3-41 The Secretariat supplies such information and recommendations to the Court in the form of reports, which are prepared for every decision or set of decisions that the Court will be asked to make at a particular committee or plenary session. Each report will contain a substantial amount of information on the features and characteristics of the case, including a summary of the dispute. Where appropriate, the Secretariat may also attach exhibits to these reports, such as copies of relevant contracts, correspondence, submissions from the parties, and other contemporaneous documentation. The Secretariat's management and the Counsel assigned to the case are on hand at Court sessions to answer any questions Court members may have regarding the case. Where the Court does not feel it has sufficient information at its disposal to make a fair and informed decision, it may ask the Secretariat to retrieve additional information from the file, and occasionally even requests the Secretariat to contact the parties or the arbitral tribunal in cases where the file does not contain the information it needs.

3-42 In many instances, the Secretariat will recommend a particular course of action in the report if the decision is to be made at a committee session. Recommendations by the Secretariat on important or complex decisions are the result of substantial deliberation within the Secretariat. Initially, the team administering a particular case will prepare a draft report and recommendation, which will then be distributed to all other teams and the Secretariat's management one day prior to the Secretariat staff meeting at which they will be discussed. Secretariat staff meetings are held on a weekly basis and chaired by the Secretariat's management, who take the meeting through each proposed decision in the draft agendas. The variety of legal and cultural backgrounds on hand means individual matters are analysed from a number of perspectives in a manner that is not dissimilar to a Court session, thereby assuring the quality and consistency of the Secretariat's work. More informal exchanges of information and views also occur on a regular basis amongst staff members from all teams. The Secretariat puts great care and considerable thought into its recommendations to the Court.

3-43 Where a decision is to be made in a committee session, the Secretariat's agenda will usually be distributed to the three-member panel one week before the session, unless it is a "tabled matter", in which case it will be distributed two days before the session, or, in extremely urgent cases, on the day before or the morning of the session.

3-44 The Secretariat's role at a plenary session is different, as the Court will assign one of its members to report on the decision to be taken and make a recommendation. The Secretariat will then assist the *rapporteur* by providing him or her with the information needed to prepare the report. The Secretariat will also submit an agenda to brief the Court on relevant background material and to provide an analysis of the possible decisions, but it will not include a recommendation.

ARTICLE 2: DEFINITIONS

In the Rules:

(i) "arbitral tribunal" includes one or more arbitrators;

(ii) "claimant" includes one or more claimants, "respondent" includes one or more respondents, and "additional party" includes one or more additional parties;

(iii) "party" or "parties" include claimants, respondents or additional parties;

(iv) "claim" or "claims" include any claim by any party against any other party; and

(v) "award" includes, *inter alia*, an interim, partial or final award.

3-45 **Purpose.** Article 2 establishes the meaning within the Rules of several important and frequently used terms. The provision does not contain capitalized defined terms. Rather, its approach is to specify notable items that fall within the meaning of a term. Some flexibility is preserved in this way by avoiding exclusionary statements that may unduly restrict the Court and arbitral tribunals in their application of the Rules.

3-46 **2012 modifications.** The terms "party" and "claim" have been added to the definitions. They are discussed below (see paragraphs 3-48 and 3-49). The term "additional party", which is now used to describe a party to the arbitration that has been joined pursuant to Article 7 (see paragraphs 3-289 and following), is now also mentioned in Article 2(ii).

3-47 **On "claimant", "respondent" and "additional party".** Many ICC arbitrations now include more than two parties or two groups of parties. The clarification in Article 2, subparagraph (ii), to encompass the terms' plural forms has the effect of formally extending the Rules' applicability to such cases.

3-48 **On "claim".** An entirely new inclusion, this serves to recognize claims other than principal claims (claimant against respondent) and counterclaims (respondent against claimant) as claims under the Rules. Such other claims include those between claimants or respondents (sometimes called "cross-claims"), and claims by or against parties that have been joined to the proceedings but are on neither the claimant's nor the respondent's side (see paragraphs 3-324 and following). This addition to Article 2 is particularly relevant to the new Articles 7–10, which authorize parties to join other parties and bring claims against any party and under more than one contract, and the Court to consolidate separate arbitrations where appropriate.

3-49 **On "party".** Also new to the 2012 Rules, the definition of "party" distinguishes "additional parties" from "claimants" and "respondents", thereby formally extending the meaning of the term to parties that are neither claimants nor respondents. This is particularly important in light of the formal recognition of joinder in Article 7. Most parties joined pursuant

to Article 7 will choose to be recognized as either claimants or respondents, which will determine their involvement in the selection of arbitrators (see Article 12(7)) and the payment of advances on costs (see Article 36(4)), as these matters often relate to parties on one or other side of the dispute. However, in a small number of cases, the designation of a party as either claimant or respondent may be inappropriate given that party's distinct position in the dispute. Article 2 now envisages an alternative, which is also reflected in new drafting in Articles 12(7) and 36(4).

3-50 **On "award".** Article 2's main purpose in providing a definition for "award" is to clarify that the Rules apply to all types of awards, regardless of the label chosen by the arbitral tribunal (e.g. partial, interim or final). The provision stops short of providing any guidance on whether an arbitral tribunal's decision should be rendered as an award or whether it can be made as an order. The question is particularly relevant to ICC arbitration as awards (but not orders) must be submitted to the Court in draft form for scrutiny pursuant to Article 33 (see paragraphs 3-1185–3-1190).

ARTICLE 3: INTRODUCTION TO WRITTEN NOTIFICATIONS AND COMMUNICATIONS AND TIME LIMITS IN ICC ARBITRATION

3-51 **Purpose.** Article 3 contains rules concerning how to send communications, to whom, in how many copies, and to which address. It also defines when communications are deemed to be made for the purpose of calculating time limits under the Rules.

3-52 Article 3 can be and is often superseded or supplemented by other arrangements. Arbitral tribunals and parties will often agree at the beginning of the arbitration on specific methods for making notifications and communications. Failing agreement, the arbitral tribunal is likely to issue directions in this respect. For example, the arbitral tribunal may request that the parties send a hard copy of any lengthy submissions (e.g. over thirty pages) to each arbitrator but allow smaller submissions and regular correspondence to be sent by email only. The arbitral tribunal will often also give directions concerning the running of time limits, compliance with deadlines, and the complexities engendered by the involvement of different time zones.

3-53 **2012 modifications.** No substantive changes have been made to Article 3. However, the provision may be subsequently amended if and when the Secretariat develops an online submission and case management system. Article 7 of Appendix I permits a formally accelerated procedure for such amendments.

ARTICLE 3(1): WRITTEN NOTIFICATIONS OR COMMUNICATIONS FROM PARTIES AND ARBITRAL TRIBUNALS

> 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.

3-54 **Purpose.** Article 3(1) specifies the number of copies of pleadings and other written communications to be supplied by the parties. It also clarifies that a copy of any arbitral tribunal correspondence to the parties must be sent to the Secretariat. These requirements ensure, in the interests of due process and efficiency, that all actors in an arbitration are informed at the same time of all matters relevant to the proceedings. Copying all correspondence to the Secretariat enables it to be kept informed about the progress of a case and to maintain a full record of all communications and documents so that it and the Court can fulfil their functions under the Rules.

3-55 **2012 modifications.** The term "notification" has been added where reference is made to correspondence from the arbitral tribunal to the parties. The addition was made so that the provision mirrors the following three paragraphs of Article 3, which all refer to "notifications and communications".

Pleadings and other communications from the parties

3-56 Article 3(1) fixes the number of copies of documents that parties should supply.

3-57 **Supplying multiple copies of certain documents to the Secretariat.** Article 3(1) is referred to in several articles of the Rules (i.e. Articles 4(4), 5(3), 35(2)) in relation to the number of copies to be provided to the Secretariat for distribution to the other parties and the members of the arbitral tribunal and for the Secretariat's files. The Secretariat is responsible for notifying the Request for Arbitration and insists on receiving a hard copy of the document and its annexes for every other party and every arbitrator, as well as for itself. Pursuant to Article 4(4), it will withhold notification until it has received these hard copies. The Secretariat also requires the respondent to submit hard copies of the Answer pursuant to Article 5(3), although it will recognize any direct transmission of hard copies of the Answer by the respondent to the other parties. Requests for Joinder are also subject to requirements with respect to hard copies (see paragraph 3-299) and notification will be withheld where they are not met.

3-58 A complicating factor in meeting these requirements is that the exact number of parties and arbitrators may not be known at the time of submitting the Request, Answer or Request for Joinder. The number of arbitrators may still need to be agreed on by the parties or determined by the Court pursuant to Article 12(2). Furthermore, additional parties may be joined pursuant to Article 7(1) at any time prior to the appointment or confirmation of any arbitrator. If the number of arbitrators remains to be determined, the Secretariat will ask to be provided with enough hard copies to cover the proposed number of arbitrators. If an additional party is later joined to the arbitration, the Secretariat will request additional copies of all relevant documents for that additional party.

3-59 Additionally, the number of copies to be circulated may vary depending on the number of party representatives or a party's specific requirements (e.g. additional courtesy copies). Where a single party is represented by counsel from more than one law firm, the Secretariat will usually request that a hard copy be provided for each firm.

3-60 **Copying communications and documents directly to other actors.** Aside from those specific instances (explained above) in which multiple copies must be sent to the Secretariat, documents and communications should be addressed or copied directly by the sender to all other relevant actors, always with a copy to the Secretariat. In this respect, ICC arbitration differs from certain other forms of institutional arbitration where the institution distributes *all* communications.

3-61 Following transmission of the case file to the arbitral tribunal, the arbitral tribunal and the parties are free to agree on any practice for circulating correspondence, provided the Secretariat receives a copy of all communications. Most communications and submissions are nowadays transmitted by email, which simplifies the task of copying them to all involved, including the Secretariat.

3-62 **Communications from the arbitral tribunal.** Article 3(1) requires that all communications sent by the arbitral tribunal to the parties also be sent to the Secretariat. Article 3(1) does not apply to communications between the arbitrators, which need not be communicated to the Secretariat but in practice sometimes are.

3-63 **Communications from the Secretariat.** Article 3(1) does not apply to communications from the Secretariat to the parties or the arbitrators. In practice, the Secretariat will almost always send a copy of its correspondence with the parties to all parties, in the interests of due process. It will also usually send a copy of any communication with the arbitral tribunal to all of its members. The Secretariat will send certain communications to the arbitral tribunal only without copying them to the parties, or to the parties only without copying them to the arbitral tribunal (e.g. correspondence between the Secretariat and the arbitral tribunal relating to the scrutiny of a draft award pursuant to Article 33 will not be copied to the parties).

ARTICLE 3(2): NOTIFICATIONS OR COMMUNICATIONS FROM THE SECRETARIAT OR ARBITRAL TRIBUNALS

> All notifications or communications from the Secretariat and the arbitral tribunal shall be made to the last address of the party or its representative for whom the same are intended, as notified either by the party in question or by the other party. Such notification or communication may be made by delivery against receipt, registered post, courier, email, or any other means of telecommunication that provides a record of the sending thereof.

3-64 **Purpose.** Article 3(2) indicates the address to which communications and notifications from the arbitral tribunal and the Secretariat should be sent. It also describes permissible means of communication for the Secretariat and the arbitrators.

3-65 **2012 modifications.** The provision now formally recognizes email as a possible means of communication and has removed obsolete means of communication such as telex, which was still mentioned in the 1998 Rules.

3-66 **Notification address.** Article 3(2) specifies that communications and notifications must be sent to the most recent address that the party being notified has provided for itself, or if the party has not done so, to the address for that party provided by another party. In practice, notifications are generally sent to the addresses of representatives whose contact information has been supplied by the participating parties.

3-67 The Terms of Reference usually contain all relevant addresses for notification (Article 23(1), subparagraph (b)). Therefore, the requirement contained in Article 3(2) will be chiefly of use prior to drawing up the Terms of Reference, provided all parties are participating in the arbitration. The Secretariat relies on the information received from the parties and does not independently verify whether addresses are correct. If notification of the Request for Arbitration fails, the Secretariat will request another address from the claimant and re-notify the document to the new address. If the claimant is unable to provide a new address, the Secretariat leaves it to the claimant to decide whether it wishes to have the arbitration proceed despite the respondent's not having received the Request. Where the claimant does wish to proceed, the Secretariat will establish a deemed date of receipt pursuant to Article 3(3) (see paragraph 3-73).

3-68 **Means of communication.** Communications from the Secretariat and the arbitral tribunal must be sent by a means that creates a record of sending. Where postal or courier services are used, this implies registration or delivery against receipt. While the provision now recognizes email as a valid means of communication, it is unlikely in practice that the Secretariat will notify any originating documents, such as a Request for Arbitration or

an Answer, exclusively by email. The Secretariat generally uses a courier service or registered mail, where available, to notify parties of a Request for Arbitration or a Request for Joinder. Once the proceedings are under way and where all parties are participating, the Secretariat commonly uses email for other notifications (e.g. of Court and Secretariat decisions) and will keep electronic proof of receipt of such emails by the parties and the arbitral tribunal.

ARTICLE 3(3): DATE ON WHICH A NOTIFICATION OR COMMUNICATION IS DEEMED TO BE MADE

A notification or communication shall be deemed to have been made on the day it was received by the party itself or by its representative, or would have been received if made in accordance with Article 3(2).

3-69 **2012 modifications.** Minor linguistic adjustments.

3-70 Article 3(3) fixes the date on which a notification or communication is deemed to have been made (the "notification date"). While it does not specify which notifications or communications it covers, the reference to Article 3(2) is interpreted as limiting its scope to communications from the Secretariat and the arbitral tribunal. Therefore, the parties and the arbitral tribunal are encouraged to decide early in the proceedings how the dates of parties' communications and submissions will be established.

3-71 The notification date can be important as it may trigger a time limit under the Rules. For example, Article 5(1) grants the respondent thirty days from receipt of the Request for Arbitration to submit its Answer, while Article 35(2) grants a party thirty days from receipt of an award to submit an application for correction or interpretation of that award (for a discussion of time limits under the Rules, see paragraphs 3-75–3-79).

> Note to Parties and Arbitrators
>
> **DATING COMMUNICATIONS FROM PARTIES**
> The date on which letters or submissions from the parties are made is not discussed in the Rules. Accordingly, parties are encouraged to agree on the matter at the outset. The arbitral tribunal may wish to consider issuing appropriate directions.

3-72 The use of receipt as the criterion for notification places a requirement on the Secretariat to use means of communication for which a date of receipt may be determined. This requirement is recognized in Article 3(2), which lists means of communication that allow for proof of receipt (see paragraph 3-68).

3-73 In certain cases, proving actual receipt may be impossible. Accordingly, Article 3(3) enables the notification date to be fixed by reference to the date on which the notification or communication would have been received if made in accordance with Article 3(2), that is to say at the party's last known address and using a permitted means of communication. The Secretariat then preserves a record of its attempt to make the notification or communication and of when and why such an attempt ultimately failed (e.g. the intended recipient had moved; the address was invalid; the intended recipient refused delivery).

3-74 However, the notion of deemed receipt is not without risks, particularly for notification of the Request for Arbitration. Under Article V(1), subparagraph (b), of the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), a state court may refuse to enforce an award where a party did not receive proper notice of the arbitration proceedings. Notification is therefore an aspect of arbitration procedure that the Secretariat performs with considerable care. If it is unable to obtain proof of actual receipt of the Request by the respondent, it will contact the claimant to request an alternative address or determine how it should proceed (see paragraph 3-67).

ARTICLE 3(4): CALCULATION OF TIME LIMITS

Periods of time specified in or fixed under the Rules shall start to run on the day following the date a notification or communication is deemed to have been made in accordance with Article 3(3). When the day next following such date is an official holiday, or a non-business day in the country where the notification or communication is deemed to have been made, the period of time shall commence on the first following business day. Official holidays and non-business days are included in the calculation of the period of time. If the last day of the relevant period of time granted is an official holiday or a non-business day in the country where the notification or communication is deemed to have been made, the period of time shall expire at the end of the first following business day.

3-75 **2012 modifications.** Minor linguistic adjustments.

3-76 Article 3(4) is concerned with the calculation of periods of time fixed either in the Rules or pursuant to them. The Rules fix a number of time limits. For example, Article 5(1) provides that the respondent must submit its Answer to the Secretariat within thirty days of receiving the Request. Other provisions establishing specific time limits include Articles 5(6), 7(4), 8(3), 12(2), 12(3), 12(5), 14(2), 23(2), 30(1), 35(1) and 35(2). Furthermore, the Court and its Secretariat have the authority to fix additional time limits when administering proceedings under the Rules.