Written by leading practitioners in the field, this fifth edition of *Arbitration World* provides readers with a single reference guide to over 50 different arbitration regimes and institutions around the world.

Arbitration World provides an informative, comparative and balanced overview of the key issues and is an essential resource for parties and lawyers engaged in arbitration, or considering arbitration as an option.

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ISBN 978-0-414-03916-2
9 780414 039162

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INTERNATIONAL SERIES

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General Editors: Karyl Nairn QC & Patrick Heneghan
Skadden, Arps, Slate, Meagher & Flom (UK) LLP

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Published in September 2015 by Thomson Reuters (Professional) UK Limited, trading as Sweet & Maxwell
Friars House, 160 Blackfriars Road, London, SE1 8EZ
(Registered in England & Wales, Company No 1679046.
Registered Office and address for service:
2nd floor, 1 Mark Square, Leonard Street, London EC2A 4EG)
A CIP catalogue record for this book is available from the British Library.

ISBN: 9780414039162

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FOREWORD

Karyl Nairn QC & Patrick Heneghan | Skadden, Arps, Slate, Meagher & Flom (UK) LLP

We are delighted to have been invited once again by Thomson Reuters to edit this fifth edition of *Arbitration World*, published by its widely recognised legal arm, Sweet & Maxwell (and forming part of their new *International Series*).

Following the success of the previous publication, we are hoping that this revised and extended fifth edition will serve as an invaluable reference guide to the key arbitration jurisdictions, rules and institutions across the globe.

In the three years since the last edition was published, the arbitral landscape has continued to evolve, with important developments in both the law and practice of arbitration. For example, new arbitration centres have opened in New York, Seoul, Moscow and Mumbai; established institutions such as the LCIA, AAA, HKIAC, ICDR, SIAC, VIAC, UNCITRAL and WIPO have published revised arbitration rules; new arbitration legislation has been enacted in Hong Kong, Australia, Belgium and Austria; while other jurisdictions, such as India, have sought through case law to improve their "arbitration-friendly" credentials.

The global status and popularity of arbitration has also grown since the last edition of *Arbitration World*. From 2012 to 2014, ICSID saw the highest annual number of filings in its history, notwithstanding the criticisms in certain quarters about the legitimacy of the existing system of investment treaty arbitration. Arbitration is also extending its global reach – arbitral institutions are reporting that the parties to arbitration are more diversified than ever; 156 state parties have now adopted the New York Convention.

To reflect this trend of expansion, we have continued to broaden the scope of *Arbitration World*. This latest edition has 55 chapters, including 38 jurisdictions and 16 arbitration institutions. We feature 11 new chapters, comprising Belgium, Cayman Islands, Colombia, Egypt, Korea, Malta, Peru, Scotland and the arbitral institutions of CIETAC, SIAC and the SCC.

Arbitration World aims to provide a simple and practical guide to arbitration law and practice for parties and practitioners, enabling its readers to assess the comparative benefits and challenges of arbitrating in various jurisdictions and/or under the auspices of different institutions.

We should like to take this opportunity to express our gratitude to all the authors of *Arbitration World*, old and new. The popularity of this publication is testament to the quality and expertise of the leading law firms, practitioners and institutions who have committed their time to the project.

We should also like to thank Emily Kyriacou and her team at Thomson Reuters, including Katie Burrington, Nicola Pender and Chris Myers, for their superb management and coordination efforts. We also extend our gratitude to Michele O'Sullivan for commissioning the project all those years ago.

Finally, we wish to pay tribute to our hard-working colleagues at Skadden, Gulnaar Zafar, Ben Jacobs, Sabeen Sheikh, Bing Yan, Anna Grunseit, Judy Fu, Nicholas Lawn, Kam Nijar, Laura Feldman, David Edwards, Ekaterina Churanova, Calvin Chan, Ross Rymkiewicz, Catherine Kunz, Melis Acuner, Emma Farrow, Devika Khopkar, Sara

Nadeau-Seguin, Nicholas Adams, Ahmed Abdel-Hakam, Simon Mercouris, Anna Heimbichner, Joseph Landon-Ray, Simon Walsh, Alex van der Zwaan, Tom Southwell, Christopher Lillywhite and Eleanor Hughes, who have assisted with the review and editing of the chapters featured in this latest edition; *Arbitration World* has been a true Skadden team effort and we are most grateful for all the support received.

Patrick Heneghan and Karyl Nairn QC, July 2015

INTERNATIONAL CHAMBER OF COMMERCE (ICC)

Stephen Bond, Nicole Duclos, Miguel López Forastier & Jeremy Wilson | Covington & Burling LLP

1. INSTITUTIONAL HISTORY AND ORGANISATIONAL FRAMEWORK

1.1 How is the institution organised and run and what is its history?

The International Court of Arbitration (the Court) is not a traditional court, but rather an administrative institution of the International Chamber of Commerce (ICC). The ICC is a non-profit, private organisation devoted to the promotion of international commerce. To that end, the ICC provides policy services in areas such as marketing and advertising, taxation, competition, corporate responsibility, and commercial law and practice.

The Court, established in 1923, is the independent arbitration body of the ICC. It administers the resolution of disputes through its arbitration rules. The Court does not adjudicate those disputes; rather, it acts in an administrative capacity, deciding such matters as the place of arbitration (when not agreed by the parties), the appointment and replacement of arbitrators (when necessary), and the determination of arbitrator fees. If an arbitrator is challenged as biased or otherwise not competent to decide a dispute, the Court will decide the merits of that challenge. The Court also scrutinises draft awards of ICC tribunals and performs a variety of case management activities to ensure the efficiency and orderliness of the proceedings. In recent years, the Court has been charged with administering more than 1,300 ICC arbitrations.

In performing its administrative functions, the Court acts through its Secretary General, the Secretariat and the Secretariat's case management teams. There are presently some 90 members of the Secretariat, encompassing some 30 nationalities. The case management teams divide and handle cases according to regions or language groups. Seven of the Secretariat's case management teams are based in Paris, with additional teams based in New York and Hong Kong. Each case management team is led by a counsel, who is assisted by two or three deputy counsel and administrative assistants.

The Court now has approximately 180 members, coming from over 80 countries, who are appointed for three-year terms based on proposals from the ICC National Committees and Groups. The current president of the Court is Alexis Mourre of France. The Court's 17 vice presidents come from Belgium, Brazil, Colombia, Egypt, France/Iran, Germany, Japan, Korea, Netherlands, New Zealand, Nigeria, Romania, Russia, Switzerland, United Kingdom and the United States. Once appointed, the Court's members must remain independent from the National Committees in performing their functions.

2. REGIONAL SCOPE AND STATISTICS

2.1 What regions are covered by the institution?

The Court is a global institution. As noted above, the Court's case management teams are based in Paris, Hong Kong and New York. The ICC has marketing officers covering all regions. The official working languages of the Secretariat are French and English, and the Court's official correspondence is available in those languages as well as in Spanish, German, and Portuguese. The Court can deal with arbitrations in Spanish and German, and Secretariat personnel speak approximately 25 languages.

In 2014 alone, the Court received nearly 800 Requests for Arbitration and six applications for emergency measures. These requests concerned over 2,000 parties from 140 countries and independent territories, and places of arbitration were located in 57 countries throughout the world. Arbitrators of 79 nationalities were appointed or confirmed, and this group rendered 459 awards.

In 2013 (the latest available detailed statistics), the top five countries from which parties to ICC arbitrations came were:

1. USA – 174 parties.

2. Germany – 140 parties.

3. France – 102 parties.

4. Brazil – 91 parties.

5. China (including Hong Kong) – 86 parties.

The top five nationalities of arbitrators were:

1. UK – 170.

2. Switzerland – 141.

3. France – 128.

4. USA – 93.

5. Germany – 74.

The top five cities designated as seats of arbitration were:

1. Paris – 118.

2. London – 70.

3. Geneva – 56.

4. Zurich – 34.

5. Singapore – 33.

3. RULES

3.1 Which arbitration rules are associated with your institution? What are the main areas covered by those rules? Are there any distinguishing features, for example, with respect to expedited formation? Have your rules recently changed or are they about to change? If so, how?

The Rules of Arbitration of the International Chamber of Commerce (the Rules) were most recently updated in 2012. The Rules cover all aspects of an arbitral proceeding, from commencement of the arbitration to correction and interpretation of the award. A new feature of the Rules is the availability of an emergency arbitrator procedure to provide interim and conservatory relief before the constitution of the arbitral tribunal.

Prior to the amendment of the Rules in 2012, parties could also seek interim relief before submitting a dispute to arbitration if they had expressly consented to the application of the ICC's Rules for a Pre-Arbitral Referee Procedure, which dated back to 1990. In practice, however, that procedure was rarely used. Under the 2012 Rules, any arbitration agreement entered into after 1 January 2012 will automatically constitute acceptance of the Rule's emergency arbitrator procedure, unless the parties expressly opt out of it. The emergency arbitrator procedure is discussed in more detail in *Section 8* below.

An additional distinguishing feature of the Rules is the Court's process for scrutinising draft awards (*discussed in Section 12 below*).

The 2012 ICC Rules introduced ground-breaking provisions (which have since been taken up to at least some extent by other major arbitral institutions) dealing with issues arising out of multi-party or multi-contract (that is, claims arising out of or in connection with more than one contract) arbitrations. These are discussed in more detail in Section 3 below.

4. COMPLEX ARBITRATIONS

4.1 Have your arbitration rules developed specific provisions to address common joinder and consolidation issues which arise in multi-party arbitrations? How do you add an additional party to an ongoing arbitration? How do you pursue claims arising out of multiple contracts in a single arbitration and combine two or more separate but related arbitrations?

The Rules include specific provisions governing complex arbitrations. The Rules allow the parties to request joinder of additional parties as a general matter before arbitrators are appointed or confirmed (*Article 7*). After one arbitrator has been appointed or confirmed, additional parties may be joined only if all parties agree, including the party to be joined (*Article 7*). To accommodate this rule, the Secretariat's practice is to notify the parties when an arbitrator is about to be appointed or confirmed. Joinder is only permitted where the parties are all party to the same arbitration agreement (*Article 6(4)(i)*).

The Rules now provide that, in an arbitration with multiple parties, any party may make claims against any other party (*Article 8(1)*) if the ICC Court is prima facie satisfied that the parties are all party to the same arbitration agreement (*Article 6(4)(i)*).

Claims arising out of or in connection with multiple contracts may be made in a single arbitration, irrespective of whether the claims are made under one or more than one arbitration agreement (*Article 9*). If the claims are made under more than one arbitration agreement, the Court must be prima facie satisfied that:

- The arbitration agreements are compatible.
- All the parties have agreed that those claims can be determined together in a single arbitration (*Articles 6(4)(ii) and 9*).

Where multiple arbitrations have already been commenced, the Court may consolidate those arbitrations if:

- The parties so agree.
- All the claims are made under the same arbitration agreement.
- The arbitrations are between the same parties, in connection with the same legal relationship, and the Court finds the arbitration agreements compatible (*Article 10*).

In deciding whether to consolidate cases, the Court may consider whether one or more arbitrators have been appointed in the proceedings and, if so, whether the same person has been appointed in the other proceedings (*Article 10*). Consolidation usually occurs into the first-commenced arbitration, unless all the parties agree otherwise (*Article 10*). The ICC Court's decision on consolidation is final, but the tribunal is still competent to find that it lacks jurisdiction over one or more claims.

5. COSTS OF THE ARBITRATION

5.1 How do you calculate fees and what are the parties' obligations in this respect? Are arbitrators' fees and the fees of the institution charged on an ad valorem or hourly basis? Do you require a provisional advance or any advance on costs? Is there provision for separate advances on costs?

The Court fixes arbitrators' fees and administrative costs based on an "*ad valorem*" basis, that is, a scale that is primarily based on the total amount in dispute in claims and counter-claims. As the amount in dispute increases, the percentage of arbitrators' fees and administrative costs decreases, until a cap is reached. The following table, which is based on Articles 36 and 37 and Appendix III of the Rules, summarises the Rules' ordinary fees and the parties' obligations in this respect:

Fee type	Amount	Payor	Due date
Filing fee (non-refundable, credited to claimant's portion of advance on costs)	$3,000	The claimant, and any party that requests joinder of an additional party	At the time the claimant files the Request for Arbitration or at the time when another party files a request to join an additional party
Provisional advance	Set by the Secretary General in an amount intended to cover the costs of the arbitration up until the Terms of Reference have been drawn up	The claimant	As soon as practicable, after the Court's Secretary General has reviewed the Request for Arbitration. The Court and Secretariat wait for this provisional advance to be paid before taking significant steps in the arbitration
Advance on costs of arbitration – the ICC's budget for the case, including arbitrators' fees and expenses, and the ICC's administrative fees	Fixed by the Court	Usually all parties in equal shares	After the Answer and counter-claims have been filed, when the Secretariat transfers the case file to the arbitral tribunal
Actual costs of arbitration	Arbitrators' fees and expenses, plus administrative costs	The arbitral tribunal can award costs in favour of or against one or more parties in the award	At the end of the arbitration

The Court decides the arbitrators' fees, taking into account the diligence and efficiency of the tribunal, the time spent, the speed of the proceedings and the case's complexity. An arbitrator's usual hourly rate or other fee structure is not taken into account. If a case settles, is withdrawn or otherwise does not proceed to final award, the Court will fix the fees and expenses of the arbitrators and the ICC administrative expenses following similar criteria (*Article 37*). Where the respondent submits counter-claims, the Court may, under certain conditions, fix separate advances on costs (*Article 36*).

A party seeking interim measures from an emergency arbitrator must pay an advance of $40,000 in arbitrator fees and administrative expenses to initiate that proceeding (*Appendix V, Article 7*). This amount may be increased in light of the nature of the case or the amount of work performed by the emergency arbitrator (*Appendix V, Article 7*).

5.2 If money is held in advance of arbitration costs, is the interest credited to parties or the institution? What procedures are available if a party is unhappy with the proposed or actual costs? What are the consequences of one party refusing to pay any required advance on costs? Are there any provisions dealing with security for costs?

The amounts paid as advances on costs do not yield interest for the parties or the arbitrator (*Appendix III, Article 1(13)*); rather, these amounts are credited to the institution. Parties may make representations to the ICC Secretariat as to what amounts are appropriate for costs, but the Rules do not create a formal mechanism for parties to dispute the proposed or actual costs decided by the ICC. Those amounts are broadly predictable, however, because they are based on the amounts at stake in the arbitration. If one party refuses to pay a required advance on costs, the other party is free to pay that party's share so that the proceedings may advance. When neither party complies with a request for an advance on costs, the Secretary General may, in consultation with the arbitral tribunal, direct the tribunal to suspend its work and set a deadline for the payment of those costs, after which the claim shall be deemed withdrawn if the costs have not yet been paid (*Article 36*).

6. AGREEMENTS TO ARBITRATE

6.1 Does your institution recommend a standard form arbitration clause? If so, please provide details

The ICC standard form arbitration clause states: "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".

If the parties wish to exclude the emergency arbitrator provisions set out in Article 29 and Appendix V of the Rules (*see Section 8 below*), they should do so expressly in the arbitration clause. The ICC recommends adding an extra sentence to the standard clause stating: "The Emergency Arbitrator Provisions shall not apply".

In practice, parties often amend the standard clause to stipulate:

- The law governing the contract.
- The number of arbitrators.
- The place of arbitration.
- The language of the arbitration.

The ICC recommends that parties should always ensure that the arbitration agreement is in writing and carefully and clearly drafted. (The authors also strongly recommend stipulating the law governing the arbitration clause itself).

The ICC also notes that the standard clause can be modified to take account of:

- The requirements of any national laws at the place of arbitration or at the place of probable enforcement.
- The involvement of more than two parties or contracts.

- The use of other ICC dispute resolution services in a multi-tiered dispute resolution clause.

The parties are free to include provisions in the arbitration clause that supplement the Rules, but problems may arise when parties purport to modify the Rules. If the parties attempt to modify the Rules in a manner that "goes to the heart" of ICC arbitration, such as deleting the Terms of Reference or the scrutiny of draft awards procedure, the Court may decline to administer the case.

7. INITIATING PROCEEDINGS

7.1 What must a party wishing to commence an arbitration submit to the institution (that is, required documents)? What are the contents of such a submission? What are the procedural requirements? Who has responsibility for serving the proceedings, the institution or the initiating party?

Article 4(1) provides that a party wishing to commence arbitration should submit a Request for Arbitration and a non-refundable $3,000 filing fee to the Secretariat at the ICC's office in Paris, Hong Kong or New York. The date on which the Request is received by the Secretariat is deemed to be the date of commencement of the arbitration.

Article 4(3) states that the Request for Arbitration must include, among other things:

- The name, address and contact details of each party and of the claimant's legal representatives.
- A description of the nature and circumstances of the dispute giving rise to the claims and of the basis on which the claims are made.
- A statement of the relief sought, including the amounts of any quantified claims and, to the extent possible, an estimate of the monetary value of any other claims.
- Any relevant agreements, including the arbitration agreement.
- All relevant particulars and any observations or proposals concerning the number of arbitrators and the nomination of arbitrators (if required).
- All relevant particulars and any observations or proposals as to the place of arbitration, the applicable rules of law and the language of the arbitration.

The Secretariat will notify the claimant and the respondent of the Request and the date of such receipt. The Secretariat will also send a copy of the Request to the respondent.

8. INTERIM RELIEF

8.1 Are there any provisions dealing with interim relief prior to the formation of the tribunal? Are there any provisions dealing with the appointment of an "emergency arbitrator"?

Overview

Article 29 and Appendix V of the Rules (the Emergency Arbitrator Provisions) provide for the appointment of an emergency arbitrator who can order interim measures prior to the formation of the tribunal if the required measures are so urgent that the requesting party cannot await the formation of the tribunal. The procedure is not the equivalent of an expedited arbitration.

Under Article 29(5), the Emergency Arbitrator Provisions apply only to parties who are signatories (or successors to signatories) of the arbitration agreement relied upon. Further, under Article 29(6), the Emergency Arbitrator Provisions shall not apply if:

- The arbitration agreement was concluded prior to 1 January 2012, the date on which the 2012 Rules came into effect.
- The parties have agreed to another pre-arbitral procedure that provides for the granting of conservatory, interim or similar measures, such as the ICC Pre-Arbitral Referee Rules.
- The parties opt out of the Emergency Arbitrator Provisions.

The decision of the emergency arbitrator takes the form of an order rather than an arbitral award (*Article 29(2)*). Article 29(3) provides that the tribunal, once constituted, shall not be bound by the emergency arbitrator's order and may modify, terminate or annul it. Unless the tribunal directs otherwise, Article 6(6) of Appendix V provides that the order shall cease to be binding upon the issue of the tribunal's final award, the termination of the emergency procedure by the President of the Court, the acceptance by the Court of a challenge to the emergency arbitrator, the withdrawal of claims or the termination of the arbitration before a final award has been rendered.

Article 29(7) confirms that parties may still seek interim relief from the appropriate national courts pursuant to the Rules, and this right shall not be deemed to infringe or waive the arbitration agreement.

Procedure

Under the Emergency Arbitration Provisions, the entire emergency process should take a maximum of 18 days from the filing of the application to the issuing of the order, although the Court or the emergency arbitrator may grant extensions when appropriate.

The process begins when the applicant files the application for emergency measures with the Secretariat. Article 1(3) of Appendix V sets the requirements for an application, which include a requirement to provide "the reasons why the applicant needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal". The application must be accompanied by an emergency measures fee (which is currently $40,000) to cover the fees and expenses of the Secretariat and the emergency arbitrator.

Assuming that no tribunal has been constituted in relation to this dispute, the Secretariat passes the application to the President of the Court. Under Article 1(5) of Appendix V, the President will check whether the application is admissible under Articles 29(5) and 29(6) (*see above*). At this stage, the Secretariat will also pass the application to the responding party, regardless of whether or not the President decides that the application is admissible.

If the President decides that the application is admissible, Article 2(1) of Appendix V provides that he or she must appoint an emergency arbitrator within as short a time as possible, normally within two days from the receipt of the application. The President has sole discretion as to the appointment of the emergency arbitrator. Under Article 3(1) of Appendix V, either party may challenge the appointment of the emergency arbitrator within three days of being notified of the appointment, although a challenge does not suspend the emergency proceedings. The Court shall decide on any challenge after the emergency arbitrator and the other party have had an opportunity to comment on the challenge.

An applicant for emergency measures must still file a Request for Arbitration. Article 1(6) of Appendix V provides that the President shall terminate the emergency proceedings if a Request for Arbitration has not been received by the Secretariat within 10 days from receipt of the application for emergency measures. However, the emergency arbitrator has discretion to extend this time limit.

Under Article 5(1) of Appendix V, the emergency arbitrator must establish a procedural timetable within two days of appointment. The emergency arbitrator has discretion to determine the procedure, subject to the requirement under Article 5(2) of Appendix V to "act fairly and impartially and ensure that each party has a reasonable opportunity to present its case".

Under Article 6(4) of Appendix V, the emergency arbitrator must issue the order within 15 days of appointment, unless an extension is granted by the President. There is no limitation on the types of measures that the emergency arbitrator can order and the emergency arbitrator may grant conditional orders (for example, requiring the requesting party to provide security). The order should also contain the emergency arbitrator's decision on costs, although this decision may be deferred to the tribunal. As the decision takes the form of an order rather than an award, the Court does not scrutinise the order prior to publication.

9. SELECTION/APPOINTMENT/CHALLENGE OF ARBITRATORS

9.1 How are arbitrators appointed? Are there any requirements as to the number of arbitrators? How are their independence and availability ensured? What is the procedure with respect to sole arbitrators, co-arbitrators and the selection of the chairman?

Under Article 11(6), the parties have autonomy to appoint the tribunal in whatever manner they wish. The default appointment mechanisms in Articles 12 and 13 shall apply in the event the parties have not provided otherwise.

Article 11: Independence and Impartiality

Article 11(1) sets out the general rule that every arbitrator "must be and remain impartial and independent of the parties involved in the arbitration".

Articles 11(2) and 11(3) provide that arbitrators have a continuing duty to disclose "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, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality". While arbitrators may seek guidance from sources such as the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration to determine whether particular circumstances require disclosure, the Court is not bound to follow such guidelines. In addition to this general duty of disclosure, Article 11(2) provides that, prior to appointment or confirmation, "a prospective arbitrator shall sign a statement of acceptance, availability, impartiality and independence".

Article 12: Constitution of the Tribunal

Article 12(1) states that disputes shall be decided by a sole arbitrator or by three arbitrators. Pursuant to Article 11(6), parties can provide for an alternative number of arbitrators, but this would be highly unusual.

Article 12(2) provides that, where the parties have not agreed upon the number of arbitrators, the default position is that the Court shall appoint a sole arbitrator, unless the case warrants the appointment of three arbitrators. If the dispute is particularly complex or high value, the ICC is likely to prefer a three-person tribunal. In this scenario, the parties are given 15 days each to nominate a co-arbitrator, with the Court appointing the president of the tribunal and co-arbitrator(s) if either party fails to make their nomination on time.

If the parties agree to have the dispute resolved by a sole arbitrator, but fail to agree on a candidate within 30 days of the service of the Request for Arbitration on the respondent, or such longer time as the Secretariat may allow, the Court shall appoint the sole arbitrator under Article 12(3).

Similarly, under Article 12(4), if the parties have agreed to a three-person tribunal, each party should nominate a co-arbitrator in the Request for Arbitration and Answer respectively, but if either party fails to do so the Court shall appoint a co-arbitrator for the defaulting party.

The default position under Article 12(5) is that the Court shall also be responsible for appointing the president of the tribunal. However, in practice, the parties may agree, (and often do so), that they or the co-arbitrators should be responsible for appointing the president, with the Court to make the appointment only if the parties or co-arbitrators are unable to agree.

Article 13: Appointment and Confirmation of the Arbitrators

The appointment of party-nominated or agreed arbitrators must be confirmed by the Court or Secretary General under Article 13. Alternatively, if the parties have not nominated an arbitrator, Article 13 also sets out the process by which the Court shall make the appointment.

When an arbitrator has been nominated by the parties, the Secretariat will send him or her a statement of acceptance, availability, impartiality and independence. The Secretariat will then forward the completed statement to the parties and invite their comments. Under Article 13(2), if there is no objection by the parties to the arbitrators, the Secretary General may confirm the arbitrator without reference to the Court.

If either party objects to the arbitrator's confirmation, which may happen regardless of whether the arbitrator discloses any issues in the statement, the objection will usually be referred to the Court. A party's objection to an arbitrator's confirmation may not be limited to impartiality and independence concerns (*Article 14(1)*). The Court

will exercise its discretion as to whether or not to confirm the arbitrator's appointment, but should have regard to the factors in Article 13(1), namely the "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 the Rules".

The ICC does not have a pre-approved list of arbitrators. If the Court is required to appoint an arbitrator, it will generally do so through the mechanism set out in Article 13(3), whereby it appoints the arbitrator based on the proposal of a National Committee or Group of the ICC. National Committees and Groups are associations of the ICC members in 90 countries and four territories. The Court will first select the appropriate National Committee or Group based on factors such as the nationalities of the parties and the co-arbitrators, and the applicable law and language of the arbitration. The Court will then provide the selected National Committee or Group with the details of the arbitration so that it can select an appropriate candidate from the pool of arbitrators in its country or territory. The Court will ultimately decide whether the proposed arbitrator is suitable for appointment, taking into account the Article 13(1) considerations.

If the proposed arbitrator is not accepted by the Court, it may go back to the same National Committee or Group, approach a new National Committee or Group or even appoint a suitable candidate directly. Article 13(4) also provides that there may be circumstances where the Court can appoint an arbitrator directly from the start (for example, if the Court considers that it would be appropriate to appoint an arbitrator from a country or territory where there is no National Committee or Group).

When the Court appoints an arbitrator under Article 13, the arbitrator must still complete the statement of acceptance, availability, impartiality and independence and the parties will have an opportunity to object.

9.2 What are the procedures for mounting challenges, including when and how the parties may submit objections and how arbitrators' appointments can be challenged after the event? How can arbitrators be replaced once removed/unable to continue with the appointments?

If a party has objections to an arbitrator's appointment, the party should object to the confirmation of that arbitrator by the Court. If a party has objections to an arbitrator after the arbitrator has been appointed or confirmed, the party may still challenge an arbitrator under Article 14, provided that, in accordance with Article 14(2), the challenge is submitted either within 30 days of receipt of the notification of the appointment or confirmation of the arbitrator, or within 30 days of the party becoming aware of the facts and circumstances giving rise to the challenge.

The challenge must be made by submitting a written statement to the Secretariat. Under Article 14(3), the Court should give the challenged arbitrator, the other arbitrators and the other party the opportunity to comment on the challenge in writing. The Court will then decide on the admissibility and the merits of the challenge. It will not give reasons for its decision.

If a challenge is successful and an arbitrator is removed, Article 15(4) gives the Court discretion to decide whether to repeat the original nomination process or follow an alternative process. After the tribunal has been reconstituted, it shall decide the extent to which it needs to repeat any of the prior proceedings (if at all).

Note that Article 15 also provides for the replacement of arbitrators upon their death or resignation, or if the Court exercises its discretion under Article 15(2) to replace an arbitrator on its own initiative.

Monitoring efficiency

The Rules allow the Court and Secretariat to monitor each case to ensure that tribunals are conducting proceedings "in an expeditious and cost-effective manner", as required by Article 22(1).

The Court can impose sanctions on arbitrators who fail to act in an expeditious and cost-effective manner. In extreme circumstances, the Court could exercise its power under Article 15(2) to replace an arbitrator for failing to fulfil his or her functions "in accordance with the Rules or within the prescribed time limits".

10. RESOLUTION OF JURISDICTIONAL ISSUES

10.1 Does the institution play a role in determining jurisdiction disputes? How does the role of the institution interplay with the role of the tribunal and the national courts in this regard?

Under Article 6(3), the default position is that the tribunal shall decide all jurisdictional disputes, without any input from the ICC. However, the Secretary General may decide to refer the matter to the Court for a prima facie ruling under Article 6(4) if:

- The respondent does not file an Answer but the Secretariat in its review of the Request for Arbitration notes a jurisdictional issue.
- The respondent files an Answer which raises a jurisdictional issue.

Under Article 6(4), if a jurisdictional matter is deferred to the Court, the Court must be "*prima facie* satisfied that an arbitration agreement under the Rules may exist" in order for that matter to proceed. This is not a high threshold and will only be based on the limited evidence provided by the parties at this stage.

The Secretary General should only defer jurisdictional matters to the Court when he or she believes there to be a real doubt that the claim might not meet the Court's low prima facie threshold. If no such doubt exists, the tribunal alone will deal with jurisdiction.

If the Court decides that the matter should not proceed, Article 6(6) provides that the parties retain the right to ask any national court having jurisdiction to rule on whether or not there is a binding arbitration agreement between the parties.

11. TYPICAL AND/OR REQUIRED PROCEDURES

11.1 In brief, what are the key documents which must be filed by the parties (for example, request for arbitration, defence, reply) and the timescales for filing them?

Opening papers

An arbitration is initiated when the claimant files a Request for Arbitration with the ICC Secretariat (*Article 4(1)*). The form and contents of the Request for Arbitration are discussed in greater detail in *Section 7* above. Once the Request

for Arbitration is filed, the Secretariat transmits it to the respondent, who should then submit an Answer within 30 days of receipt (*Article 5*). The required contents of the Answer closely mirror those of the Request for Arbitration (*Article 5(1)*). Even if the respondent requests an extension of time for its Answer, it must also, at a minimum, "submit observations or proposals concerning the number of arbitrators and their choice" and, if appropriate, nominate an individual to serve as arbitrator (*Article 5(2)*). Should the respondent intend to assert a counter-claim in the arbitration, it should do so simultaneously with the Answer (*Article 5(5)*), although in practice the Answer and any counter-claims can be submitted at any time prior to the Terms of Reference (*see below*). The claimant must respond to the counter-claim within 30 days (*Article 5(6)*).

Terms of Reference

Once the arbitral tribunal has been constituted, it will draw up the Terms of Reference (*Article 23*). This process must be completed within two months (*Article 23(2)*). Historically, this mechanism originated from the need for a new agreement to arbitrate in jurisdictions that did not recognise the validity of agreements to arbitrate future disputes. Today, almost all jurisdictions will enforce an agreement to arbitrate disputes that may arise in the future, but the Terms of Reference now fulfil many of the advantages of an early case management conference and serve other useful functions.

In practice, each party typically will submit to the arbitral tribunal a summary of its claims, counter-claims, defences and relief sought, or the tribunal will extract such summaries from the parties' opening papers, for inclusion in the Terms of Reference. In addition to these summaries, the Terms of Reference shall include a list of the issues to be determined, unless the arbitral tribunal considers it inappropriate (*Article 23(1)(d)*); the names and contact information of the parties, their representatives and the arbitrators; the place of arbitration; and other relevant issues, such as whether the tribunal has the power to act as an *amiable compositeur* or decide the dispute *ex aequo et bono* (*Article 23(1)(g)*).

Once finalised, the Terms of Reference should be signed by the parties and the arbitral tribunal, and transmitted to the Court for approval (*Article 23(2)*). The Court may also approve the Terms of Reference if a party fails to sign. After the Terms of Reference have been approved by the Court, "no party shall make new claims which fall outside the limits of the Terms of Reference unless it has been authorized to do so by the arbitral tribunal" (*Article 23(4)*).

11.2 How is the procedural timetable established? What written submissions/memorials are typically required? What are the general rules with respect to document production and hearings, and the typical length of proceedings?

Case management, procedural timetable and discovery

The order, timing, number and form of the principle submissions in an ICC arbitration are decided by agreement of the parties, or failing agreement by decision of the tribunal, based on the positions taken at the case management conference (*Article 24(1)*). The procedural decisions reached during or soon after the case management conference are then memorialised by the tribunal in the procedural timetable (*Article 24(2)*).

In general terms, both the parties and the tribunal are bound to "conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute" (*Article 22(1)*). In making its award of costs, the tribunal may take into account whether the parties have complied with this requirement (*Article 37(5)*).

The details of procedure, however, are left open: the tribunal "may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties" (*Article 22(2)*).

Appendix IV of the ICC Rules includes examples of various case management techniques for controlling time and costs that tribunals may employ. Some of these include bifurcating the proceedings, issuing partial awards on key issues, designating issues to be decided on the documents without oral testimony, avoiding unnecessary or exaggerated document production, and the use of telephone or video conferencing instead of live appearances.

Notwithstanding the procedural flexibility afforded by the Rules, certain broad generalisations about the procedures that tend to be adopted can be made. Generally, large disputes under the Rules are decided by two rounds of briefing, which the parties exchange sequentially. The terminology for these papers varies, but can include such names as "memorial", "counter-memorial", "statement of claim", "statement of defence", "response" and "rejoinder". These submissions will each contain the facts, the law, and any fact or expert witness statements (English-style procedure may differ on this). Smaller disputes may have only one round of briefing, and sometimes briefs are exchanged simultaneously rather than sequentially. The options depend on the needs of the dispute, and the view of the parties and tribunal as to the best method of presenting the facts and law to be decided.

Hearings

Though commonly used in almost all arbitrations, live hearings of witness testimony and oral argument by counsel are not required, and can be dispensed with if the parties agree (*Article 25(6)*). Arbitrations decided on the documents alone may be better suited to very low-value disputes. Otherwise, hearings are to take place at a time and place set by the tribunal (*Article 26(1)*). Unless all parties and the tribunal agree, non-parties are not permitted to attend ICC hearings (*Article 26(3)*).

12. AWARDS

12.1 Are there any time limits for the rendering of awards? What is the scope of awards available (for example, interim, partial, final)? Is there a process for scrutiny of the tribunal's award by the institution and its internal bodies?

In ICC arbitrations, the default rule is that awards must be issued within six months of the date on which the Terms of Reference have been signed by all parties and the arbitral tribunal (*Article 30(1)*). However, if that deadline is impractical under the circumstances of a given case, the tribunal may submit to the Court a reasoned request for an extension (*Article 30(2)*). The Court may also extend this time limit on its own initiative. It is very rare that a trial award is actually deferred within the six month time limit.

Prior to issuing its award to the parties, the tribunal sends an unsigned draft of its award for review by the Court (*Article 33*). The Court's function in reviewing draft awards involves scrutiny of the form of the award and checking for consistency, and "without affecting the arbitral tribunal's liberty of decision", the Court "may also draw [the tribunal's] attention to points of substance" (*Article 33*).

After approval by the Court, the signed originals of the award are sent to the Secretariat, which issues it to the parties. Should the award suffer from any clerical errors, these may be corrected within 30 days of the award being

issued. If the correction is sought by the tribunal, an application must be made to the Court (*Article 35*(*1*)). If the correction is sought by one of the parties, the application must be made to the Secretariat (*Article 35*(*2*)). Parties may also apply for an interpretation of an award using a similar procedure. In either case, the Secretariat will transmit the application to the tribunal, which will give the other party an opportunity to comment before deciding whether the correction or interpretation is merited.

All awards must state the reasons on which they are based (*Article 31*(*2*)). The tribunal may decide its award unanimously or, in the absence of agreement, by majority; failing that, the president of the tribunal may make the decision alone (*Article 31*(*1*)).

The definition of "award" in Article 2 of the Rules implicitly authorises tribunals to issue interim awards, as well as partial and final awards. Emergency interim relief is discussed above (*Section 8*). In brief, the Rules permit arbitral tribunals to order interim or conservatory measures at any time (*Article 28*(*1*)). Such measures may take the form of either an order or an award, but in both cases the tribunal must state its reasoning.

All parties, by agreeing to arbitrate their dispute under the Rules, accept that every award shall be binding on the parties, and undertake to carry out the award without delay and to waive any recourse against the award insofar as this can validly be done (*Article 34*(*6*)).

13. CONFIDENTIALITY

13.1 What are the rules as to confidentiality of the work of the institution, the materials generated during the proceedings, the documents and evidence produced and the award rendered by the tribunal? What are the duties of confidentiality of the parties, the institution members and staff and the arbitrators?

In ICC arbitrations, the duty of confidentiality applies to the ICC as an institution, its staff and Court members, and to the arbitral tribunal (*Appendix I, Article 6 and Appendix II, Article 1*).

Although the ICC Rules do not impose any confidentiality requirement on the parties, they do authorise parties to apply to the arbitral tribunal for an order relating to confidentiality (*Article 22*(*3*)). Such orders may cover the proceeding itself, any matters in connection with the arbitration, and the protection of trade secrets or confidential information.

Otherwise, parties themselves will not be bound to maintain either the fact of the dispute or the contents of the proceedings in confidence, unless they have separately agreed to do so. This can be done either explicitly and directly in the arbitration agreement, or in a subsequent agreement between the parties, or it can be done indirectly by selecting a place of arbitration whose arbitration law automatically imposes the presumption of such an obligation.

14. INSTITUTIONAL ADVANTAGES

14.1 What are the main advantages and strengths of the institution? Are there any other unique institutional features which make arbitrating under its auspices more attractive relative to other similar service providers?

The ICC is widely respected as one of the best institutional providers for international commercial arbitration, with many of the world's leading experts in international arbitration serving on the Court. The ICC's role in managing the process of appointing arbitrators in a fair and efficient way is especially respected.

The "*ad valorem*" method of determining arbitrators' fees is credited by some as fostering predictability, while being criticised by others as resulting too often in over- or under-payment of fees.

Other strengths of the ICC include the fact that it has National Committees. These operate to distribute ICC functions throughout the world, and help ensure a geographic diversity of arbitrator appointments as required.

Many arbitration practitioners appreciate the function that the ICC plays in reviewing arbitral awards before they are issued (*discussed in Section 12 above*), viewing this as contributing to accuracy and precision in awards issued in ICC arbitrations, and assisting in the enforceability of such awards when challenged before national courts.

Article 29 of the ICC Rules also provides for the appointment of an emergency arbitrator to resolve applications for urgent interim or conservatory measures prior to the constitution of the arbitral tribunal. The parties may agree to opt out of this feature.

15. OTHER DISPUTE RESOLUTION SERVICES

15.1 Are there any other mediation, expert determination or alternative dispute resolution services offered by your organisation?

The ICC offers a number of dispute resolution services besides administering arbitrations.

ICC mediations are governed by the ICC Mediation Rules, which replaced the ADR Rules in 2014. More information about these rules can be viewed online at *www.iccwbo.org/products-and-services/arbitration-and-adr/mediation/introduction*.

The ICC is often called upon to act as the appointing authority in ad hoc arbitrations that are not governed by the ICC Rules. When the ICC plays this role, its work is governed by special rules as an appointing authority, which are available at *www.iccwbo.org/products-and-services/arbitration-and-adr/appointing-authority*.

The ICC also offers three inter-related services relating to experts or expert witnesses: (i) proposal of experts and neutrals; (ii) appointment of experts and neutrals; and (iii) administration of expert proceedings. More information about these expert functions are available at *www.iccwbo.org/products-and-services/arbitration-and-adr/experts*.

The ICC also offers Dispute Boards, which it describes as "independent bodies designed to help resolve disputes when they arise during the performance of a contract". More information about ICC Dispute Boards is available at *www.iccwbo.org/products-and-services/arbitration-and-adr/dispute-boards*.

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