration is to be situated has ratified the New York Convention or other multilateral or bilateral treaties relating to the recognition and enforcement of arbitral awards; whether or not the national law on arbitration procedure applicable to International arbitrations gives the courts at the place of arbitration the power to intervene in arbitration proceedings; whether or not this law places any restrictions on the arbitrability of disputes; and whether arbitration agreements, arbitral awards and the freedom of the parties to choose the applicable law and procedural rules are respected at the place of arbitration.

The Court also ensures that the place it intends to choose for the arbitration will be regarded as neutral by the parties and that it is acceptable to all participants in the proceedings, not only from a geographical point of view but also for practical reasons (such as how distant the place is, the means of communication, the quality of infrastructure and logistics, possible problems of access and safety concerns). The Court may also take the applicable law and language of the arbitration into account, so that the place of arbitration to be fixed corresponds as much as possible to the expectations of the parties.

2- The place of the hearings and the deliberations

Article 14.2 contains a provision new to the Rules in 1998. It expressly allows the arbitral tribunal, after first consulting the parties, to hold **hearings** and meetings other than at the place of the arbitration, which will nonetheless remain the legal seat of the

[97] Article 14 of the ICC Rules

arbitral tribunal. In practice, it may well be an advantage, or even a necessity, to hear witnesses at their place of residence or work, if this is not the same as the place of the arbitration.[98] With regard to factual matters, it is sometimes necessary to inspect the material and equipment in dispute on site (e.g. goods, a machine, a factory or other physical evidence), when they are not located at the place of the arbitration.

Otherwise the place of the **deliberations** is introduced in the provision of Article 14.3 of the 1998 Rules. It provides that the arbitral tribunal may deliberate in any place it considers appropriate, which therefore need not necessarily be that of the arbitration. When deciding where to deliberate, the arbitral tribunal does not have to consult the parties or obtain their agreement.

If the members of the arbitral tribunal do not reside in the locality of the arbitration, it may well be more efficient and less costly for them not to meet at the place of the arbitration to deliberate. In this regard, the Rules fictitiously assume that the arbitral Award is rendered at the seat of the arbitration.[99]

C- Rules governing the proceedings

Article 15 of the Rules states that the proceedings before the Arbitral Tribunal shall be governed by these Rules and, where these Rules are silent, by any rules which the parties or, failing them, the Arbitral Tribunal, may settle on. Whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration and in all cases, the Arbitral Tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case. [100]

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[98] Schafer, H. and I., p. 74

[99] Article 25.3 of the Rules.

[100] Article 15 of the ICC Rules contains the highly important general provisions relating to the Rules of procedure applicable to the arbitral proceedings and fixes the order in which the potentially applicable Rules apply.

1- The parties' freedom to determine the applicable Rules of Procedure

Article 15.1 of the Rules provides that the parties may decide on any specific provisions that are not covered by the Rules themselves, thereby keeping party autonomy, which is a basic principle in arbitration. However, party autonomy is not without limits. The parties should always check that any agreement reached with regard to procedural provisions does not violate any Rules that are mandatory or considered part of public policy under an applicable law on arbitration procedure. This will usually be the arbitration law applicable at the place of the arbitration.[101]

There is no obligation upon parties to refer to a national procedural law to complement the procedural provisions in the Rules. Indeed, it is not particularly recommendable to do so, as national procedural laws are designed to meet the domestic requirements of civil trials. It is therefore wisely stated at the end of Article 15.1 that there is no necessity to refer to a national law when determining the rules of procedure. This principle ensures the flexibility of arbitration and confirms that ICC arbitration proceedings should not be conducted in the same way as court proceedings.

It should be noted that, not all the provisions of the ICC Rules of Arbitration are obligatory. The autonomy enjoyed by the parties allows them to make agreements that depart from the Rules. Great care should be taken however when the powers of the Court are involved.[102]

For instance, Article 7.6 provides that the parties may depart from Article 8, 9 and 10 relating to the constitution of the arbitral tribunal, and articles 14, 16 and 17 refer explicitly to the parties' freedom to agree on the place of the arbitration, the language of the arbitration, and the Rules of law applicable to the dispute.

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[101] Imhoos C., p. 40

[102] It is not specified in the Rules which provisions may or may not be modified by the parties, but some articles clearly give them this possibility.

There can be no doubt that the parties are not free to alter certain provisions containing essential features of ICC arbitration procedure. Thus, the parties may not agree to exempt the arbitral tribunal from drawing up the Terms of Reference or submitting its Award in draft form to the Court for scrutiny.

2- Procedural agreements against the arbitral tribunal's will

Article 15.1 does not answer the question whether, after the arbitral tribunal has been constituted, the parties may agree upon rules of procedure without its help or even against its will. This rarely happens, as such behavior would be discourteous and it is in practice unlikely that parties should agree on basic Rules of Procedure that the arbitrators would consider unacceptable. Nonetheless, it should be noted that practitioners believe that, although bound by the Rules agreed by the parties, arbitrators are entitled to resign if the rules originally agreed are modified after they have taken up office. Others consider that once the arbitral tribunal has been constituted, the parties cannot make procedural agreements contrary to its will, as the legal relationship is no longer simply between the parties themselves.

In practice, there have been cases in which the parties agreed on long extensions of time limits or the cancellation or postponement of a hearing, without taking into account the expectations of the arbitral tribunal. Given that arbitrators must plan ahead, postponements may have considerable financial consequences and make it difficult for arbitrators to render the Award within the prescribed time limits.[103]

D- The language of the arbitration

In arbitration proceedings, as in all litigation, the language is very important. It is both the means by which each party tries to prove its case to the arbitrators and the instrument with which the arbitrators conduct the proceedings and make their

[103] Schafer, Verbist and Imhoos, p. 77

decisions. The written language is also the medium in which law is formulated. In international arbitrations, the parties often speak different languages, unless they come from the same linguistic region. The same may be said of the arbitrators. The ICC Rules of Arbitration are neutral as far as language is concerned and allow the proceedings to be conducted in any language.

The ICC always takes any agreement on language into account when appointing an arbitrator. If no agreement has been made and the parties use different languages in their pleadings, the language and languages of the arbitration must in that case be determined by the arbitral tribunal, unless it manages to elicit an agreement from the parties; for practical purposes it should occur at the latest when the Terms of Reference are drawn up, i.e. as soon as the file has been transmitted to the arbitral tribunal.[104]

In addition to the general considerations discussed above, a certain number of specific problems should be mentioned which are, sometimes given, insufficient attention in practice.

1- The nomination of arbitrators

When parties do not agree on the language of the arbitration, one of them may try to influence the decision made in this regard by nominating an arbitrator who does not speak the other language to be taken into consideration. Given that the nomination of an arbitrator to serve on a three-member tribunal is one of the basic rights of the parties, an unstable situation may result. In such circumstances, especially if requested by the other party, the ICC Court may decide not to confirm the person concerned, on the basis of Article 9.1, because that person lacks a requisite skill. However, the Court is free to decide as it thinks fit, although it exercises its discretion with restraint.[105]

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[104] Redfern and Hunter. p. 85
[105] Newmark and Hill, p.26

2- The language of the applicable Rules of Law

Often in international arbitrations, the language of the arbitration is not the same as the language in which the applicable Rules of Law have been drafted and commented upon. This does necessarily matter, however, as the difficulty at issue may be of a factual nature, calling above all for an interpretation of the contract. If this is not the case, the parties and their lawyers should ensure that the arbitrator they choose has at least some knowledge of the applicable law and enough linguistic understanding to avoid having to use translations. In cases involving legal difficulties, parties should carefully describe the legal basis on which they rely, with references to case law, scholarly articles and even expert legal opinions. These may need to be accompanied by translations. It is worth recalling that the general Rule according to which the parties describe the facts and the tribunal knows and ascertains the law does not usually apply in international arbitration.[106]

E- Applicable Rules of Law

The first and second paragraphs of Article 17 of the ICC Rules for arbitration appear at first prospect to be clear and unambiguous. The arbitral tribunal must settle the dispute on the basis of the provisions of the contract and, where these are insufficient, on the basis of the Rules of Law chosen by the parties, having regard to relevant trade usages.

1- Choice of the applicable Rules of law by the parties.

In most of the cases referred to ICC arbitration the parties have already chosen the law to be applied by the arbitral tribunal to the merits of the dispute.[107] In a handful of contracts, the parties chose Rules or principles other than national laws for the

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[106] *ibid.* p. 27

[107] The parties had chosen the applicable rules of law in 82% of the contracts underlying disputes referred to the ICC Court in 2003. in 80.4% of contracts they chose a national law.

determination of their dispute, including European Community Law, general principles of equity, international commercial law, and the United Nations Convention on Contracts for the International Sale of Goods (CISG).

It should be noted that the 1998 ICC Rules of Arbitration aimed to give parties greater freedom by allowing them to choose the Rule of Law to be applied by the arbitral tribunal to the merits of the dispute. In so doing, they acknowledged the growing trend over recent years for parties to choose as the governing law of their contract not a national law but 'general principles of law', *'lex mercatoria'* or the UNIDROIT principles of International Commercial Contracts.

Otherwise, like in some international conventions, the UNCITRAL Model Law and the arbitration Rules of certain other institutions, Article 17.2, requires the arbitral tribunal to take account of trade usages even if it applies a national law.

It may often be helpful to refer to trade usages as a way of filling gaps in the applicable law. This is because usages are inclined to develop more quickly than law in the field of International trade. However, the need to take account of trade usages should not lead the arbitral tribunal to disregard the provisions of the law chosen by the parties.[108]

Sometimes, when the parties have not specified the applicable law, arbitrators decide the case on the basis of trade usages only. They justify this approach by referring to those international conventions and institutional Rules which, as mentioned above, require arbitrators in all cases to take account of trade usages.

2- Determination of the applicable Rules of Law by the arbitral tribunal

The different ICC arbitral awards show the great variety of methods used by international arbitrators to determine the applicable law. More often, arbitrators

[108] Imhoos C., p. 45

determine the Rules of Law applicable to the merits of the dispute according to one of the following methods:

a- System of Rules for conflict-of-laws.

According to this method, the arbitrator determines the applicable law, using the Rule of Conflict he deems to be appropriate to the particular case.

Upon what basis should the Rule of Conflict to be used by an international arbitrator be determined? Should it be the Rule of Conflict of the country from which the arbitrator comes or is a national, or that of the country in which the arbitral tribunal has its seat or from which one or other of the parties comes? An arbitrator is not bound to follow the rules of conflict of one country rather than another, but may choose any of the various possibilities, according to his preference. International arbitrators appear generally not to limit themselves to a single national system of Rules for conflict-of-laws. [109]

b- Use of the general principles of private International law.

This method involves identifying common or generally accepted principles amongst the main conflict-of-laws rules. On this basis, arbitrators sometimes look for the most closely connected country.

Although plausible, the reference to different systems of conflict-of-laws rules contains a risk of simplification, as the above-mentioned principles vary somewhat from one system to another. This perhaps explains why some arbitral tribunals prefer to refer to international conventions such as the European Community Convention on the Law Applicable to Contractual Obligations, opened for signature in Rome on 19 June 1980, or the Hague Convention on the Law Applicable to International Sales of Goods.

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[109] Roland Lohnert, International Commercial Arbitration in Theory and Practice. Jan C Schultz & Albert J., van den Berg – Salzburg, 2000, p. 22

c- The direct method

Under the direct method, the applicable law is determined without referring to any conflict-of-laws system. Usually the arbitrator will attempt to establish a determining or meaningful connection between the contract and the law that he decides to apply. This may be the place of the performance which is characteristic of the contract, the Centre of gravity of the contract, the place where the contract is performed, or the seller's place of residence, etc.[110]

d- Application of rules other than those of a national law

On several occasions arbitrators have based their awards not on a given national law but on trade usages or general principles of law. Such awards have been rendered both in cases where arbitrators were vested with the powers of an *amiable compositeur*.

i) Trade usages.

Sometimes, in cases where the parties have not specified the applicable law, the arbitral tribunal will base its decision on trade usages alone, referring for this purpose to International conventions and the rules of other arbitration institutions that require arbitrators to take account of trade usages in all cases, as mentioned above.

ii) '*Lex mercatoria*' and 'general principles of law'.

Unlike 'trade usages', these two expressions, which are often thought to be synonymous, are not used in international conventions or the Rules of Arbitration institutions. However, no definition that clearly describes the concept and encompasses all views expressed on the subject has so far been found. Some legal writers submit that arbitrators often do not distinguish between 'trade usages' and lex *mercatoria*. There have so far been very few awards based exclusively on *lex mercatoria* without at the same time a national law being applied. Some of these awards have been challenged in state courts. Dismissing such actions, English and

[110] *ibid*, p. 25

French courts have held that arbitrators may base their decisions on internationally recognized legal principles regulating contractual relations, or even on *lex mercatoria.* When it comes to identifying the rules of the so called *lex mercatoria* or the 'general principles of law' regarding International sales, arbitrators regularly rely on the United Nations Convention on Contracts for the International Sale of Goods.[111]

3- Mandatory Rules

Most countries have laws giving state courts sole jurisdiction over certain disputes, which are consequently excluded from arbitration. They involve situations where the outcome of the dispute has an effect upon third parties (e.g. -although this is not the case everywhere- certain disputes concerning companies, family maintenance, or claims for the annulment or cancellation of patents and trademarks) or situations that have an important public interest aspect. State courts will refer simply to their rules of conflict, if need be.[112]

If the law applicable to a party's personal status limits its freedom to contract, that law must be applied whenever it is mandatory for the party concerned, even if the legal consequences of doing so are unfair, as when a state claims immunity or when a restrictive provision seems quite unjustified in the circumstances.

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[111] Schafer. Verbist and Imhoos, p. 86

[112] Article 7 of the Rome Convention provides that the mandatory rules of a country other that with which the situation is most closely connected should be respected, whenever they are relevant and after consideration, appear to be applicable.

[112] Lohnert R., p. 30

Section II: The Terms of Reference and the Procedural Timetable

When the ICC Rules of Arbitration were first created in 1922, the enforcement of agreements giving jurisdiction over potential commercial disputes to an arbitral tribunal was impossible in many countries, especially those belonging to the civil law tradition. In this context, the purpose of the Terms of Reference, which amounted to a contract between the parties, was to give a legal basis to the arbitral tribunal's jurisdiction. Another important purpose of the Terms of Reference has been to allow the ICC International Court of Arbitration, when scrutinizing awards, to check that the arbitral tribunal has not gone beyond its mission and has covered all the claims made by the parties. Our earlier comments on Article 15 (procedural rules) and Article 16 (language of the arbitration) are also relevant here. A similar purpose also underlies the requirement to establish a procedural timetable.

A- Drawing up the Terms of Reference

The "Terms of Reference" is a distinguishing feature of the ICC Rules. They are a summary of the claims and issues in dispute and particulars of the procedure and it is prepared by the tribunal and signed by the parties at the onset of the proceedings.

Even though under the ICC Rules time may be saved by including the Statement of Claim and the nomination of an arbitrator with the Request for Arbitration, some commentators believe more time can be lost under its Terms of Reference procedure.

The Terms of Reference are justified primarily by the fact that they require the arbitrators and the parties to decide early in the proceedings, by mutual agreement if possible and having regard to the requirements of the case, how the substance of the dispute and procedural matters covered only in general terms in rules are to be handled.

1- The procedure

The Terms of Reference are drawn up on the basis of the parties' most recent written submissions. Some arbitral tribunals leave it to the parties to provide a summary of their claims and simply draft the part of the Terms of Reference covering the points mentioned under a, b, f, and g of Article 18.1. This is not the best way to proceed, however, as the summary of the parties' claims and the list of issues to be determined need to be analyzed by the arbitral tribunal at this stage so that any misunderstandings can immediately be removed.

Article 18.1 allows the Terms of Reference to be prepared and signed by correspondence or to be drawn up at a meeting with the parties. It may be that such agreement between parties can equally well be obtained by letter, which saves time and cost. In any event, it is advisable for the arbitral tribunal to send the parties a draft first, asking them to respond quickly with their comments. Any problems identified in the first draft may be dealt with in a new draft sent out to the parties for them to give their approval or to make their comments within a specified time limit. If it is impossible to obtain an agreement in this way, or if the size of the case makes it necessary, a meeting will have to be quickly arranged. It will be useful for the parties to indicate their availability as soon as possible so as to avoid delays due to postponements requested when dates are proposed. The arbitral tribunal should be mindful of this.[113]

Ideally, the arbitral tribunal will prepare the meeting in such a way that discussions are confined to the essential issues and conducted in accordance with a strict plan and for the purpose of finalizing and signing the Terms of Reference.

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[113] Michael Hwang, The prospect for arbitration and alternative dispute resolution. Senior Counsel and Arbitrators, Singapore, 2002, p. 30

Even though, the time allowed for signing the Terms of Reference is clearly stated and the arbitral tribunal has two months from the moment the file is transmitted to it in which to draw up the Terms of Reference and have been signed by all parties or, failing this, to submit them to the ICC International Court of Arbitration for approval. In many cases this time limit is not respected due to the difficulty of finding a date when all the parties are available and to the fact that they usually insist on being given adequate time to present their views. The arbitral tribunal should as a rule inform the Court and how it intends to continue the proceedings. On this basis, the Court will decide whether to extend the time limit on its own accord.[114]

2- The procedural timetable

Since 1998, the rules have included a provision requiring the arbitral tribunal to establish a procedural timetable. The purpose of this provision is to speed up the proceedings through improved planning. Its introduction is explained by the fact that practitioners involved in the drafting of the new Rules realized that participants in international arbitrations require more time than they are accustomed to having under national procedural laws for agreeing on deadlines for submissions and dates of hearings. The arbitrators and the parties' lawyers often have heavy schedules, making it difficult to fix dates if this is not addressed early enough. It may be necessary to wait several months for a hearing if the date is not arranged until after the parties have submitted their pleadings. A provisional timetable in which these dates are fixed also makes it possible to clarify how many exchanges of pleadings there should be and how evidence should be produced.[115]

One of the great benefits of the timetable lies in the fact that the parties are at least morally committed to respect it once they have given their consent. Article 18.4

[114] Article 18.2 of the ICC Rules.
[115] Hwang, p. 33

clearly requires the arbitral tribunal to refer to the parties before establishing the timetable. However, their consent is not essential, although obviously desirable.

If for whatever reason the timetable cannot be established at the same time as the Terms of Reference, it should attended to as quickly as possible thereafter. The provisional timetable can of course be modified to take account of unforeseen events that may arise during the proceedings.

B- New Claims

Article 19 of the ICC Rules for Arbitration states that after the Terms of Reference have been signed or approved by the Court, the parties shall not make any new claims or counterclaims which fall outside the limits of the Terms of Reference unless it has been authorized to do so by the Arbitral Tribunal, which shall consider the nature of such new claims or counterclaims, the stage of the arbitration and other relevant circumstances.

Parties can always agree between themselves to submit new claims in the course of the proceedings after the Terms of Reference have been drawn up, even if they do not satisfy the conditions laid down in Article 19. In this case, the Arbitral Tribunal will decide the new claims out of respect for party autonomy.[116]

It is primarily up to the Arbitral Tribunal to check in each case whether the unqualified acceptance of new claims by the other party can be considered under Article 33 to cure a violation of Article 19 or whether it amounts to tacit agreement to include the new claims. In any event, given the possibility that the Award could be challenged later for non-compliance with procedural rules, it is advisable that provision be made for an explicit agreement or, if need be, a decision by the Arbitral Tribunal.

[116] Article 19 of the ICC Rules prohibit the admission of any new claims or counterclaims after the Terms of Reference signing unless it has been authorized by the Arbitral Tribunal which has the role to consider the nature of such new claims or counterclaims.

Otherwise, when the new claims do not fall within the limits of the Terms of Reference, they are admissible only if accepted by the **Arbitral Tribunal.**

Article 19 lists certain considerations to which the Arbitral Tribunal should give attention when deciding on the admissibility of new claims relating to the principal claims or the counterclaims. The Arbitral Tribunal will check whether there is a relationship between the new claims and the facts on which the claims contained in the Terms of Reference are based. If the new claims deal with quite different matters from those mentioned in the Terms of Reference and are unrelated to the initial request for arbitration, they will probably not be accepted by the Arbitral Tribunal. For instance, if the original request for arbitration concerned a contract for the sale of goods and the new claims submitted by one of the parties after the Terms of Reference have been drawn up concern another contract between the parties, such as a licensing agreement containing no arbitration clause, the new claims should not be accepted.

However, there are times when the new claims concern the same contract and the same facts. This would be the case, for instance, if a party initially requests the payment of the sales price stipulated in the contract and then, once the Terms of Reference have been signed, claims a right to damages due to infringement of the contract. In this case, the Arbitral Tribunal would probably regard the new claim as related to the initial request and would therefore be more likely to consider it admissible.[117]

[117] Schafer, Verbist and Imhoos, p. 98

C- Establishing the facts of the case

The Arbitral Tribunal's first task is to establish the facts of the case (Article 20). Each party describes the circumstances of the case which could reveal contradictory positions with respect the events underlying the dispute. The Arbitral Tribunal may use all appropriate means to clarify these contradictions, which means that it has considerable freedom to decide how to go about establishing the facts.[118]

Generally, the parties should provide all factual information and supporting evidence. However, the Arbitral Tribunal may at any point request an expert to give an opinion on technical or economic questions.

1- Preparatory submissions

First of all, the Arbitral Tribunal should first examine the written documents submitted by the parties. Although this may seem self-evident, it reflects an approach to international arbitration that is not shared by all legal traditions, that is to say it puts written and oral submissions on an equal footing and presupposes that the hearings have usually been amply prepared by the parties' written pleadings.[119]

Pleadings are exchanged in accordance with the provisions contained in the Terms of Reference or as instructed by the Arbitral Tribunal. After the initial request and the answer have been filed and the Terms of Reference drawn up, there are on average one or two further exchanges of pleadings before the hearing, although there may sometimes be more. In some cases, parties file their pleadings simultaneously rather than successively.

It is common for evidence such as contracts, technical documents, correspondence, expert opinions and written testimonies to be attached to the pleadings. They can sometimes fill several binders. More detailed provisions on this subject may

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[118] *ibid*, p.99

[119] Article 20.2 of the 1998 ICC Rules

occasionally be found in the Terms of Reference or in a procedural order issued by the arbitral tribunal.[120]

2- A decision based on oral discussions and production of evidence

In most ICC arbitrations one or more hearings take place after the exchange of pleadings. If this has not been agreed with the parties or settled by the arbitral tribunal when establishing the procedural timetable, the arbitral tribunal will decide on this after hearing the parties and considering the progress of the proceedings.[121] If a hearing has already taken place and the Arbitral Tribunal believes that the parties have had a reasonable opportunity to present their arguments, it may reject a request from one of the parties for another hearing. This will be the case when all the evidence has been presented in good time and the facts have therefore been established.[122]

The parties and their representatives are entitled to take part in all discussions and hearings where evidence is produced and should be summoned in accordance with Article 3.1 and 2.

D- The Conduct of the Hearings

When the arbitral tribunal schedules a hearing, be it at the request of a party or of its own accord, it must summon the parties in good time and in due form.[123]

It is advisable for the Arbitral Tribunal to agree with the parties on available dates first, before officially fixing the date.[124] it is also necessary to check that the witnesses, experts and other persons to be heard at the same time are also available to appear on the chosen date.

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[120] David Howell, Making of Decisions, Directions, Orders and Awards in an Institutional Arbitration. Fulbright & Jaworski, p. 15

[121] Article 18.4 of the rules

[122] Howell, p. 17

[123] Article 21 of the 1998 ICC Rule

[124] *ibid,* Article 18.4

Concerning the proceedings, the arbitral tribunal decides alone how it will be conducted at the hearing, although it will preferably seek the parties' views first. It will ask them whether they wish to present their pleadings orally, how much time they will need for this purpose and whether they intend to ask for witnesses to be heard.[125]

For sure the hearing is recorded and the same applies to the drawing up of minutes or a tape recording. If the parties wish, the arbitral tribunal will take the necessary steps to organize this and, if appropriate, will fix an advance to cover the related costs.

The case where the Arbitral Tribunal wishes one or more witnesses to attend a hearing, it must decide in detail how they will be questioned (Article 20.3). If more than one witness is called, the Arbitral Tribunal must decide whether during the examination of one witness other witnesses may be present.

It should be noted, when conducting a hearing, the Arbitral Tribunal should generally keep in mind that each side should be given the opportunity to present its case. This presupposes that all the parties are given the right to take part in the discussions and the production of evidence. It is out of the question that the Arbitral Tribunal should decide the dispute on the basis of circumstances unknown to one or other of the parties. In accordance with the requirement to act fairly and impartially, as laid down in Article 15.2 of the rules, the arbitral tribunal will make sure that the parties have the same amount of time to present their arguments.

E- Closing the proceedings

Article 22 of the ICC rules states that 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 authorized by the Arbitral Tribunal.

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[125] *ibid.* Article 20.3

1- The significance of the closing of the proceedings

These provisions, which were introduced into the rules in 1998, are aimed at accelerating the proceedings. They oblige the arbitrators to declare the proceedings officially closed when the parties have had a reasonable opportunity to put forward their arguments. As already mentioned in connection with Article 15.2, the arbitral tribunal decides when the proceedings have reached the stage at which the parties may be considered to have had a reasonable opportunity to present their cases.[126]

The closing of the proceedings marks the end of the discussions on the points at issue. From then on, the parties may present no further pleadings nor introduce any new evidence. Once the arbitral tribunal has ordered or confirmed the closing of the proceedings in writing, it begins its deliberations leading to the final Award. Normally, any arguments presented by the parties after that moment are inadmissible and cannot be taken into consideration by the arbitral tribunal. If the parties wish to present further pleas, they may do so only if authorized by the Arbitral Tribunal.

2- Date on which the Award is expected to be rendered

When closing the proceedings, the Arbitral Tribunal is required to indicate when it expects to submit its draft Award to the ICC International Court of Arbitration for scrutiny (Article 22.2). it must inform the Secretariat of the Court of this date. The Court checks that the date is within the time limit for rendering the Award laid down in Article 24 of the rules and, if necessary, will extend this time limit. The Arbitral Tribunal must therefore finely plan its deliberations.

The Arbitral Tribunal and the parties must remember that the draft Award must first be submitted to the ICC Court for scrutiny and approval, which may take up to a month.[127]

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[126] Schafer, Verbist and Imhoos, p. 113
[127] Article 27 of the 1998 ICC Rules

F- Conservatory and interim measures

There are times when parties need to seek conservatory and interim measures. This for instance will be the case when damage or other unexpected events have occurred and evidence must immediately be obtained so as not to be irremediably lost. Sometimes, a party may wish to ensure that its contractual partner does not destroy or alter goods which are important to the outcome of the dispute. On other occasions, a party may wish to ensure that its opponent has provided adequate guarantees to cover the reimbursement of its expenses in the event that the Award is in its favor.[128]

According to Article 23 of the Rules the parties are allowed to deny the Arbitral Tribunal jurisdiction in this regard. The parties may also agree to limit the Arbitral Tribunal's power of ordering certain specific conservatory and interim measures.[129]

It is imperative that any national rules containing mandatory provisions restricting the Arbitral Tribunal's jurisdiction with respect to conservatory and interim measures be respected.[130]

The arbitration process under the 1998 rules is in fact compatible with the expediency as a substantial principle of arbitration. After the fulfillment of the provisions and the requirements stated in the said procedure and after the performance of the Terms of Reference, it is necessary for the arbitrators to move for the making of the award, which is the essential object of this route. The finding of the arbitral proceedings will be discussed in the following chapter.

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[128] Howell, p.30

[129] Article 23.1 provides that, ' as soon as the file has been transmitted to it', an arbitral tribunal may, at the request of one parties, order conservatory and interim measures which it deems appropriate, unless the parties have otherwise agreed.'

[130] Also, parties may decide that a given judicial authority has jurisdiction for interim measures when allowed by the procedural law to which it is subject.

CHAPTER 5

The Findings of the Arbitral Proceedings

The Award, as we have seen before, is the final product of a great deal of work both by the arbitrators and by the parties and their legal teams. According to Article 2 of the Rules, the term 'Award', as used in the Rules, refers, *inter alia,* to an interim, partial or final award.

The meaning of a Final Award is clear. It rules conclusively on all the claims. It may also be an award in which the arbitral tribunal declines jurisdiction. A partial Award rules only on part of the claims that have been made. The definition of Interim Award is described as decision on the applicable law and decision confirming the arbitral tribunal's jurisdiction. There is no consistency in the use of the terms in International arbitration practice and national arbitration laws do not define them either. [131]

Arbitral Tribunals usually order conservatory and interim measures in the form of awards if the decision is likely to be enforceable and faces no legal obstacles, notably under the arbitration law in the countries where enforcement might be sought.[132]

Section I: The Arbitral Award

The Award, as an essential finding of the arbitration process, is in fact regulated and synchronized by Article 24 and the follows of the 1998 Rules. The Arbitral Tribunal is required to conduct the proceedings and to make the award according to the following mandatory provisions.

A- The time limit for the Award

Arbitration proceedings should normally take place quickly, as this is what the parties expect. For that reason, the Rules set a time limit within which the Award must be rendered. This time limit is six months from the date on which the last party signs the

[131] Howell, p. 26
[132] Article 23.1 of the 1998 ICC rules

Terms of Reference or, if one of the parties refuses to sign the Terms of Reference, the date on which the Arbitral Tribunal is notified of the ICC International Court of Arbitration's decision to approve the Terms of Reference.[133]

The Arbitral Tribunal must conduct the proceedings and render its final Award within this period of six months. It is not sufficient for it simply to submit its draft Award to the ICC International Court of Arbitration within six months; the final Award approved by the Court must be signed by the Arbitral Tribunal and notified to the parties by the Secretariat before the six months have expired. It is the notification of the final Award that marks the real end of the proceedings.[134]

An extension of the time-limit could be required upon a request from the Arbitral Tribunal or of its own accord, the Court will decide on the extension of a reasonable length. If the Arbitral Tribunal and the parties have agreed on a timetable for the conduct of the arbitration (Article 18.4 of the Rules) spanning more than six months, the Court will take account of this and usually grant an extension longer than the three months by which it normally extends the time limit if the procedural timetable does not contain sufficient details.[135]

B- Making of the Award

Article 25 of the 1998 ICC Rules states that when the Arbitral Tribunal is composed of more than one arbitrator, the Award is given by a majority decision and in the absence of the majority the Award shall be made by the Chairman of the Arbitral Tribunal.

It may occasionally happen that a majority Award is rendered, failing unanimity amongst all the members of the Arbitral Tribunal. This happened on 30 occasions in

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[133] Article 18.3 and Article 24.1 of the 1998 ICC Rules.

[134] In 2001, 341 awards were rendered by the ICC Court; 359, in 2002; 369 in 2003; 345 in 2004 and 325 awards were rendered in 2005.

[135] Schafer, Verbist and Imhoos, p. 118

2003. The arbitrator who disagrees with the majority sometimes submits a dissenting opinion to the other members of the Arbitral Tribunal and to the ICC Court. [136]

The majority must check in this respect that the dissenting opinion is not prejudiced, that it does not unjustifiably question whether the Arbitral Tribunal's deliberations or the arbitration proceedings were conducted correctly, and that it is not likely to provide grounds for setting aside the Award. The Arbitral Tribunal should also check whether or not informing the parties of a dissenting opinion could be deemed to be a violation of the confidentiality of the deliberations under mandatory Rules at the place of arbitration. This is a matter to which the ICC International Court of Arbitration gives consideration when scrutinizing draft awards.[137]

In such circumstances, an Arbitral Tribunal may decide that, for the parties' information, a dissenting opinion should be attached to the Award when it is notified to them. [138]

C- Rules applicable to the making of an ICC Award

When the Arbitral Tribunal comprises three members, its decision is usually unanimous, but may also be made by a majority of the members. If, as very exceptionally happens, there is no majority, the chair of the Arbitral Tribunal will decide alone.[139] The Rules ensure that an Award may be rendered, even if the members of the Arbitral Tribunal each have a different opinion.

According to Article 25.2 of the Rules, the Award must state the reasons upon which it is based. It is not enough for the Arbitral Tribunal to decide the dispute; it must also

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[136] Howell, p. 35

[137] Article 6 of Appendix II to the Rules.

[138] In 2003, no less than 369 awards were approved by the Court. These comprised 234 final awards, 99 partial or interim awards, and 36 awards by consent.
According to the statistics published by the Court, the latter returned awards to arbitral tribunal on 32 occasions in 2003, 34 in 2002, 19 in 2001and 26 in 2000. The above figures reflect both the quality of arbitrators in ICC proceedings and the way in which the Court pertinently exercises its powers.

[139] Article 25.1 of the ICC Rules

give the reasons that have led to its decision. In other words, it must set forth the grounds justifying and explaining the operative part of the Award.

The Rules do not mention whether the reasons must be stated briefly or in detail, leaving it to the arbitral tribunal to decide how they are to be drafted. However, the grounds given should inform the parties of the reasons for the decision, as this will encourage them to accept and comply spontaneously with the award

D- Awards by Consent

If the parties come to a compromise over their dispute after the matter has been referred to the Arbitral Tribunal, they may ask the Arbitral Tribunal to render an award making their arrangement enforceable. Such Award by consent may be rendered even if the Terms of Reference have not yet been signed. The parties are in this case asked to confirm that there is no need for Terms of Reference.

There is no obligation under the Rules to render an award by consent if a case is settled. The Arbitral Tribunal may consider issuing such an award 'if so requested by the parties'. This new wording in the 1998 Rules clarifies that all parties have to request that an award by consent be rendered. This request may be included in the settlement agreement or in separate submissions.[140]

An Award by Consent usually reproduces the operative part of the settlement reached by the parties, thereby obliging them to fulfill the obligations upon which they have agreed. In addition, in accordance with Article 31.3 of the Rules, the Award will decide which party is required to pay the costs of the arbitration or in what proportion they shall be split between the parties.[141]

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[140] Howell, p.37

[141] Article 31.3 states that 'The final Award shall 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'.

E- Date and place for making the Award

The date stated in the Award is deemed to be that on which it was made. As the Rules require awards to be submitted to the ICC Court in draft form for scrutiny and approval before being rendered, the date that appears in the Award will always be later than that on which the draft Award was approved by the Court, even if the Arbitral Tribunal has already terminated its deliberations.

The place where the Award is rendered is the place of the arbitration as fixed or recorded by the Court.[142]

This prevents the Arbitral Tribunal from changing the 'nationality' of the Award by deliberating and signing it in another place. This could easily happen, given the various means of communication (letter, telephone) used when deliberating and the fact that the arbitrators may reside in different places. The 'nationality' of an Award is highly important when it comes to its recognition and enforcement. For instance, the New York Convention applies only to foreign awards, not to domestic awards.[143]

F- Scrutiny of awards by the Court

Article 27 of the 1998 ICC Rules states that before signing any Award, the Arbitral Tribunal shall submit it in draft form to the Court, which 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.

The ICC International Court of Arbitration's scrutiny of the draft Award is unique in the arbitration world and constitutes one of the essential features of ICC arbitration

[142] Under the current version of the Rules, the Court no longer makes a decision officially confirming the place of arbitration when it is chosen by the parties.

[143] Article 25.3 does not require the arbitrators to sign the Award at the place of arbitration, which will usually save them from having to return to the place of arbitration simply for this purpose.

procedure. No Award – be it interim or final award or an award by consent – may be rendered by an Arbitral Tribunal without first being scrutinized and approved by the Court 'as to its form'.[144]

The purpose of this scrutiny is to avoid the risk of an ICC award containing a serious formal defect. The Court checks, amongst other things, whether the award rules on all the claims, includes an operative part and gives the reasons for the Arbitral Tribunal's decisions. The Court will also draw attention to any typographical or computational errors which the Secretariat may point out to it. The Court also checks whether there are any mandatory legal requirements at the place of arbitration that may have been overlooked by the Arbitral Tribunal.[145]

According to Article 27 of the Rules, the Court may draw the Arbitral Tribunal's attention 'to points of substance', which means that the Court may nonetheless comment on the reasons for the decision. For instance, it may draw the Arbitral Tribunal's attention to the fact that an Award contains reasons which contradict each other and could make it partly incomprehensible. The Arbitral Tribunals are free to modify their awards in the light of any substantial comment and they usually appreciate the Court's opinion on their draft awards.[146]

The scrutiny process remains a feature, which the counsel in charge of the matter has the right within the Secretariat of the Court to examine the draft Award before submitting it to the Court. The counsel's daily experience makes him well placed to know what points of form are likely to be raised by the Court. He may immediately draw the Tribunal's attention to any typographical or computational errors. After

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[144] Verbist, Schafer and Imhoos; p. 123.

[145] Article 6 of the Internal Rules of ICA (Appendix II to the Rules) states that when the Court scrutinizes draft awards in accordance with Article 27 of the Rules, it considers, to the extent practicable, the requirements of mandatory law at the place of arbitration.

[146] Article 27 of the ICC Rules states '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'.

conferring with the Secretary General, the counsel will discuss one or more points with the chair of the Arbitral Tribunal or the sole arbitrator by telephone. These informal discussions help to avoid delays, for even if the Court does no more than draw the Arbitral Tribunal's attention to points of substance, it will wait until these points have been clarified before approving the award as to its form.

G- Notification, Deposit and Enforceability of the awards

The Award will be notified only after all the costs of the arbitration mentioned in Article 31.3 of the Rules have been paid to ICC in accordance with Article 30.3 of the Rules, given that an Award may order one of the parties to reimburse the other for its costs, but does not provide ICC or the arbitrators with an enforceable title in respect of the payment of the costs due (ICC administrative expenses and the fees and expenses of the arbitrators). When all the costs have been paid, the Secretariat notifies the Award to the parties in accordance with Article 3.2 of the Rules and the indications given in the Terms of Reference.

It should be noted, that upon a request from the party in order to obtain the compulsory enforcement of awards and also for other reasons, the Secretary General of the ICC International Court of Arbitration issues copies certified as true for submissions to the relevant authorities, especially with applications for enforcement orders in accordance with the Rules of the New York Convention or in compliance with applicable national laws.

Finally, it is also important to mention that the arbitration is distinguished by the fact that the arbitral tribunal's decisions, including the Award deciding the dispute, are not subject to appeal before a judicial authority in order to obtain a different decision. The parties may of course agree otherwise, but this is uncommon and not provided for in the Rules.

The principle of the award enforcement is stated through the Rules of the New York Convention, according to which the recognition and enforcement of an Award may be refused if it has not yet become 'binding' upon parties. Also, the provisions in the New York Convention allow an Award enforcement to be refused or to be set aside if 'public policy' has been violated. The notion of 'public policy' refers to compulsory provisions which have to be respected on account of their overriding legislative importance.[147]

[147] Schafer. Verbist and Imhoos, p. 127

Section II: Correction and Interpretation of the ICC Arbitral Awards

The work of the Arbitral Tribunal ceases when it renders its final Award. From that moment it is usually 'divested of its powers', unless the parties or the arbitrators have provided otherwise. It may happen that the parties disagree on the terms of the decision, which may contain typographical or computational errors, or because the operative part of the Award or the grounds upon which it is based are not clear, or so they claim. The question therefore arises as to whether the parties may turn again to the same Arbitral Tribunal or whether new proceedings must be commenced.

The current rules confirm the practice developed by the ICC International Court of Arbitration to fill this gap. The correction and interpretation of the awards is now expressly subject to a procedure and time limits. However, the provisions contained in the 1998 rules correspond in principle to those found in the UNCITRAL model law (Article 33), the UNCITRAL Arbitration Rules (Articles 35 and 36).[148]

A- The Formal Conditions

Applications based on Article 29 of the Rules must be sent to the Secretariat by the parties within thirty days following the notification of the Award, in as many copies as required under Article 3(1) of the Rules. In the event of failure to comply with the latter obligation, is there any cure? Although this would be desirable, the question remains open, as does that of whether, if a party is not responsible for overrunning the time limit (as, for instance, in a case of *force majeur*), the time limit may be reset. This would be desirable in the event of *force majeur,* but there too it is not possible to affirm with any certainty that the Court would allow this.

An application for correction or interpretation also has financial implications. According to Article 2(7) of Appendix III to the Rules, the Court may fix an advance

[148] *ibid.* p. 130

to cover additional fees and costs of the Arbitral Tribunal and make the transmission of the application to the Arbitral Tribunal subject to prior payment of the entire advance in cash.

B- Correction of the Arbitral Award

Although the ICC Court's scrutiny of draft awards is in principle designed to avoid the need for correction once the Award has been rendered, there are nevertheless times when an Award contains typographical or computational errors or other mistakes that must be corrected before the Award can be carried out.

The initiative may be taken by the parties or the Arbitral Tribunal. Even without being asked, the Arbitral Tribunal may correct any errors it may find in its Award, provided it does so within 30 days following the date of the Award (not 30 days following the date of notification (Article 29.1)).

The correction may also be requested by one of the parties, within 30 days from the date on which the party requesting the correction was notified of the Award. The application must be sent to the Secretariat, which then forwards it to the Arbitral Tribunal. If the30-days time limit has expired, the application is inadmissible.

Once it has received the application for correction and before making a decision, the Arbitral Tribunal begins by inviting the other party to submit its comments. The maximum time allowed for this is 30 days.

The Arbitral Tribunal then has a further period of 30 days, which may be renewed by the Court, to rule on the application. If it decides that the Award should be corrected, it issues an 'addendum' to the Award. Like all awards, the addendum must be scrutinized by the Court in accordance with Article 27 of the Rules. Not until the

addendum has been approved by the Court does it become an integral part of the Award and is notified to the parties by the Secretariat.[149]

An application for the correction of an Award cannot lead to a change in the Arbitral Tribunal's decision. It may only concern the correction of typographical or computational errors. A correction could, for instance, be occasioned by the fact that a party was ordered to pay 100 000 dollars in the operative part of the Award, whereas this figure is 1 000 000 dollars in the presentation of the grounds leading to the decision.[150]

C- Interpretation of arbitral Award

Since the 1998, the Rules also allow for the interpretation of an Award. Although the procedure is basically the same as for corrections, a distinction should be made between the interpretation and the correction of an Award. The essential difference lies in the fact that the arbitral tribunal cannot interpret an Award unless requested to do so by the parties

The Rules make the interpretation of awards subject to very strict conditions, so as to prevent parties from resisting the enforcement of an Award by opening a discussion on its interpretation. The Arbitral Tribunal may of course dismiss the application for interpretation if it considers that the Award is clear and does not need interpretation. It will naturally do so if it comes to the conclusion that the application is an improper attempt to reopen discussions. The Arbitral Tribunal cannot change its decision once it has ruled on the dispute, which means that an application for interpretation cannot be intended to alter the decision.[151]

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[149] Schafer, Verbist, Imhoos, p. 132

[150] Brooks W. Daly, Correction and interpretation of Arbitral Awards under the ICC Rules of Arbitration, ICC International Court of arbitration Bulletin, vol.13 – Spring 2002, p. 63

[151] Schafer, Verbist and Imhoos, p. 135

Once the time limit given to the other party to submit its comments has expired, the Arbitral Tribunal has 30 days in which to rule on the application for interpretation. However, this time limit may be extended by the Court. If the Arbitral Tribunal finds that the Award needs to be interpreted, it will do so in an 'addendum' to the Award. As in the case of corrections, the Arbitral Tribunal must submit its draft addendum to the Court for scrutiny and approval.[152]

D- Practical issues

The Rules provide for correction of clerical, computational, or typographical errors, or any errors of similar nature. Requests for correction, as opposed to interpretation, might be expected to be the most straightforward type for Article 29 application, and some, such as the correction on the Tribunal's Addendum in case 10386,[153] which provides for the replacement for a period with a comma in order clearly to separate hundreds and thousands and avoid any confusion with a decimal point in English numerical notation.

There are also examples of easily corrected errors in Article 29 applications submitted by parties. One of these is case 9391,[154] where the Tribunal decided in its final Award that each party should bear 50% of the costs of Arbitration, but the amount the respondents were ordered to pay in this respect was equal to 100% of such costs. The respondents submitted in Article 29 application and the Tribunal, realizing its error, issued an Addendum reducing the respondents' payment by half.

A request for interpretation is properly made when the terms of an Award are so vague or confusing that a party has a genuine doubt about how the award should be executed. It may nevertheless be tempting for a losing party to ask for interpretation even when faced with a clear Award. A hypothetical losing respondent may hope that

[152] Article 27 of the 1998 ICC Rules.
[153] See Appendix IV
[154] See Appendix V

in reviewing its Article 29 application, wherein such respondent reargues the merits of its case, the Tribunal may realize that the respondent's arguments were in fact more forceful than those of the claimant and therefore change the Award. Unfortunately for the respondent, Article 29 was not meant to empower tribunals to change the substance of their awards. The hypothetical respondent's application would therefore be rejected in a decision from the Tribunal.[155]

ICC case 8810[156] provides an example of a request for interpretation that the Tribunal considered beyond the scope of Article 29. The respondent was in fact asking for much more than interpretation when requesting that the Tribunal change one of its rulings on the basis of new 'full adversarial proceedings' on the subject. At issue was the Tribunal's decision to fill a 'contractual gap' in the parties' licensing agreement by reference to the reasonable behavior of bona fide competent professionals. The respondent considered that its pleadings had not foreseen this eventuality and that it should be permitted to make further submissions on the meaning of 'reasonable behavior'. In its decision refusing the respondent's request, the Tribunal explained first that 'interpretation should only be granted in case there is a need for clarification of the Award or a need to improve such a wording which would enable the parties to fully understand what the Arbitral Tribunal meant in its decision.'[157]

E- Reasoning

All ICC awards must provide reasoning for their conclusions[158] and the same rule applies to Article 29 Addenda[159]. If brief decisions have not displeased the ICC Court, arbitrators are expected to state why an application is beyond the purview of Article 29, and not just affirm that it is. Likewise with Addenda, it is not sufficient simply to

[155] Daly, p.64
[156] See Appendix VI
[157] Daly, p. 66
[158] Article 25.2 provides that an Award 'shall state the reasons upon which it is based.
[159] Article 29.3 provides that the provisions of Article 25 shall also apply to Addenda.

set forth the amended or additional text of the Award; the reasons for the correction or interpretation should be stated.

The Court has on several occasions sent draft decisions and addenda back to tribunals with instructions to include a reasoned basis for each finding.[160] In some cases, the first draft addendum submitted for the Court's scrutiny containing only the amended text of the Award is insufficient and should be returned to the Tribunal whose final text should contain reasoning for each amendment. The Court practices have also shown that arbitrators need not to exaggerate the complexity of the reasoning required when faced with what they consider to be a meritless application. A sample of Arbitrators' reasoning, issuing an Addendum correcting typographical errors, is stated simply as follows 'I have decided against interpretation because I consider that my conclusions are sufficiently reasoned and that the Award is clear on its face.'

F- Conclusion

Article 29 has now been in force for over seven years, during which time its provision for correction has functioned well, offering a clear procedure for repairing small errors. It seems that a few parties could, innocently or not, present appeals on the merits of Article 29 applications, but the examples of the misuse of Article 29 are heavily outnumbered by the occasions when parties have used it as intended. Ultimately, the greatest responsibility for ensuring that Article 29 is not a source of complication and delay rests with arbitrators, who should dispose quickly of frivolous requests and prevent endless exchanges of comments with parties resulting in an unnecessary prolongation of Article 29 proceedings.

[160] The Notes states: 'An Addendum or a Decision shall contain the reasons upon which it is based...'

As we have seen before, from the practical summary of the ICC International Court of Arbitration proceedings, starting from the request for arbitration till the making of the Arbitral Award, it is useful in the next chapter to draw some useful cases studies which deal with the large scale of the ICC Rules of Arbitration.

CHAPTER 6

Cases Studies

In this chapter two practical ICC cases have been selected to demonstrate the wide application of the ICC Rules, and to highlight some definitive obstacles where parties to arbitration are seriously faced with some unpredictable technical procedure as the efficiency or inefficiency of the national courts in taking some substantial decision related to the arbitration proceedings, and other issues which are mentioned below.

Section I: UK Company *vs.* TCI and Chinese Companies

The following case shows the different factual risks facing the parties during an international arbitration process when those parties are of different nationalities and when their assets are not defined and are not easy to seize in order to realize and execute the arbitral Award. The following questions show the background of the case: Which assets are likely to be available if an arbitration claim is successful? Where would a party have to go to get execution of its arbitral award if its contractual counterparties refuse to honor the award voluntarily? Which steps and proceedings should be followed under the ICC Rules and during the arbitration process in favor to enforce lately the Arbitral Award? Which procedure should be followed for the hearing of a witness during an arbitration process under the ICC Rules?

A- The facts

The ICC Arbitral Tribunal was composed of three distinguished arbitrators, and the seat of the arbitration was London (according to Article 14 of the ICC Rules). The language of the arbitration was English (Article 16) and the English law was the governing substantive law (Article 17).

The ICC award was made jointly and severally against two Respondents, a Chinese company and a Turkish Caicos Island company ("TCI") in favor of the Claimant, an English company.

Since the commencement of the arbitration, the Claimant has participated in numerous court proceedings in China, England and the TCI in connection with the arbitration. The following is a chronological description of successes in obtaining relief in England and the TCI in support of the arbitration and defeating a challenge to the award in England, and difficulties in enforcing the award in China and the TCI.

B- Injunction in the TCI

Over a year after the arbitration was commenced, the Claimant sought and obtained a freezing order (an injunction) from the TCI Supreme Court in support of the arbitration. The TCI court ordered the Respondent TCI company in the arbitration not to dispose of its assets up to a value of US$10 million, which was the ultimate value of the Arbitral Award.

The application to the TCI Court was made pursuant to Article 23(2) of the ICC Rules, which provides:

"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 of such measures or for the implementation of any such measures ordered by an Arbitral Tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the Arbitral Tribunal. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat..."

The procedure consisted of commencing an action and filing an application before the TCI Supreme Court and attending an *ex parte* hearing in chambers before the Supreme Court judge, of which there was only one. The order was granted the same day at the *ex parte* hearing, was notified to the TCI company, and was never challenged, varied or discharged. The order was also notified to the ICC and to the Arbitral Tribunal in accordance with Article 23(2) of the ICC Rules.

C- Witness Summons in England

Also during the arbitration, the Claimant obtained a summons from the English court compelling a witness resident in England to testify in person during the hearing on the merits in the arbitration, which was held in London. This particular witness was a former employee of one of the Respondents.

The Claimant first wrote to the Arbitral Tribunal requesting that they summon the witness to appear at the hearing.

This request was based upon the Terms of Reference in the arbitration, which expressly provided: ***"Upon request of either party, the Arbitral Tribunal may summon witnesses, either to appear at the hearings or to present evidence in such form as the Tribunal deems appropriate".***

The Arbitral Tribunal asked for an indication as to (a) whether the witness had been asked to appear voluntarily and his response if any, (b) the specific nature and relevance of his expected testimony, (c) the legal procedure that would be used to compel the witness to testify and the form of summons sought from the Arbitral Tribunal, and (d) whether the witness would be offered remuneration and if so the amount.

With respect to the legal procedure and the form of summons, the Claimant relied on Section 43 of the English *Arbitration Act 1996* (the "English Arbitration Act"), which

provides: "***43.(1) A party to arbitral proceedings may use the same court procedures as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence (2) This may only be done with the permission of the tribunal or the agreement of the other parties. (3) The court procedures may only be used if _ a) the witness is in the United Kingdom, and b) the arbitral proceedings are being conducted in England and Wales or, as the case may be, Northern Ireland".***

The Claimant explained that the form of the summons sought would be in accordance with the standard form prescribed by the CPR (or Civil Procedure Rules) to secure the attendance of witnesses and the production of documents or other evidence. As to remuneration, the Claimant also explained that he had offered to pay the witness a reasonable *per diem* rate for his time and to reimburse him for all reasonable expenses and that the witness had agreed with this.

The Arbitral Tribunal granted the Claimant request for a witness summons and provided an authorization letter in the following form:

"Pursuant to Claimant's request in the above cited arbitration conducted under the Rules of the International Chamber of Commerce, and in accordance with Section 43 of the Arbitration Act 1996 (England &Wales), the Arbitral Tribunal grants permission to summon [the witness] (residing at [address])as a witness at hearings scheduled to be held in London from [date]. Claimant may use the court proceedings authorized by Section 43 of said Arbitration Act".

A witness summons was obtained from the English court and sent to the witness. Following this, the Claimant provided a summary of the expected testimony to the

Arbitral Tribunal and the Respondents, and the witness appeared and testified at the arbitration hearing on the merits of the award.

C- Challenge in England

Shortly after the arbitral award was rendered, the Respondent TCI company commenced a challenge in the English Commercial Court, London being the seat of the arbitration. The Respondent TCI company sought to set aside the award under Sections 67(1) and 68(1) of the English Arbitration Act on the basis that the Arbitral Tribunal lacked substantive jurisdiction and that there was a serious procedural irregularity.

The Court dismissed the challenge on both grounds. With respect to the Arbitral Tribunal's substantive jurisdiction, the Court refused to admit the amended case on the basis of the length of delay and the fact that the allegations were considered on their face to be inherently improbable. With respect to the allegation of serious procedural irregularity, the Court found that there was a procedural irregularity caused by the Arbitral Tribunal ***"failing formally to record in writing the decisions which they had made during [a] telephone conference on 9 February to dispense with a further hearing ... and then failing to notify all parties to the Arbitration of that decision,"*** but this was not a serious procedural irregularity, nor one that caused substantial injustice to the TCI company. The court awarded indemnity costs against the TCI company and refused to give the TCI company permission to appeal its decision to the English Court of Appeal.

D- Enforcement in the TCI

Also, shortly after the arbitral award was made, the Claimant sought and obtained an *ex parte* order from the TCI Supreme Court granting him leave to enforce the arbitral award against the Respondent TCI company.

The TCI is not a New York Convention jurisdiction, and there is little precedent in the TCI for seeking the recognition and enforcement of a foreign arbitral award.

The enforcement proceeding was commenced by way of an action under the TCI Arbitration Ordinance and the filing of an application and affidavit to the only TCI Supreme Court judge. An *ex parte* hearing was held in chambers before the judge, who made an order granting the Claimant leave to enforce the award subject to the Respondent TCI company having two weeks to apply to set aside the order. The TCI company applied to set aside the order within the two-week period, and the enforcement order was suspended by its terms until final resolution of the application for setting aside.

The TCI company followed this with an application to recuse the judge on the basis of a statement the judge had made in a separate TCI court proceeding. The judge dismissed both the set aside application and the recusal application, thus making the enforcement order effective.

However, the TCI company appealed these decisions to the TCI Court of Appeal. At the appeal hearing, the Court of Appeal ruled that the judge should have recused himself and the TCI authorities appointed the TCI Supreme Court Registrar as a judge for the purposes of these proceedings and other related proceedings.

Then the Claimant applied successfully to the Registrar sitting as a judge for the appointment of a receiver over the assets of the TCI company on the basis of the Claimant effective enforcement order.

However, when the next session of the Court of Appeal took place, the Court of Appeal declared by a decision that the enforcement order still stood because it had been made before the judge's statement leading to his recusal and those proceedings took one year after the original enforcement order had been granted.

In the meantime, the Registrar sitting as a judge had granted an application to wind up the TCI company and had appointed a liquidator and the Claimant filed a claim in the liquidation on its behalf, but there were no longer any assets against which this claim could be realized. A global settlement was later reached, which is referred to below.

E- Enforcement in China

Shortly after commencing enforcement proceedings in the TCI, the Claimant also commenced enforcement proceedings in China, this time against the Respondent Chinese company (which was foreign owned by the Respondent TCI company and others).

While China is a New York Convention jurisdiction and has arbitration legislation in place, its courts have little experience in enforcing foreign arbitral awards.

Enforcement was commenced by way of action in the First Intermediate Court in Shanghai, the Court with jurisdiction over the Chinese company, seeking recognition and enforcement of the award. Although the Claimant only wanted to enforce the award in China against the Chinese company, the Court required the Claimant to make both the Chinese and TCI companies parties to the action. The Court also required that notice of the action be served on both companies and it was impossible to do so with the TCI company. The Court was responsible for this notice and served the notice to the last known Chinese addresses of each company.

At the first hearing, the Chinese company appeared and the TCI company did not appear, and the Court decided that it could not proceed with the case until the TCI company was properly served with notice of the proceedings. Thus, the court fixed the next hearing for eight months later.

Shortly thereafter, the TCI company was put into liquidation in the TCI, and a liquidator was appointed (as described above).The Claimant were successful in

persuading the Shanghai court to accept service of the relevant documents on an agent of the TCI liquidator in China. However, the TCI liquidator refused to appoint an agent in China until the question of his fees was resolved.

Despite the liquidator's refusal, the Claimant succeeded in persuading the Shanghai court to accept that satisfactory service had been made and notice had thus been given to the TCI company of the proceedings in China. The Shanghai court then made an order recognizing the award. This was almost two years after the recognition and enforcement proceeding had been commenced. At about the same time, the parties to the dispute reached a global settlement, and the enforcement of the award in China was stayed.

F- Findings

The arbitration-related litigation described above demonstrates the importance of the jurisdictions in which a party's contractual counter parties are incorporated and their assets are located, as well as the importance of the jurisdiction of the seat of the arbitration.

Before commencing an arbitration and indeed before drafting an arbitration agreement, it is important to consider what assets are likely to be available if an arbitration claim is successful, and where those assets are located, *i.e.*, where a party would have to go to realize upon its arbitral award if its contractual counterparties refuse to honor the award voluntarily.

It is also important to consider the arbitration law in these jurisdictions, as well as in the jurisdictions where any counterparties are incorporated at the seat of the arbitration. This allows a party to know in advance for each jurisdiction (1) what interim relief from the courts might be available in support of the arbitration, (2) how

a challenge to the award would normally be dealt with, and (3) how recognition and enforcement of the award would normally be dealt with.

One of the factors that should be taken into account in this assessment is the efficiency or inefficiency of the relevant national courts. In the case described in this article, there were examples of both efficiency and inefficiency on the part of the national courts (sometimes examples of both in the same jurisdiction).

However, the arbitration referred to in this article is a good example of a case where the cost of the arbitration continued well after the arbitral award was made, despite the award being procedurally and substantively strong and made by three distinguished arbitrators.

All the above highlights the importance of evaluating the post arbitration risks before commencing arbitration, as opposed to during the arbitration or, even worse, after an arbitral award has been made.

Section II: State of Israel vs. NIOC Company

On 1 February 2005, the French Supreme Court (Cour de Cassation) rendered an important decision, which confirms the Court's general stance in favor of arbitration. The Court affirmed the French courts' right to appoint an arbitrator on behalf of one of the parties where not doing so would have effectively blocked the other party from exercising its right to arbitration, notwithstanding the weak link of the arbitration process with France. This decision has improved the role of the national Court in promoting the effectiveness of the international arbitration proceedings. The legal questions are expressed as follows:

Does a national Court have jurisdiction to take a decision on behalf of a party to an arbitration agreement and under which circumstances?

A- The facts

The facts of the case were as follows. In 1968 the State of Israel and the National Iranian Oil Company (NIOC) signed a participation agreement relating to oil transactions. The arbitration clause contained in the agreement provided that if the two arbitrators designated by the parties could not agree on the choice of a third arbitrator, the President of the International Chamber of Commerce (ICC) would be asked to proceed with the nomination of the chairman.

A dispute arose in 1994 and the State of Israel refused to nominate its arbitrator. The NIOC made a request under Article 1493, paragraph 2, of the French Code of Civil Procedure (NCPC) before the President of the Paris Court of First Instance (Tribunal de Grande Instance) for the designation of the arbitrator on behalf of the State of Israel.

Article 1493 of the NCPC provides as follows:

"If, with respect to arbitrations which are taking place in France or which have been subjected by the parties to French procedural law, there is a difficulty in constituting the arbitral tribunal, the party that acts first may, in the absence of a contrary provision, seize the President of the Court of First Instance of Paris in accordance with the provisions of Article 1457".

B- The Court Decision

The State of Israel contested the jurisdiction of the French judge. The place of arbitration was not France and French law did not apply. The only nexus with France was that the President of the ICC, which is located in Paris, was named in the arbitration agreement as the appointing authority for the chairman of the arbitral tribunal if the two party-appointed arbitrators could not agree on a chairman. The Paris Court of First Instance agreed with the State of Israel and found that it did not have jurisdiction to appoint an arbitrator on behalf of the State of Israel.

The Paris Court of Appeal disagreed. In a first decision, it fixed the State of Israel a period of time to name its arbitrator, and, when Israel failed to do so, it nominated an arbitrator on Israel's behalf in a second decision.

The French Supreme Court agreed with the Paris Court of Appeal:

"l'impossibilité pour une partie d'accéder au juge, fût-il arbitral, chargé de statuer sur sa prétention, à l'exclusion de toute juridiction étatique, et d'exercer ainsi un droit qui relève de l'ordre public international consacré par les principes de l'arbitrage international et l'article 6. 1, de la Convention européenne des droits de l'homme, constitue un déni de justice qui fonde la compé-tence internationale du président du tribunal de grande instance de Paris, dans la mission d'assistance et de coopération du juge étatique à la constitution d'un tribunal arbitral, dès lors qu'il existe un rattachement avec la France;"

The impossibility for a party to access a judge, even if he is an arbitrator, in charge of hearing its claim, to the exclusion of all national jurisdictions, and thus to exercise a right which is part of the international public order protected by the principles of international arbitration and Article 6-1 of the European Convention on Human Rights, constitutes a denial of justice which justifies the international jurisdiction of the President of the Court of First Instance of Paris, acting in its mission as a national judge to assist and cooperate in the creation of an arbitral tribunal, when there is a link with France.

The French Supreme Court's decision was based on two-step reasoning:

First, the Court found that it was impossible for NIOC to access the Israeli or Iranian courts for the nomination of an arbitrator on behalf of the State of Israel. Under Israeli law, Iran is considered as an enemy of Israel and as such forbidden to be represented by counsel before Israeli courts. In addition, the jurisdiction of Iranian courts is not recognized by Israel.

Second, the Court found that the link between the dispute and France (the parties' designation of the President of the ICC as appointing authority with respect to the chairman of the arbitral tribunal), even though weak, was sufficient to justify the international competence of the French judge in this case, where it constituted the sole link on which NIOC could usefully draw to realize the parties' common intention to have recourse to arbitration.

While the French Supreme Court took a pragmatic approach and chose not to leave NIOC without a remedy, it is questionable whether the parties' designation of the President of the ICC as appointing authority should be held to constitute a link with France. The ICC is supposed to be a "nation-less" institution and its location in France

is considered to be merely *fortuitous.* This is indeed the cornerstone of international arbitration, a mechanism of dispute resolution that is often favored for its (at least theoretical) absence of a link with a particular nation.

C- Findings

The rule to be drawn from the NIOC case is that, notwithstanding the absence of a provision to this effect in French law, the French courts have exceptionally asserted their "international jurisdiction" to appoint an arbitrator on behalf of the party whose request has been refused at the request of the other party in an arbitration that is not taking place in France or subject to French procedural law, when two conditions are fulfilled: **(i)** in the absence of such "international jurisdiction" there would be a "denial of justice"; and **(ii)** the arbitration has some link with France, however weak that link may be.

Finally, and separately, of note is the French Supreme Court's express holding that the right of access to a judge is part of the international public order and protected by Article 6-1 of the European Convention on Human Rights, even if that judge is an arbitrator.

CONCLUSION

International transactions offer both great rewards and great risks. Often, parties focus only on the possibilities of reward and do not seriously consider the risks inherent in dealing with foreign partners, cultures, customs, laws, and courts. For this reason, if the parties to an international commercial contract do not take into consideration the substantial legal issues concerning their contractual relation, they will certainly be risking significant financial problems arising from the misinterpretation of the aforesaid contract. Such issues bring new challenges calling for appropriate solutions. Hence, it is suggested that careful evaluation and negotiation of dispute resolution procedures should conducted by the parties to ensure a satisfactory deal. Therefore, the disputant parties are responsible for the selection of any one of the international arbitration institution to favor the chances of an appropriate Award within a reasonable delay, at reasonable cost and by confidential and neutral means. No doubt, ICC International Court of Arbitration can respond to such matters due to its capacity to adapt and to evolve according to the increase of the number of the parties, the variety of their claims and the issues in dispute.

On these grounds, the ICC Arbitral Award – Rules and Procedures – has been selected as a practical and legal subject to answer all the related issues concerning the parties who have agreed to resolve their contractual dispute before the ICC as an arbitral body. The arbitration process, administered by the ICC International Court of Arbitration and its standard clause has been described at length throughout this context. Consequently, the request for arbitration, the constitution of the arbitral tribunal, the realization of the Terms of Reference, till the making of the Arbitral Award, which forms the main ICC Rules statement, have been discussed thoroughly.

The different advantages of the arbitration specifically under the 1998 ICC Rules have also been discussed. Nonetheless, the ICC as a World Business Organization and its role as the outstanding organization in the field of international dispute resolution have taken up the first part of the present framework. Accordingly, it has been shown the function of the ICC by taking the international initiative to modify and update perspectively, throughout a century, its arbitration Rules and by supporting and retaining the world business recommendations and parties' financial perspectives.

Indeed, this paper has shown that arbitration under the ICC Rules remain a consensual process whereby the parties to a dispute have agreed to accept as final the judgment of a third person or persons in settling the matter in question. An important element of the ICC arbitration process depends on the consent and on the voluntary agreement of the disputants, and the willingness of the arbitrator(s) to serve. As has been discussed above, the disputing parties shall agree in advance of any actual dispute to submit their differences to ICC arbitration or they will simply agree to arbitrate an existing problem. They select the arbitral body, appoint the arbitrators, the language, the applicable law and the place of arbitration and ensure respect for the rules by which their disagreement will be settled.

The Arbitral Award or settlement decided upon by the arbitrator obtains its binding force from the contract or agreement of the parties to arbitrate, and does not require the coercive legal apparatus of the State to be respected or enforced. The parties are asked to abide by their arbitration agreement, moving to the arbitration process; they will be also asked to abide the Arbitral Award. However, when an award is not carried out spontaneously, the successful party must then seek to enforce it through proceedings in a national court where international conventions or treaties will be relevant. Therefore, any award rendered and binding in a New York Convention

country can, under the Convention, be enforced in any other New York Convention signatory state. It can be said that parties to arbitration are required to conclude a commune deal package between them in first stage, with the ICC International Court of Arbitration through a second stage.

This work is not intended as a criticism of any particular set of the ICC dispute resolution methods. It is an invitation for a description and a discussion, not only now, but on an on-going basis, of the advantages of the ICC as an arbitral body. Many advantages can be obtained from this prominent international institution, due to the availability of its pre-established rules and procedures, the administrative assistance by the Secretariat, the physical facilities and support services, and other advantage of proven value.

This study has not only shown the favorable advantages rewards that the disputant parties can acquire through institutional arbitration, but has also demonstrated the unsatisfactory results when those parties do not examine carefully their arbitration agreement in advance to avoid any kind of unpredictable issues, as it has been shown in the previous cases studies. The importance of evaluating the post-arbitration risks, before commencing arbitration, remains outstanding. Lack of precaution will mark a complex deficit for the party's dispute resolution method. Parties will be endangered to face an extra-charge arbitration expenses. The institution administrative fees are certainly high in disputes of large amount, especially where these fees are related to the amount in dispute. The disputants shall take into consideration the international institution's bureaucracy that may lead to delays and added costs. To not take into consideration the location of the party's assets, favorable to the holder of the successful award, will be also an extra added charge for the latter. The assessment of the law, the jurisdiction where any counterparties are incorporated and the seat of

arbitration shall be part of the information to be considered by the signatory to an arbitration agreement.

As Serge Lazareff has said, knowledge of arbitration has become necessary not only for professional lawyers but also for all those engaged in world business. The arbitration process could be compared to an effective "judiciary culture", to be considered as the very fine "tools" which are available for the benefit of all parties engaged in the arena of international business and trade. However, this can be said also of the ICC 1998 Rules of Arbitration discussed above, which have been considered by some practitioners as evolutionary rather than revolutionary. They are the challenge and commitment, and indeed the *nobile officium* during all of the years to come will be to use them, whether as arbitrators or as lawyers, in a very professional manner.

APPENDIX I

RULES OF ARBITRATION OF THE INTERNATIONAL CHAMBER OF COMMERCE

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 World 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 the Rules of Arbitration of the International Chamber of Commerce (the "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 is 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 is 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.
(ii) "Claimant" includes one or more claimants and
"Respondent" includes one or more respondents.
(iii) "Award" includes, *inter alia*, an interim, partial or final Award.

Article 3: Written Notifications or Communications; Time Limits

1-All pleadings and other 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 last 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. 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 made on the day it was received by the party itself or by its representative, or would have 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 made 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 made, 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 made, the period of time shall expire at the end of the first following business day.

COMMENCING THE ARBITRATION

Article 4: 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 on which 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) the name in full, description and address of each of the parties;
b) a description of the nature and circumstances of the dispute giving rise to the claim(s);
c) a statement of the relief sought, including, to the extent possible, an indication of any amount(s) claimed;
d) 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 on administrative expenses required by Appendix III ("Arbitration Costs and Fees") 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 to the Request once the Secretariat has sufficient copies of the Request 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 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:
a) its name in full, description and address;
b) its comments as to the nature and circumstances of the dispute giving rise to the claim(s);
c) its response to the relief sought;
d) 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
e) any comments as to the place of arbitration, the applicable rules of law and the language of the arbitration.

2-The Secretariat may grant the Respondent an extension of the 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 to do so, the Court shall proceed in accordance with these Rules.

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

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

5-Any counterclaim(s) made by the Respondent shall be filed with its Answer and shall provide:
a) a description of the nature and circumstances of the dispute giving rise to the counterclaim(s); and
b) a statement of the relief sought, including, to the extent possible, an indication of any amount(s) counterclaimed.

6-The Claimant shall file a reply to any counterclaim within 30 days from the date of receipt of the counterclaim(s) 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
1-Where the parties have agreed to submit to arbitration under the Rules, they shall be deemed 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.

2-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 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.

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.

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 their claims and pleas even though the contract itself may be non-existent or null and void.

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 a 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 have not provided otherwise, the Arbitral Tribunal shall be constituted in accordance with the provisions of Articles 8, 9 and 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 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 the Answer, respectively, one arbitrator for confirmation. 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 nomination 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 9: Appointment and Confirmation of the Arbitrators
1-In confirming or appointing arbitrators, the Court shall consider the prospective arbitrator's nationality, residence and other relationships with the countries of which the parties or the other arbitrators are nationals and the prospective arbitrator's 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 9(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 has not given 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 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, if one exists, of the country of which such person is a national.

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 it regards as suitable to act as arbitrator, applying Article 9 when it considers this 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 necessary, 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 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.

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 advance on costs requested by the Secretariat at this stage has 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 it 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, by any rules which the parties or, failing them, the Arbitral Tribunal may settle on, 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:
a) the full names and descriptions of the parties;
b) the addresses 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*.

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2-The Terms of Reference shall be signed by the parties and the Arbitral Tribunal. Within two months of the date on which 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 have been signed in accordance with Article 18(2) or 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 shall 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 counterclaims which fall outside the limits of the Terms of Reference unless it has been authorized to do so by the Arbitral Tribunal, which shall consider the nature of such new claims or counterclaims, the stage of the arbitration and other relevant circumstances.

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 studying the written submissions of the parties and 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 authorized 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 authorized by the Arbitral Tribunal.

2- When the Arbitral Tribunal has declared the proceedings 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 it, the Arbitral Tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The Arbitral Tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of 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 or a waiver of the arbitration agreement and shall not affect the relevant powers reserved 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.

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 by the parties of the Terms of Reference or, in the case of application of Article 18(3), 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 if so requested by the parties and if 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

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1-Once an Award has been made, the Secretariat 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 Secretariat.

5-The Arbitral Tribunal and the Secretariat shall assist 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 errors 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, in a number of copies as stated in Article 3(1). After transmittal of the application to the Arbitral Tribunal, the latter 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*.

COSTS

Article 30: Advance to Cover the Costs of the Arbitration

1-After 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 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 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.

Article 31: Decision as to the Costs of the Arbitration

1-The costs of the arbitration shall include the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court, in accordance with the scale in force at the time of the commencement of the arbitral proceedings, 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.

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 proportion they shall be borne by the parties.

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, on its own initiative, may extend any time limit which has been modified pursuant to Article 32(1) 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 provision of these Rules, or of 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.

APPENDIX II

STATUTES OF THE INTERNATIONAL COURT OF ARBITRATION OF THE ICC

Article 1: Function
1-The function of the International Court of Arbitration of the International Chamber of Commerce (the "Court") is to ensure the application of the Rules of Arbitration of the International Chamber of Commerce, and it has all the necessary powers for that purpose.

2-As an autonomous body, it carries out these functions in complete independence from the ICC and its organs.

3-Its members are independent from the ICC National Committees.

Article 2: Composition of the Court
The Court shall consist of a Chairman, Vice-Chairmen, and members and alternate members (collectively designated as members). In its work it is assisted by its Secretariat (Secretariat of the Court).

Article 3: Appointment
1-The Chairman is elected by the ICC World Council upon the recommendation of the Executive Board of the ICC.

2-The ICC World Council appoints the Vice-Chairmen of the Court from among the members of the Court or otherwise.

3-Its members are appointed by the ICC World Council on the proposal of National Committees, one member for each Committee.

4-On the proposal of the Chairman of the Court, the World Council may appoint alternate members.

5-The term of office of all members is three years. If a member is no longer in a position to exercise his functions, his successor is appointed by the World Council for the remainder of the term.

Article 4: Plenary Session of the Court
The Plenary Sessions of the Court are presided over by the Chairman or, in his absence, by one of the Vice-Chairmen designated by him. The deliberations shall be valid when at least six members are present. Decisions are taken by a majority vote, the Chairman having a casting vote in the event of a tie.

Article 5: Committees
The Court may set up one or more Committees and establish the functions and organization of such Committees.

Article 6: Confidentiality
The work of the Court is of a confidential nature which must be respected by everyone who participates in that work in whatever capacity. The Court lays down the Rules regarding the persons who can attend the meetings of the Court and its Committees and who are entitled to have access to the materials submitted to the Court and its Secretariat.

Article 7: Modification of the Rules of Arbitration
Any proposal of the Court for a modification of the Rules is laid before the Commission on Arbitration before submission to the Executive Board and the World Council of the ICC for approval.

APPENDIX III

INTERNAL RULES OF THE INTERNATIONAL COURT OF ARBITRATION OF THE ICC

Article 1: Confidential Character of the Work of the International Court of Arbitration

1-The sessions of the Court, whether plenary or those of a Committee of the Court, are open only to its members and to the Secretariat.

2-However, in exceptional circumstances, the Chairman of the Court may invite other persons to attend. Such persons must respect the confidential nature of the work of the Court.

3-The documents submitted to the Court, or drawn up by it in the course of its proceedings, are communicated only to the members of the Court and to the Secretariat and to persons authorized by the Chairman to attend Court sessions.

4-The Chairman or the Secretary General of the Court may authorize researchers undertaking work of a scientific nature on international trade law to acquaint themselves with Awards and other documents of general interest, with the exception of memoranda, notes, statements and documents remitted by the parties within the framework of arbitration proceedings.

5-Such authorization shall not be given unless the beneficiary has undertaken to respect the confidential character of the documents made available and to refrain from any publication in their respect without having previously submitted the text for approval to the Secretary General of the Court.

6-The Secretariat will in each case submitted to arbitration under the Rules retain in the archives of the Court all Awards, Terms of Reference and decisions of the Court, as well as copies of the pertinent correspondence of the Secretariat.

7-Any documents, communications or correspondence submitted by the parties or the arbitrators may be destroyed unless a party or an arbitrator requests in writing within a period fixed by the Secretariat the return of such documents. All related costs and expenses for the return of those documents shall be paid by such party or arbitrator.

Article 2: Participation of Members of the International Court of Arbitration in ICC Arbitration

1-The Chairman and the members of the Secretariat of the Court may not act as arbitrators or as counsel in cases submitted to ICC arbitration.

2-The Court shall not appoint Vice-Chairmen or members of the Court as arbitrators. They may, however, be proposed for such duties by one or more of the parties, or pursuant to any other procedure agreed upon by the parties, subject to confirmation.

3-When the Chairman, a Vice-Chairman or a member of the Court or of the Secretariat is involved in any capacity whatsoever in proceedings pending before the Court, such person must inform the Secretary General of the Court upon becoming aware of such involvement.

4-Such person must refrain from participating in the discussions or in the decisions of the Court concerning the proceedings and must be absent from the courtroom whenever the matter is considered.

5-Such person will not receive any material documentation or information pertaining to such proceedings.

Article 3: Relations between the Members of the Court and the ICC National Committees

1-By virtue of their capacity, the members of the Court are independent of the ICC National Committees which proposed them for appointment by the ICC World Council.

2-Furthermore, they must regard as confidential, vis-à-vis the said National Committees, any information concerning individual cases with which they have become acquainted in their capacity as

members of the Court, except when they have been requested by the Chairman of the Court or by its Secretary General to communicate specific information to their respective National Committees.

Article 4: Committee of the Court
1-In accordance with the provisions of Article 1(4) of the Rules and Article 5 of its Statutes (Appendix I), the Court hereby establishes a Committee of the Court.

2-The members of the Committee consist of a Chairman and at least two other members. The Chairman of the Court acts as the Chairman of the Committee. If absent, the Chairman may designate a Vice-Chairman of the Court or, in exceptional circumstances, another member of the Court as Chairman of the Committee.

3-The other two members of the Committee are appointed by the Court from among the Vice-Chairmen or the other members of the Court. At each Plenary Session the Court appoints the members who are to attend the meetings of the Committee to be held before the next Plenary Session.

4-The Committee meets when convened by its Chairman. Two members constitute a quorum.

5-(a) The Court shall determine the decisions that may be taken by the Committee.
(b) The decisions of the Committee are taken unanimously.
(c) When the Committee cannot reach a decision or deems it preferable to abstain, it transfers the case to the next Plenary Session, making any suggestions it deems appropriate.
(d) The Committee's decisions are brought to the notice of the Court at its next Plenary Session.

Article 5: Court Secretariat
1-In case of absence, the Secretary General may delegate to the General Counsel and Deputy Secretary General the authority to confirm arbitrators, to certify true copies of Awards and to request the payment of a provisional advance, respectively provided for in Articles 9(2), 28(2) and 30(1) of the Rules.
2-The Secretariat may, with the approval of the Court, issue notes and other documents for the information of the parties and the arbitrators, or as necessary for the proper conduct of the arbitral proceedings.

Article 6: Scrutiny of Arbitral Awards
When the Court scrutinizes draft Awards in accordance with Article 27 of the Rules, it considers, to the extent practicable, the requirements of mandatory law at the place of arbitration.

ARBITRATION COSTS AND FEES

Article 1: Advance on Costs
1-Each request to commence arbitration pursuant to the Rules must be accompanied by an advance payment of US$ 2,500 on the administrative expenses. Such payment is non-refundable, and shall be credited to the Claimant's portion of the advance on costs.

2-The provisional advance fixed by the Secretary General according to Article 30(1) of the Rules shall normally not exceed the amount obtained by adding together the administrative expenses, the minimum of the fees (as set out in the scale hereinafter) based upon the amount of the claim and the expected reimbursable expenses of the Arbitral Tribunal incurred with respect to the drafting of the Terms of Reference. If such amount is not quantified, the provisional advance shall be fixed at the discretion of the Secretary General. Payment by the Claimant shall be credited to its share of the advance on costs fixed by the Court.

3-In general, after the Terms of Reference have been signed or approved by the Court and the provisional timetable has been established, the Arbitral Tribunal shall, in accordance with Article 30(4)

of the Rules, proceed only with respect to those claims or counterclaims in regard to which the whole of the advance on costs has been paid.

4-The advance on costs fixed by the Court according to Article 30(2) of the Rules comprises the fees of the arbitrator or arbitrators (hereinafter referred to as "arbitrator"), any arbitration-related expenses of the arbitrator and the administrative expenses.

5-Each party shall pay in cash its share of the total advance on costs. However, if its share exceeds an amount fixed from time to time by the Court, a party may post a bank guarantee for this additional amount.

6-A party that has already paid in full its share of the advance on costs fixed by the Court may, in accordance with Article 30(3) of the Rules, pay the unpaid portion of the advance owed by the defaulting party by posting a bank guarantee.

7-When the Court has fixed separate advances on costs pursuant to Article 30(2) of the Rules, the Secretariat shall invite each party to pay the amount of the advance corresponding to its respective claim(s).
8-When, as a result of the fixing of separate advances on costs, the separate advance fixed for the claim of either party exceeds one half of such global advance as was previously fixed (in respect of the same claims and counterclaims that are the subject of separate advances), a bank guarantee may be posted to cover any such excess amount. In the event that the amount of the separate advance is subsequently increased, at least one half of the increase shall be paid in cash.

9-The Secretariat shall establish the terms governing all bank guarantees which the parties may post pursuant to the above provisions.

10-As provided in Article 30(2) of the Rules, the advance on costs may be subject to readjustment at any time during the arbitration, in particular to take into account fluctuations in the amount in dispute, changes in the amount of the estimated expenses of the arbitrator, or the evolving difficulty or complexity of arbitration proceedings.

11-Before any expertise ordered by the Arbitral Tribunal can be commenced, the parties, or one of them, shall pay an advance on costs fixed by the Arbitral Tribunal sufficient to cover the expected fees and expenses of the expert as determined by the Arbitral Tribunal. The Arbitral Tribunal shall be responsible for ensuring the payment by the parties of such fees and expenses.

Article 2: Costs and Fees
1-Subject to Article 31(2) of the Rules, the Court shall fix the fees of the arbitrator in accordance with the scale hereinafter set out or, where the sum in dispute is not stated, at its discretion.

2-In setting the arbitrator's fees, the Court shall take into consideration the diligence of the arbitrator, the time spent, the rapidity of the proceedings, and the complexity of the dispute, so as to arrive at a figure within the limits specified or, in exceptional circumstances (Article 31(2) of the Rules), at a figure higher or lower than those limits.

3-When a case is submitted to more than one arbitrator, the Court, at its discretion, shall have the right to increase the total fees up to a maximum which shall normally not exceed three times the fees of one arbitrator.

4-The arbitrator's fees and expenses shall be fixed exclusively by the Court as required by the Rules. Separate fee arrangements between the parties and the arbitrator are contrary to the Rules.

5-The Court shall fix the administrative expenses of each arbitration in accordance with the scale hereinafter set out or, where the sum in dispute is not stated, at its discretion. In exceptional circumstances, the Court may fix the administrative expenses at a lower or higher figure than that which would result from the application of such scale, provided that such expenses shall normally not

exceed the maximum amount of the scale. Further, the Court may require the payment of administrative expenses in addition to those provided in the scale of administrative expenses as a condition to holding an arbitration in abeyance at the request of the parties or of one of them with the acquiescence of the other.

6-If an arbitration terminates before the rendering of a final Award, the Court shall fix the costs of the arbitration at its discretion, taking into account the stage attained by the arbitral proceedings and any other relevant circumstances.

7-In the case of an application under Article 29(2) of the Rules, the Court may fix an advance to cover additional fees and expenses of the Arbitral Tribunal and may make the transmission of such application to the Arbitral Tribunal subject to the prior cash payment in full to the ICC of such advance. The Court shall fix at its discretion any possible fees of the arbitrator when approving the decision of the Arbitral Tribunal.

8-When an arbitration is preceded by an attempt at amicable resolution pursuant to the ICC ADR Rules, one half of the administrative expenses paid for such ADR proceedings shall be credited to the administrative expenses of the arbitration.

9-Amounts paid to the arbitrator do not include any possible value added taxes (VAT) or other taxes or charges and imposts applicable to the arbitrator's fees. Parties have a duty to pay any such taxes or charges; however, the recovery of any such charges or taxes is a matter solely between the arbitrator and the parties.

Article 3: ICC as Appointing Authority

Any request received for an authority of the ICC to act as appointing authority will be treated in accordance with the Rules of ICC as Appointing Authority in UNCITRAL or Other *Ad Hoc* Arbitration Proceedings and shall be accompanied by a non-refundable sum of US$ 2,500. No request shall be processed unless accompanied by the said sum. For additional services, ICC may at its discretion fix administrative expenses, which shall be commensurate with the services provided and shall not exceed the maximum sum of US$ 10,000.

Article 4: Scales of Administrative Expenses and Arbitrator's Fees

1-The Scales of Administrative Expenses and Arbitrator's Fees set forth below shall be effective as of 1 July 2003 in respect of all arbitrations commenced on or after such date, irrespective of the version of the Rules applying to such arbitrations.

2-To calculate the administrative expenses and the arbitrator's fees, the amounts calculated for each successive slice of the sum in dispute must be added together, except that where the sum in dispute is over US$ 80 million, a flat amount of US$ 88,800 shall constitute the entirety of the administrative expenses.

A. ADMINISTRATIVE EXPENSES

Sum in dispute (in US Dollars)	Administrative expenses(*)
up to 50 000	$ 2500
from 50 001 to 100 000	3.50%
from 100 001 to 500 000	1.70%
from 500 001 to 1 000 000	1.15%
from 1 000 001 to 2 000 000	0.70%
from 2 000 001 to 5 000 000	0.30%
from 5 000 001 to 10 000 000	0.20%
from 10 000 001 to 50 000 000	0.07%
from 50 000 001 to 80 000 000	0.06%
over 80 000 000	$ 88 800

APPENDIX III

(*) For illustrative purposes only, the table on the following page indicates the resulting administrative expenses in US$ when the proper calculations have been made.

B. ARBITRATOR'S FEES

Sum in dispute (in US Dollars)	Fees(**)	
	minimum	Maximum
up to 50 000	$ 2500	17.00%
from 50 001 to 100 000	2.00%	11.00%
from 100 001 to 500 000	1.00%	5.50%
from 500 001 to 1 000 000	0.75%	3.50%
from 1 000 001 to 2 000 000	0.50%	2.75%
from 2 000 001 to 5 000 000	0.25%	1.12%
from 5 000 001 to 10 000 000	0.10%	0.616%
from 10 000 001 to 50 000 000	0.05%	0.193%
from 50 000 001 to 80 000 000	0.03%	0.136%
from 80 000 001 to 100 000 000	0.02%	0.112%
over 100 000 000	0.01%	0.056%

(**) For illustrative purposes only, the table on the following page indicates the resulting range of fees when the proper calculations have been made.

SUM IN DISPUTE (in US Dollars)	A. ADMINISTRATIVE EXPENSES (in US Dollars)
up to 50 000	2500
from 50 001 to 100 000	2500 + 3.50% of amt. over 50 000
from 100 001 to 500 000	4250 + 1.70% of amt. over 100 000
from 500 001 to 1 000 000	11 050 + 1.15% of amt. over 500 000
from 1 000 001 to 2 000 000	16 800 + 0.70% of amt. over 1 000 000
from 2 000 001 to 5 000 000	23 800 + 0.30% of amt. over 2 000 000
from 5 000 001 to 10 000 000	32 800 + 0.20% of amt. over 5 000 000
from 10 000 001 to 50 000 000	42 800 + 0.07% of amt. over 10 000 000
from 50 000 001 to 80 000 000	70 800 + 0.06% of amt. over 50 000 000
from 80 000 001 to 100 000 000	88 800
over 100 000 000	88 800

APPENDIX III

SUM IN DISPUTE (in US Dollars)	B. ARBITRATOR'S FEES (in US Dollars)	
	Minimum	Maximum
up to 50 000	2500	17.00% of amount in dispute
from 50 001 to 100 000	2500 + 2.00% of amt. over 50 000	8500 + 11.00% of amt. over 50 000
from 100 001 to 500 000	3500 + 1.00% of amt. over 100 000	14 000 + 5.50% of amt. over 100 000
from 500 001 to 1 000 000	7500+ 0.75% of amt. over 500 000	36 000 + 3.50% of amt. over 500 000
from 1 000 001 to 2 000 000	11 250 + 0.50% of amt. over 1 000 000	53 500 + 2.75% of amt. over 1 000 000
from 2 000 001 to 5 000 000	16 250 + 0.25% of amt. over 2 000 000	81 000 + 1.12% of amt. over 2 000 000
from 5 000 001 to 10 000 000	23 750 + 0.10% of amt. over 5 000 000	114 600 + 0.616% of amt. over 5 000 000
from 10 000 001 to 50 000 000	28 750 + 0.05% of amt. over 10 000 000	145 400 + 0.193% of amt. over 10 000 000
from 50 000 001 to 80 000 000	48 750 + 0.03% of amt. over 50 000 000	222 600 + 0.136% of amt. over 50 000 000
from 80 000 001 to 100 000 000	57 750 + 0.02% of amt. over 80 000 000	263 400+ 0.112% of amt. over 80 000 000
over 100 000 000	61 750 + 0.01% of amt. over 100 000 000	285 800 + 0.056% of amt. over 100 000 000

APPENDIX IV

CASE No. 10386 (unpublished)

Date of Addendum: April 2000
Place of Arbitration: Seattle; USA

1. Preamble

1.1 The consent Award in this matter, dated 10 March 2000, has been delivered by the ICC International Court of Arbitration.

1.2 The Arbitral Tribunal has noted two typographical errors in the consent Award.

1.3 The Arbitral Tribunal therefore has prepared an Addendum to its Award containing corrections to the typographical errors.

1.4 The Addendum was submitted for the approval of the Court within 30 days of the date of such Award, in terms of Article 29.1 of the ICC Rules.

2. Addendum to Award

2.1 Articles 4.1.1 and 4.1.2 of the consent Award dated 10 March 2000 should now read:

(a) 4.1.1 Orders the Respondent... to pay the claimant ..., the sum of Japanese Yen (¥) ...,...,...,....

(b) 4.1.2 Orders the Respondent,..., to pay the claimant,..., the sum of ¥ ...,...,... by way of interest from 27 March 1998 to 2 February 2000.

2.2 In all other respects, the Award is confirmed.'

APPENDIX V

CASE No. 9391 (unpublished)

Date of Addendum: July 2000
Place of Arbitration: Istanbul, Turkey

Addendum to the Award of 14th March, 2000

On March 14, 2000 the Arbitral Tribunal rendered by majority its final Award in the above referenced matter.

The Award was notified to the parties by the ICC International Court of Arbitration on 21st March, 2000.

With a fax dated 24th April, 2000..., Counsel for Defendant [No. 2], drew the attention of the ICC International Court of Arbitration to a contradiction in point 3 of the operative part of the Award, requesting its correction.

The request was forwarded to the parties by fax dated 10th May, 2000 inviting them to communicate to the Arbitral Tribunal not later than within 14 days any comments to that request.

The parties did not react.

Defendant request is founded.

Therefore point 3 of the operative part of the Award has to be corrected and shall read as follows:

Taking into account that the provision.... Has been paid in full by claimant (...will be reimbursed to claimant by ICC), Defendants shall pay to claimant (within one month from the date of the notification of the Addendum to the Parties) the sum of... as reimbursement for the provisions already paid.

Reasons

There is an obvious computational error in the original of point 3 which calls for a correction in the above expressed way.'

APPENDIX VI

CASE No. 8810 (unpublished)

Date of Decision: December 2000
Place of Arbitration: Paris, France

1. on 2nd August 2000, [counsel to Respondent] made an application for the interpretation of the Interim Award dated 28th June 2000, rendered by the Arbitral Tribunal in the ICC case no. 8810.....

2. [Claimant in the arbitration proceedings] submitted "Comments on the application for the Interim Award of June 28, 2000" on 15th September 2000.

3. The ICC Court of Arbitration granted the Arbitral Tribunal an extension of time up to 17th November 2000 to submit its decision on the application to the Court.

The Arbitral Tribunal's Findings

20. Interpretation should only be granted in case there is a need of clarification of the Award or a need to improve such wording which would enable the parties to fully understand what the Arbitral Tribunal meant in its decision.

21. In the present case, the Arbitral Tribunal first decides that there is no need to have full adversarial proceedings on interpretation, since the parties have been given the opportunity to fully explain their position.

22. As far as Items 3 and 4 of the operative section of the Interim Award ... are concerned, the Arbitral Tribunal considers that they are self-explanatory, and that there is no ambiguity in the wording of the decision, as is rightly indicated by claimant in its "Comments on the application for interpretation of the Interim Award of June 28, 2000..."

23. As far as Respondent's other request are concerned (deletion of part of the wording of Items 3 and 4 of the operative section of the Interim Award, rectification of alleged mistakes, inconsistent reasons or incorrect assumptions), these complaints pertain to the reasons and the merits of the case and fall outside the scope of a request for interpretation.

24. the Arbitral Tribunal does not follow Respondent's complaint that the Arbitral Tribunal did not hear arguments on certain issues, or that certain assumptions "relate to issues which have not been the subject of any discussion, let alone any evidentiary proceedings before the Arbitral Tribunal" or that " the Arbitral Tribunal was not in a position, on the basis of the pleadings and evidence before it, to assess" any other issue. Respondent is entitled to reserve its rights regarding the respect of rights and defence, but the Arbitral Tribunal considers that the parties have been given full opportunity to express themselves on all subjects which are covered by the Interim Award, or the last few years, in arbitration procedure which gave rise to numerous written submissions, expert reports, testimony and oral presentation hearings and numerous orders or awards already rendered by the Arbitral Tribunal.

25. Consequently, the application for interpretation of the Interim Award of June 28, 2000 submitted by the Respondent on 2nd August 2000 is dismissed.'

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