

Proposed Modifications to the ICC Arbitration Rules and Explanatory Comments

Amended draft of 7 May 2020

CONFIDENTIAL: NOT FOR CIRCULATION

The proposed modifications of the 2017 ICC Rules of Arbitration (“Rules”) are drafted by the ICC International Court of Arbitration (“Court”). In accordance with the Statutes of the Court, the proposals (accompanied by explanatory comments) were laid before the ICC Commission of Arbitration and ADR (“Commission”) at its Fall meeting in Seoul on 21 September 2019. National Committees and individual Commission members were afforded the opportunity to comment on the proposals ahead of the Fall meeting. New draft proposals were prepared thereafter by the Court and its Secretariat with the assistance of the Secretary of the Commission. National Committees and individual Commission members were invited to comment by 15 March 2020. Upon receipt of the comments received and further input from the Bureau of the Court, a third draft was sent on 27 March 2020 in which the proposed amendment of Article 10 has been withdrawn and further minor modifications have been made (marked in purple).

This present fourth draft includes **new proposals** to clarify that the Rules afford arbitral tribunals the procedural authority to decide the manner in which hearings may be conducted, including videoconferencing, telephone conference or other means. (**Amendment XIII, Articles 25 and 26; other changes are marked in blue.**) This document is sent to all Commission Members and National Committees before being laid before the Commission during its re-scheduled Spring meeting set to take place in Paris on 8 July 2020. Comments, if any, should be sent by 8 June to the Commission’s secretariat.

Amendment I - Article 1

Article 1. International Court of Arbitration

Current text of paragraph 4:

4. As provided for in the 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.

Proposed amendment of paragraph 4:

4. As provided for in the 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~~ at one of its next sessions.

Comment:

This minor Amendment reflects current Court practice, which is to report decisions to the next available plenary session of the Court identified in the plenary session calendar established by the Secretariat at the start of each calendar year. As the frequency of plenary sessions has increased in recent times with extraordinary plenaries being organized on occasion, said next available regular plenary may, or may not be, the “*next session*” of the Court.

Amendment II - Article 2

Article 2. Definitions

Current text of lit. (v):

- (v) “award” includes, *inter alia*, an interim, partial or final award.

Proposed amendment of lit. (v):

- (v) “award” includes, *inter alia*, an interim, partial ~~or,~~ final or additional award.

Comment:

This minor modification to Article 2 mirrors Amendment XIV introducing language to reflect current Court practice regarding additional awards in Article 36. (See below).

Amendment III - Article 3

Article 3. Written Notifications or Communications; Time Limits

Current text of paragraph 1:

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 notification or communication from the arbitral tribunal to the parties shall be sent to the Secretariat.

Proposed amendment of paragraph 1:

1. Save as otherwise provided in Articles 4(4)(b) and 5(3), 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 notification or communication from the arbitral tribunal to the parties shall be sent to the Secretariat~~ shall be sent to each party, each arbitrator, and the Secretariat. Any

notification or communication from the arbitral tribunal to the parties shall also be sent in copy to the Secretariat.

Comment:

This Amendment aims to substitute the requirement to supply pleadings and communications in “a number of copies” with a requirement to send said pleadings and communications to all intended recipients. Its purpose is twofold:

First, to reflect the reality increasingly encountered in ICC arbitrations, namely the exchange of pleadings and communications by electronic means rather than in paper form. It equally reflects the Secretariat’s encouragement towards parties to effectively dispense with written communications in paper form, to the extent possible. The Amendment nevertheless does not prohibit a submission in paper form, where a party opts for it.

Second, to take into account the upcoming introduction of the Secretariat’s online case management platform which will facilitate submissions by electronic means and thus further the principal purpose of the Amendment highlighted above¹.

The last sentence of the Amendment reflects the same considerations with regard to notifications and communications made by arbitral tribunals.

Amendment IV - Articles 4 and 5; Article 1 Appendix V

Article 4. Request for Arbitration

Current text of paragraph 4:

4. Together with the Request, the claimant shall:
 - a) submit the number of copies thereof required by Article 3(1); and
 - b) make payment of the filing fee 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 claimant’s right to submit the same claims at a later date in another Request.

Proposed amendment of paragraph 4:

4. Together with the Request, the claimant shall:
 - a) ~~submit the number of copies thereof required by Article 3(1);~~ make payment of the filing fee required by Appendix III (“Arbitration Costs and Fees”) in force on ~~the date the Request is submitted;~~ and
 - b) ~~make payment of the filing fee required by Appendix III (“Arbitration Costs and Fees”) in force on the date the Request is submitted.~~ submit a sufficient number of copies of the Request for each other party, each arbitrator and the Secretariat where the claimant requests transmission of the Request by delivery against receipt, registered post or courier.

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

¹ Pursuant to the second part of Article 7 of Appendix I, “[...] the Court, in order to take account of developments in information technology, may propose to modify or supplement the provisions of Article 3 of the Rules or any related provisions in the Rules without laying any such proposal before the Commission”. In light of the Commission’s recent work on the use of information technology in arbitration, the Court has nevertheless opted to lay this proposed modification before the Commission.

file shall be closed without prejudice to the claimant's right to submit the same claims at a later date in another Request.

Article 5. Answer to the Request; Counterclaims

Current text of paragraph 1:

1. Within 30 days from the receipt of the Request from the Secretariat, the respondent shall submit an Answer (the "Answer") which shall contain the following information: [...]

Proposed amendment of paragraph 1:

1. Within 30 days from the day following the date of receipt of the Request from the Secretariat, the respondent shall submit an Answer (the "Answer") which shall contain the following information: [...]

Current text of paragraph 3:

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

Proposed amendment of paragraph 3:

3. ~~The Answer shall be submitted to the Secretariat in the number of copies specified by Article 3(1).~~ The Answer shall be submitted in a sufficient number of copies for each other party, each arbitrator and the Secretariat where the respondent requests transmission thereof by delivery against receipt, registered post or courier.

Current text of paragraph 6:

6. The claimant shall submit a reply to any counterclaim within 30 days from the date of receipt of the counterclaims communicated by the Secretariat.

Proposed amendment of paragraph 6:

6. The claimant shall submit a reply to any counterclaim within 30 days from the day following the date of receipt of the counterclaims communicated by the Secretariat.

Article 1 Appendix V. Application for Emergency Measures

Current text of paragraph 2:

2. The Application shall be supplied in a number of copies sufficient to provide one copy for each party, plus one for the emergency arbitrator, and one for the Secretariat.

Proposed amendment of paragraph 2:

2. The Application shall be supplied in a number of copies sufficient to provide one copy for each party, plus one for the emergency arbitrator, and one for the Secretariat where the party submitting the Application requests transmission thereof by delivery against receipt, registered post or courier.

Comment:

The proposed changes to Articles 4(4), 5(3), 5(6) and Article 1(2) Appendix V mirror the Amendment of Article 3(1) specifically in the context of the transmission of the Request and Answer: the requirement for "sufficient number of copies" will only apply where claimant or respondent requests the transmission of the corresponding Request or Answer in paper form.

Amendment V - Article 6

Article 6. Effect of the Arbitration Agreement

Current text of paragraph 6(4)(i):

4. In all cases referred to the Court under Article 6(3), the Court shall decide whether and to what extent the arbitration shall proceed. The arbitration shall proceed if and to the extent that the Court is prima facie satisfied that an arbitration agreement under the Rules may exist. In particular:
 - (i) where there are more than two parties to the arbitration, the arbitration shall proceed between those of the parties, including any additional parties joined pursuant to Article 7, with respect to which the Court is prima facie satisfied that an arbitration agreement under the Rules that binds them all may exist; and [...]

Proposed amendment:

4. In all cases referred to the Court under Article 6(3), the Court shall decide whether and to what extent the arbitration shall proceed. The arbitration shall proceed if and to the extent that the Court is prima facie satisfied that an arbitration agreement under the Rules may exist. In particular:
 - (i) where there are more than two parties to the arbitration, the arbitration shall proceed between those of the parties, including any additional parties joined pursuant to Article [\(7\)\(1\)](#), with respect to which the Court is prima facie satisfied that an arbitration agreement under the Rules that binds them all may exist; and [...]

Amendment VI - Article 7

Article 7. Joinder of Additional Parties

Current text of paragraph 1:

1. A party wishing to join an additional party to the arbitration shall submit its request for arbitration against the additional party (the “Request for Joinder”) to the Secretariat. The date on which the Request for Joinder is received by the Secretariat shall, for all purposes, be deemed to be the date of the commencement of arbitration against the additional party. Any such joinder shall be subject to the provisions of Articles 6(3)–6(7) and 9. No additional party may be joined after the confirmation or appointment of any arbitrator, unless all parties, including the additional party, otherwise agree. The Secretariat may fix a time limit for the submission of a Request for Joinder.

Proposed amendment of paragraph 1:

1. A party wishing to join an additional party to the arbitration shall submit its request for arbitration against the additional party (the “Request for Joinder”) to the Secretariat. The date on which the Request for Joinder is received by the Secretariat shall, for all purposes, be deemed to be the date of the commencement of arbitration against the additional party. Any such joinder shall be subject to the provisions of Articles 6(3)–6(7) and 9. Unless all parties, including the additional party, otherwise agree, or as provided for in Article 7(5), no additional party may be joined after the confirmation or appointment of any arbitrator. The Secretariat may fix a time limit for the submission of a Request for Joinder.

Proposed addition of paragraph 5:

5. Any Request for Joinder made after the confirmation or appointment of any arbitrator shall be decided by the arbitral tribunal once constituted and shall be subject to the additional party having accepted the constitution of the arbitral tribunal and agreeing to

the Terms of Reference, where applicable. In deciding on such a Request for Joinder, the arbitral tribunal shall take into account all relevant factors, which may include whether the arbitral tribunal has *prima facie* jurisdiction over the additional party, the timing of the Request for Joinder, the nationality of the parties, possible conflicts of interests and the impact of the joinder on the arbitral procedure. Any decision to join an additional party is without prejudice to the arbitral tribunal's decision as to its jurisdiction with respect to that party.

Comment:

This Amendment aims at allowing the arbitral tribunal, upon the request of any party, to join a consenting additional party to the arbitration. The possibility of such joinder may well arise as the case unfolds, particularly where procedural efficiency makes it necessary that the consenting additional party be joined. This may well be the case, for instance, where the additional party was not a named claimant or respondent at the outset of the proceedings and has a vested interest on the outcome of the dispute – either in putting forward its own prayers for relief or in supporting or opposing the relief already formulated by other parties.

An application to join additional parties after the constitution of the arbitral tribunal is not infrequent in contemporary institutional arbitration². The requirement that the joined party accept the composition of the arbitral tribunal (and, as the case may be, the Terms of Reference), will avoid any *Dutco* risk for the award. The joined party will be required in any case to be bound by the arbitration agreement, which the arbitral tribunal will assess on a *prima facie* basis at the stage of the joinder. Finally, the arbitral tribunal has discretion to accept or refuse a request for joinder based on its timing, its impact on the procedure and all relevant circumstances.

Amendment VII - Article 11

Article 11. General Provisions

Proposed addition of paragraph 7:

7. Each party must promptly inform the Secretariat, the arbitral tribunal and the other parties, of the existence and identity of any non-party which has entered into an arrangement for the funding of claims or defences and has an economic interest in the outcome of the arbitration.

Comment:

In order to address the increasing use of claims funding in international arbitration as a source of potential conflict of interest, the proposed addition establishes a duty on parties to inform the Secretariat, the arbitral tribunal and the other parties of the existence and identity of any non-party which has entered into an arrangement to fund the claims or defences with an economic interest in the outcome of the arbitration.

Amendment VIII - Article 12

Article 12. Constitution of the Arbitral Tribunal

Current text of paragraph 8:

8. In the absence of a joint nomination pursuant to Articles 12(6) or 12(7) 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 president. In such case, the Court shall be at liberty to choose any person it

² See, for instance, Articles 27(1)(b) of the HKIAC Rules (2018); 7(8) of the SIAC Rules (2016); and 22(1) of the LCIA Rules (2014).

regards as suitable to act as arbitrator, applying Article 13 when it considers this appropriate.

Proposed amendment of paragraph 8:

8. In the absence of a joint nomination pursuant to Articles 12(6) or 12(7) 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 president. In such ~~case~~ cases, the Court shall be at liberty to choose any person it regards as suitable to act as arbitrator, applying Article 13 when it considers this appropriate.

Notwithstanding any agreement by the parties on the method of constitution of the arbitral tribunal, the Court may also appoint each member of the arbitral tribunal whenever necessary to avoid a serious risk of unfairness that may affect the validity of the award.

Comment:

The Amendment aims to address situations where the Court was required to assess whether, by following the specific provisions of the arbitration agreement which do not guarantee equal participation by all parties in the constitution of the arbitral tribunal, the enforceability of any award could ultimately be jeopardized.

This additional provision will address, for instance, situations arising in both multiparty and non-multi party arbitrations where the arbitration agreement calls for the unilateral appointment of the arbitral tribunal; the eventual designation of a co-arbitrator as sole arbitrator in the event of failure of nomination of the other co-arbitrator; the nomination of arbitrators by pre-determined groups of parties where the agreed number of arbitrators is different than three; etc.

These situations have so far been dealt with in the context of the general provision of Article 42³. In light of recent decisions by the Court on the subject, they appear to merit explicit elaboration.

Amendment IX - Article 13

Article 13. Appointment and Confirmation of the Arbitrators

Current text of paragraph 2:

2. The Secretary General may confirm as co-arbitrators, sole arbitrators and presidents of arbitral tribunals persons nominated by the parties or pursuant to their particular agreements, provided that the statement they have submitted contains no qualification regarding impartiality or independence or that a qualified statement regarding impartiality or 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 president of an arbitral tribunal should not be confirmed, the matter shall be submitted to the Court.

Proposed amendment of paragraph 2:

2. The Secretary General may confirm as co-arbitrators, sole arbitrators and presidents of arbitral tribunals persons nominated by the parties or pursuant to their particular agreements, provided that the statement they have submitted contains no qualification regarding impartiality or independence or that a qualified statement regarding impartiality or independence has not given rise to objections. Such confirmation shall

³ "In all matters not expressly provided for in the Rules, the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law".

be reported to the Court at ~~its next session~~ one of its next sessions. If the Secretary General considers that a co-arbitrator, sole arbitrator or president of an arbitral tribunal should not be confirmed, the matter shall be submitted to the Court.

Current text of paragraph 5:

5. The sole arbitrator or the president of the arbitral tribunal shall be of a nationality other than those of the parties. However, in suitable circumstances and provided that none of the parties objects within the time limit fixed by the Court, the sole arbitrator or the president of the arbitral tribunal may be chosen from a country of which any of the parties is a national.

Proposed amendment of paragraph 5:

5. The Court shall not appoint a sole arbitrator or a president of the arbitral tribunal of the same nationality of any party, save that in suitable circumstances:
 - a) The Court may appoint a sole arbitrator or president of the arbitral tribunal with the same nationality as any of the parties, provided that none of the parties objects within the time limit fixed by the Secretariat;
 - b) The Court may, when all the parties have the same nationality, appoint a sole arbitrator or a president having the same nationality of the parties.

Proposed addition of paragraph 6:

6. Whenever the arbitration agreement upon which the arbitration is based arises from a treaty, and unless the parties agree otherwise, no arbitrator shall have the same nationality of any party.

Comment:

Paragraph 2.

In practice, the Secretariat reports to the Court on the confirmation of arbitrators by the Secretary General whenever it is required to invite the Court to take first decisions (rather than the session immediately following the date of confirmation).

Paragraph 5.

The Amendment aims to maintain the rule whereby a sole arbitrator or president should not have the nationality of any of the parties. At the same time, it qualifies its application to reflect the most recent practice of the Court.

The first exception facilitates the appointment of a sole arbitrator or president regardless of nationality identity where the parties do not take issue with the departure from the main rule. It also ensures efficiency by allowing the Secretariat to inquire with the parties directly and set the requisite time limit.

The second exception reflects considerations arising in domestic cases (primarily in major jurisdictions such as Brazil, India and elsewhere), where all parties share the same nationality.

The Amendment also purports to ensure that nationality restrictions only apply with regard to sole arbitrator or president appointments and not to confirmations made pursuant to joint nominations by the parties, or otherwise subject to their specific agreement.

Paragraph 6.

The proposed addition establishes a specific rule excluding any arbitrator (including a party-appointed arbitrator) who shares the nationality of any party from acting in investment cases

based on a treaty. A similar provision is found under Rule 1(3) of the ICSID Arbitration Rules⁴. The proposed addition aims at ensuring the complete neutrality of the arbitral tribunal in the specific conditions of an investor/state treaty-based arbitration, where it may have to apply public international law and assess the legitimacy of public policies, regulation and legislation taken in the interest of the public.

Amendment X - Article 17

Article 17. Proof of authority

Current text of Article 17:

At any time after the commencement of the arbitration, the arbitral tribunal or the Secretariat may require proof of the authority of any party representatives.

Proposed amendment and addition to Article 17:

Article 17. Party representation

1. Each party must promptly inform the Secretariat, the arbitral tribunal and the other parties of any changes in its representation.
2. The arbitral tribunal may, once constituted and after it has afforded an opportunity to the parties to comment in writing within a suitable period of time, take any measure necessary to avoid a conflict of interest arising from a change in party representation, including the exclusion of new party representatives from participating in whole or in part in the arbitral proceedings.
3. At any time after the commencement of the arbitration, the arbitral tribunal or the Secretariat may require proof of the authority of any party representatives.

Comment:

The addition of paragraph 1 articulates a requirement to inform the Secretariat and the arbitral tribunal of any changes in their representation.

The addition of paragraph 2 recognizes the express power of arbitral tribunals, once constituted, to act upon changes in party representation which may give rise to conflicts of interest. It thus aims to address issues of party representation that may otherwise lead to the filing of challenges against arbitrators upon grounds which otherwise lie beyond their control and which the Court has unfortunately had to accept on a number of occasions. It also dispenses with the need to have such power acknowledged in the context of Terms of Reference, which requires the specific agreement of all participating parties. In light of this addition, the title of the Article is amended.

Amendment XI - Article 22(2)

Article 22 (2): Conduct of the Arbitration is amended as follows:

Current text of paragraph 2:

2. In order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties.

⁴ "The majority of the arbitrators shall be nationals of States other than the State party to the dispute and of the State whose national is a party to the dispute, unless the sole arbitrator or each individual member of the Tribunal is appointed by agreement of the parties. Where the Tribunal is to consist of three members, a national of either of these States may not be appointed as an arbitrator by a party without the agreement of the other party to the dispute [...]"

Proposed amendment of paragraph 2:

2. In order to ensure effective case management, ~~the arbitral tribunal,~~ after consulting the parties, ~~the arbitral tribunal may shall~~ adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties. Such measures may include one or more of the case management techniques described in Appendix IV.

Comment:

The changes in paragraph 2 articulate a requirement by arbitral tribunals to adopt appropriate procedural measures in the context of efficient case management and draw relevant guidance from Appendix IV, if necessary.

Amendment XII - Article 24

Article 24. Case Management Conference and Procedural Timetable

Current text of paragraph 1:

1. When drawing up the Terms of Reference or as soon as possible thereafter, the arbitral tribunal shall convene a case management conference to consult the parties on procedural measures that may be adopted pursuant to Article 22(2). Such measures may include one or more of the case management techniques described in Appendix IV.

Proposed amendment of paragraph 1:

1. When drawing up the Terms of Reference or as soon as possible thereafter, the arbitral tribunal shall ~~hold~~convene a case management conference to consult the parties on procedural measures that may be adopted pursuant to Article 22(2). ~~Such measures may include one or more of the case management techniques described in Appendix IV.~~

Current text of paragraph 2:

2. During or following such conference, the arbitral tribunal shall establish the procedural timetable that it intends to follow for the conduct of the arbitration. The procedural timetable and any modifications thereto shall be communicated to the Court and the parties.

Proposed amendment of paragraph 2:

2. During ~~or following~~ such conference or as soon as possible thereafter, the arbitral tribunal shall establish the procedural timetable that it intends to follow for ~~the~~the efficient conduct of the arbitration. The procedural timetable and any modifications thereto shall be communicated to the Court and the parties.

Comment:

The Amendment requires that a procedural timetable materialize on or about the time of the case management conference to ensure efficient conduct of the arbitration and that deliberations are not delayed.

Amendment XIII

Article 25. Establishing the Facts of the Case

Current text of paragraph 2:

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.

Proposed amendment:

- Delete current paragraph 2 and rename subsequent paragraphs.

Article 26. Hearings

Current text of paragraph 1:

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.

Proposed amendment of paragraph 1:

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. The arbitral tribunal may decide, after consulting the parties, that any hearing will be conducted by videoconference, telephone or other appropriate means of communication.

APPENDIX VI - EXPEDITED PROCEDURE RULES

Article 3

Current text of paragraph 5:

5. The arbitral tribunal may, after consulting the parties, decide the dispute solely on the basis of the documents submitted by the parties, with no hearing and no examination of witnesses or experts. When a hearing is to be held, the arbitral tribunal may conduct it by videoconference, telephone or similar means of communication.

Proposed amendment of paragraph 5:

5. The arbitral tribunal may, after consulting the parties, decide the dispute solely on the basis of the documents submitted by the parties, with no hearing and no examination of witnesses or experts. When a hearing is to be held, the arbitral tribunal may conduct it by videoconference, telephone or similar means of communication.

Comment:

The proposed changes aim to clarify that the Rules afford arbitral tribunals with the procedural authority to decide the manner in which hearings may be conducted, including videoconferencing, telephone conference or other means. As the amended provision of Article 26(1) applies to all cases, the last sentence of Article 3(5) Appendix VI becomes unnecessary.

Amendment XIV - Article 29

Article 29. Emergency Arbitrator

Current text of paragraph 6:

6. The Emergency Arbitrator Provisions shall not apply if:
 - a) the arbitration agreement under the Rules was concluded before 1 January 2012;
 - b) the parties have agreed to opt out of the Emergency Arbitrator Provisions; or
 - c) the parties have agreed to another pre-arbitral procedure that provides for the granting of conservatory, interim or similar measures.

Proposed amendment of paragraph 6:

6. The Emergency Arbitrator Provisions shall not apply if:
 - a) the arbitration agreement under the Rules was concluded before 1 January 2012;
 - b) the parties have agreed to opt out of the Emergency Arbitrator Provisions; or
 - c) ~~the parties have agreed to another pre-arbitral procedure that provides for the granting of conservatory, interim or similar measures.~~ the arbitration agreement upon which the application is based arises from a treaty.

Comment:

This Amendment first removes from the scope of the applicability conditions reviewed by the President of the Court the requirement of the absence of any party agreement referring to another pre-arbitral process for the granting of interim or conservatory measures. While this requirement was essentially introduced to address the possible co-existence of a reference to the Rules of for a Pre-Arbitral Referee Procedure, it was actually not encountered in that context over the seven and a half years of application of the Emergency Arbitrator (“EA”) provisions.

In practice, said condition has rarely been utilized to restrict the application of the EA provisions, if at all; this conclusion holds also in the context of construction-related EA proceedings, where the availability of dispute board procedures can be seen as an impediment to EA applicability. Said matters have ultimately been resolved in the context of admissibility and/or jurisdictional findings by emergency arbitrators. The Amendment does not preclude their authority to do so.

As far as treaty-based investment arbitrations are concerned, the Amendment codifies the solution applied already by the Court and excluding the application of the EA provisions. There is however the need to provide into the Rules a clear basis for it, which is today inexistent, therefore leading to objections and criticism.

Amendment XV - Article 36

Current title of Article 36:

Correction and Interpretation of the Award; Remission of Awards

Proposed amendment of title of Article 36:

Correction and Interpretation of the Award; Additional Award; Remission of Awards

Current text of paragraph 1:

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.

Proposed text of paragraph 1:

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.~~ from the date of notification of the award by the Secretariat pursuant to Article 35(1).

Current text of paragraph 2:

2. Any application of a party for the correction of an error of the kind referred to in Article 36(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). [...]

Proposed amendment of paragraph 2:

2. Any application of a party for the correction of an error of the kind referred to in Article 36(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). [...]

Proposed addition of new paragraph 3:

3. Any application of a party for an additional award as to claims made in the arbitral proceedings which the arbitral tribunal has omitted to decide must be made to the Secretariat within 30 days of the receipt of the award by such party. After transmission of the application to the arbitral tribunal, the latter shall grant the other party or parties a short time-limit, normally not exceeding 30 days, from the receipt of the application by that party or parties, to submit any comments thereon. The arbitral tribunal shall submit its decision on the application in draft form to the Court not later than 30 days following the expiry of the time limit for the receipt of any comments from the other party or parties or within such other period as the Court may decide.

Renumbering and amendment of current paragraph 3:

4. A decision to correct or to interpret the award shall take the form of an addendum and shall constitute part of the award. A decision to grant the application under paragraph 3 shall take the form of an additional award. The provisions of Articles 32, 34 and 35 shall apply mutatis mutandis.

Paragraph 4 becomes paragraph 5.

Comment:

This Amendment first concerns corrections of awards by arbitral tribunals on their own motion and sets the start of the time limit for such correction at the notification of the award rather than the date of the award, thus reducing the risk of said corrections being made out of time.

The Amendment also proposes an additional paragraph and a modification to the renumbered paragraph 4 (as well as a modification to Article 2(v); see Amendment II) to introduce language to deal with requests and timeline for additional awards.

Amendment XVI - Article 37

Article 37: Advance to Cover the Costs of the Arbitration

Current text of paragraph 2:

1. 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 expenses for the claims which have been referred to it by the parties, unless any claims are made under Article 7 or 8 in which case Article 37(4) shall apply. The advance on costs fixed by the Court pursuant to this Article 37(2) shall be payable in equal shares by the claimant and the respondent

Proposed text of paragraph 2:

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 expenses and any other expenses incurred by ICC related to the arbitration for the claims which have been referred to it by the parties, unless any claims are made under Article 7 or 8 in which case Article 37(4) shall apply. The advance on costs fixed by the Court pursuant to this Article 37(2) shall be payable in equal shares by the claimant and the respondent

Comment:

This minor Amendment addresses accounting issues arising from the existence of variable banking charges incurred during the processing of payments by the Secretariat to parties and arbitrators. It ensures that said expenses are correctly identified as expenses incurred in the course of the arbitration.

Amendment XVII - Article 43

Proposed introduction of new article 43:

Article 43: Governing law and settlement of disputes

Any claims against ICC arising out of or in connection with the administration of the arbitration proceedings by the Court under the Rules shall be governed by French law and settled by the Paris Judicial Tribunal (Tribunal Judiciaire de Paris) in France, which shall have exclusive jurisdiction.

Comment:

This proposal introduces an agreement on the forum and law applicable with regard to any claims against ICC arising out of the administration of arbitral proceedings by the Court pursuant to the Rules (under Article 1(2), the body administering arbitrations under the Rules is the Court). It aims to concentrate any proceedings against ICC arising out of or in connection to case management, which may currently be instituted in different fora and governed by different laws, to a single forum (the competent Paris court) under a single applicable law (French law).

The proposed formulation is limited to disputes against ICC in the context of case management by the Court, thus leaving any right of recourse against the award itself at the place of arbitration or a place of enforcement intact.

Amendment XVIII – Appendices I and II

APPENDIX I – STATUTES OF THE INTERNATIONAL COURT OF ARBITRATION

Article 3. Appointment

Current text of Article 3:

1. The President 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-Presidents 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 or Groups, one member for each National Committee or Group. On the proposal of the President of the Court, the World Council may appoint members in countries and territories where there is no National Committee or Group.
4. On the proposal of the President of the Court, the World Council may appoint alternate members.
5. The term of office of all members, including, for the purposes of this paragraph, the President and Vice-Presidents, is three years. If a member is no longer in a position to exercise the member's functions, a successor is appointed by the World Council for the remainder of the term. Upon the recommendation of the Executive Board, the duration of the term of office of any member may be extended beyond three years if the World Council so decides.

Proposed amended text of Article 3:

1. The President is elected by the ICC World Council upon the recommendation of the Executive Board of the ICC, based on the proposal of an independent selection committee which includes highly distinguished arbitration practitioners.
2. On the proposal of the President, the ~~The~~ ICC World Council appoints the Vice-Presidents of the Court from among the members of the Court or otherwise. The President and the Vice-Presidents of the Court form the Bureau of the Court.
3. ~~Its~~ The members of the Court are appointed by the ICC World Council on the proposal of National Committees or Groups, one member for each National Committee or Group. On the proposal of the President, the World Council may appoint alternate members.
4. On the proposal of the President ~~of the Court~~, the ICC World Council may appoint members and alternate members in countries and territories:
 - a. where there is no National Committee or Group; or
 - b. in countries and territories where there is no National Committee or Group is suspended.
5. The term of office of all members, including, for the purposes of this paragraph, the President and Vice-Presidents, is three years and may be renewed once. If a member is no longer in a position to exercise the member's functions, a successor is appointed by the World Council for the remainder of the term. ~~Upon the recommendation of the Executive Board, the duration of the term of office of any member may be extended beyond three years if the World Council so decides.~~
6. No Court member shall serve for more than two full consecutive terms, unless the World Council decides otherwise upon the recommendation of the Executive Board

further to the proposal of the President, in particular where a Court member is proposed for election as Vice-President.

Article 4. Plenary Session of the Court

Current text of Article 4:

The Plenary Sessions of the Court are presided over by the President or, in the President's absence, by one of the Vice-Presidents designated by the President. The deliberations shall be valid when at least six members are present. Decisions are taken by a majority vote, the President or Vice-President, as the case may be, having a casting vote in the event of a tie.

Proposed new Article 4:

Article 4. Committees

1. Save as provided in Articles 5(1), 6 and 7 of this Appendix, the Court conducts its work in Committees of three members.
2. The members of the Committees consist of a president and two other members.

Article 5. Committees

Current text of Article 5:

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

Proposed new Article 5:

Article 5. Special Committees

1. The Court may conduct its work in Special Committees:
 - a) to decide on matters under Articles 14 and 15(2) of the Rules;
 - b) to scrutinize draft awards in the presence of dissenting opinions;
 - c) to scrutinize draft awards in cases where one or more of the parties is a state or may be considered to be a state entity;
 - d) to decide on matters transferred to a special Committee by a Committee which did not reach a decision or deemed it preferable to abstain, having made any suggestions it deemed appropriate; or
 - e) upon request of the President.
2. The members of the special Committee consist of a president and at least six other members.

Article 6. Confidentiality

Current Article 6 renumbered as Article 8.

Proposed new Article 6:

Article 6. Single-member Committees

The Court may scrutinize draft awards under the Expedited Procedure Provisions in Single-member Committees.

Article 7. Modification of the Rules of Arbitration

Current Article 7 renumbered as Article 9.

Proposed new Article 7:

Article 7. Plenary of the Court

1. The Court meets in plenary during its annual working session. It also meets in plenary whenever so convened by the President.
2. The plenary of the Court may take any decision under Articles 4(1), 5(1) and 6 of this Appendix.
3. The members of the plenary consist of the President, the Vice-Presidents and all Court members who have accepted to attend and are in attendance.

Proposed introduction of new Article 10:

Article 10

The decisions of the Court shall be deemed to be made at Paris, France.

APPENDIX II - INTERNAL RULES OF THE INTERNATIONAL COURT OF ARBITRATION

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

Current version of paragraph 2:

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.

Proposed amendment of paragraph 2

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.~~

Article 4. Committee of the Court

Current version of Article 4:

1. In accordance with the provisions of Article 1(4) of the Rules and Article 5 of Appendix I, the Court hereby establishes a Committee of the Court.
2. The members of the Committee consist of a president and at least two other members. The President of the Court acts as the president of the Committee. In the President's absence or otherwise at the President's request, a Vice-President of the Court or, in exceptional circumstances, another member of the Court may act as president of the Committee.
3. The other two members of the Committee are appointed by the Court from among the Vice Presidents 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 president. 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.
6. For the purpose of expedited procedures and in accordance with the provisions of Article 1(4) of the Rules and Article 5 of Appendix I, the Court may exceptionally establish a Committee consisting of one member. Articles 4(2), 4(3), 4(4), 4(5), subparagraphs b) and c), of this Appendix II shall not apply.

Proposed amended title and content of Article 4:

Article 4. Constitution, quorum and decision-making

1. The members of Committees, Special Committees and Single-member Committees are appointed by the President from among the Vice-Presidents or the other members of the Court.
2. Committees and Special Committees meet whenever convened by their president.
3. The President of the Court acts as the president of the Committee, Special Committee and the plenary. In the President's absence or otherwise at the request of the President, a Vice-President of the Court may act as president of a Committee, Special Committee or the plenary. In exceptional circumstances, another member of the Court may act as president of a Committee or Special Committee.
4. The President of the Court, a Vice-President and any Court member may act in, and convene, the Single-member Committee.
5. Deliberations shall be valid:
 - a. At the Committee, when at least two members are present.
 - b. At the Special Committee and plenary, when at least six members, and the President or designated Vice-President, are present.
6. Decisions at Committees are taken unanimously. When a Committee cannot reach a unanimous decision or deems it preferable to abstain, it transfers the case to a Special Committee, making any suggestions it deems appropriate.
7. Decisions at Special Committees and the plenary are taken by majority, the President or Vice-President, as the case may be, having a casting vote in the event of a tie.

Article 5

Current Article 5 renumbered as Article 6.

Proposed new Article 5:

Article 5. Communication of reasons of decisions

1. Upon request of any party, the Court will communicate the reasons for:
 - a) decisions pursuant to Articles 6(4) and 10.
 - b) a decision made on the challenge of an arbitrator pursuant to Article 14; and

- c) a decision to initiate replacement proceedings and subsequently to replace an arbitrator pursuant to Article 15(2).
2. Any request for the communications of reasons must be made in advance of the decision in respect of which reasons are sought. For decisions pursuant to Article 15(2), a party shall address its request to the Court when invited to comment pursuant to Article 15(3).
3. In exceptional circumstances, the Court may decide not to communicate the reasons for any of the above decisions.

Renumbered Article 6 [ex 5]. Court Secretariat

Current version of paragraph 1:

1. In the Secretary General's absence or otherwise at the Secretary General's request, the Deputy Secretary General and/or the General Counsel shall have the authority to refer matters to the Court, confirm arbitrators, certify true copies of awards and request the payment of a provisional advance, respectively provided for in Articles 6(3), 13(2), 35(2) and 37(1) of the Rules, as well as to take the measure provided for in Article 37(6).

Proposed amendment of paragraph 1:

1. In the Secretary General's absence or otherwise at the Secretary General's request, the Deputy Secretary General and/or the General Counsel shall have the authority to refer matters to the Court, confirm arbitrators, certify true copies of awards ~~and~~ request the payment of a provisional advance and authorize the payment of advances in instalments, respectively provided for in Articles 6(3), 13(2), 35(2) and 37(1) of the Rules and Article 1(6) of Appendix III, as well as to take the measure provided for in Article 37(6).

Article 6

Current Article 6 renumbered as Article 7.

Comment

The proposed modifications to Appendices I and II address four points:

First, amendments to Article 3 of Appendix I relate to the election of the Court's membership. In line with ICC's governance principles, Article 3 (i) sets out the process leading to the election of the President, (ii) introduces a limit to the number of successive terms to be served by members, (iii) acknowledges the existence of the Bureau, the group comprised by the President and Vice Presidents which in particular coordinates the work of the Court, discusses policy issues and ensures uniformity of practice and (iv) explains the situations in which the President may propose the election of members and alternate members.

Second, amendments to Articles 4, 5 and 7 of Appendix I and 1 through 4 of Appendix II aim at updating the Court's *modus operandi* taking into account the realities of its contemporary workload, with a view to maintaining quality and ensuring efficiency in its decision-making. In particular, the amendments set out that (i) the Court conducts its work primarily through three-member Committees; (ii) Special Committees conduct the work which by practice was assigned to the full Court; and (iii) the plenary meets once during the Court's annual working session and thereafter at the invitation of the President (which, in principle, will see the plenary convene annually in all of Paris, Hong Kong/Singapore, New York and Sao Paulo).

Third, the amendments incorporate the existing provisions on scrutiny of draft awards under the Expedited Procedure Rules (new Article 6 of Appendix I) and practice on the

communication of reasons supporting certain decisions of the Court (new Article 5 of Appendix II).

Fourth and final, proposed new Article 10 of Appendix I clarifies that decisions by the Court are deemed to be made in Paris, given that (i) some Court sessions may be partly or fully conducted remotely and (ii) on occasion, the Court may meet in cities other than Paris.

Amendment XIX - Article 1 Appendix III

APPENDIX III - ARBITRATION COSTS AND FEES

Article 1. Advance on Costs

Current text of paragraph 6:

6. The Court may authorize the payment of advances on costs, or any party's share thereof, in instalments, subject to such conditions as the Court thinks fit, including the payment of additional ICC administrative expenses.

Proposed amendment of paragraph 6:

6. ~~The Court~~ The Secretary General may authorize the payment of advances on costs, or any party's share thereof, in instalments, subject to such conditions as the Court thinks fit, ~~including the payment of additional ICC administrative expenses.~~

Comment:

This Amendment aims to facilitate the efficient processing of requests for payments of the advance on costs by instalments by allowing the Secretary General to take appropriate decisions *in lieu* of the Court. The Court retains the power to impose whatever conditions on said process it considers necessary.

Amendment XX - Appendix IV

APPENDIX IV - CASE MANAGEMENT TECHNIQUES

Current text of section h (1):

h) Settlement of disputes:

- (i) informing the parties that they are free to settle all or part of the dispute either by negotiation or through any form of amicable dispute resolution methods such as, for example, mediation under the ICC Mediation Rules;
[...]

Proposed amendment of section h (1):

h) Settlement of disputes:

- (i) ~~informing~~ encouraging the parties ~~that they are free to~~ consider settlemente ~~of~~ all or part of the dispute either by negotiation or through any form of amicable dispute resolution methods such as, for example, mediation under the ICC Mediation Rules;
[...]

Comment:

This Amendment emphasizes the role of arbitral tribunals in encouraging (rather than simply informing) parties to consider settlement of their disputes by way of amicable dispute resolution processes.

Amendment XXI- Article 1(2) Appendix VI

APPENDIX VI - EXPEDITED PROCEDURE RULES

Article 1 (2): Application of the Expedited Procedure Rules is amended as follows

Current text of paragraph 2:

2. The amount referred to in Article 30(2), subparagraph a), of the Rules is US\$ 2,000,000.

Proposed amendment of paragraph 2:

2. The amount referred to in Article 30(2), subparagraph a), of the Rules is:
 - i. US\$ 2,000,000 if the arbitration agreement under the Rules was concluded on or after 1 March 2017 and before 1 January 2021 or
 - ii. US\$ 4,000,000 if the arbitration agreement under the Rules was concluded on or after [1 January 2021].

Comment:

Further to the first two and a half years of application of the Expedited Procedure Provisions (“EPP”) and the administration of more than 75 cases thereunder, the Court is considering whether it is appropriate to increase the figure of the amount in dispute serving as the quantitative threshold for the automatic application of the EPP⁵ (currently set at USD 2 million) and, in the affirmative, to what amount.

In this regard, it launched a consultation process through its user network to solicit views on the subject. Respondents have thus far replied favorably to an increase of the threshold amount with a registered preference pointing to a USD 4 million / USD 5 million mark. This process is on-going, and the Commission will be provided with a detailed note outlining the result of the survey in due course.

Amendment XXII - Arbitration Clauses

ICC ARBITRATION CLAUSES

Standard ICC Arbitration Clause without publication of awards

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. Any award or procedural order made in the arbitration shall not be published.

Comment:

This last Amendment concerns the standard ICC arbitration agreement and as such is not technically part of the Rules modification. It relates to the Court’s recent initiative to foster publicity of ICC arbitral awards⁶ and presents those parties who wish to opt out of said process with the possibility of doing so explicitly.

⁵ Article 30(2): “The Expedited Procedure Rules set forth in Appendix VI shall apply if: a) the amount in dispute does not exceed the limit set out in Article 1(2) of Appendix VI at the time of the communication referred to in Article 1(3) of that Appendix; or b) the parties so agree”.

⁶ Supra note 6, paragraphs 40-46.