CHAPTER 1

INTRODUCTORY PROVISIONS

Article 1 International Court of Arbitration

1 The International Court of Arbitration (the "Court") of the International Chamber of Commerce (the "ICC") is the independent arbitration body of the ICC. The statutes of the Court are set forth in Appendix I.

2 The Court does not itself resolve disputes. It administers the resolution of disputes by arbitral tribunals, in accordance with the Rules of Arbitration of the ICC (the "Rules"). The Court is the only body authorized to administer arbitrations under the Rules, including the scrutiny and approval of awards rendered in accordance with the Rules. It draws up its own internal rules, which are set forth in Appendix II (the "Internal Rules").

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

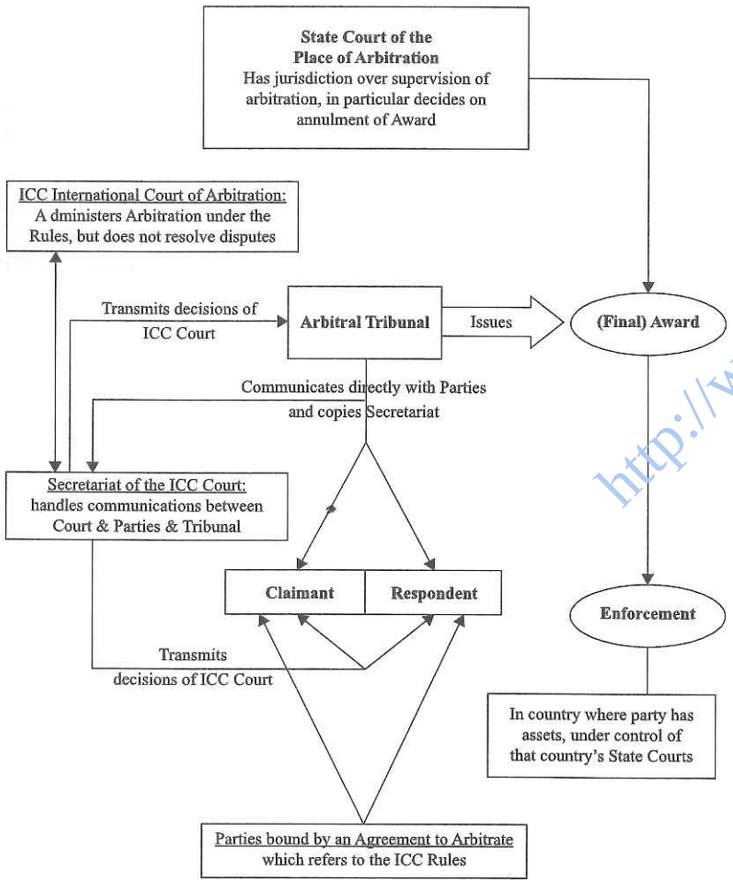
4 As provided for in the Internal Rules, the Court may delegate to one or more committees composed of its members the power to take certain decisions, provided that any such decision is reported to the Court at its next session.

5 The Court is assisted in its work by the Secretariat of the Court (the "Secretariat") under the direction of its Secretary General (the "Secretary General").[1]

[1] Article 1 corresponds to art.1 of the 1998 ICC Rules. Article 1(1) has been changed by deleting reference to how members of the ICC Court are appointed (dealt with in App. II) and to reference to international arbitration disputes.

Introductory remarks

1–1 Article 1 sets out the basic principles with respect to the ICC Court and ICC Arbitration. As described in the Introduction, ICC arbitration is a form of administered and supervised arbitration, which can take place virtually anywhere in the world. However, like any other commercial arbitration, it is anchored in a national and international framework. Schematically, ICC arbitration can be described as follows[2]:



[2] As noted in the Introduction, an ICC arbitration, like any arbitration, is subject to the law of the place of the arbitration, and, in case of enforcement proceedings, the law of the place of enforcement.

1–2 The diagram is intended to reflect various interrelated aspects of ICC arbitration. The issue is effective dispute resolution and a dispute is not effectively resolved by arbitration until a final Award has been rendered and that Award has been satisfied. The Rules are essential to that procedure but they are only part of it. As discussed in more detail under art.34, the New York Convention[3] is the basis for international enforcement of foreign Awards. Therefore, in the interest of effectiveness, it is desirable to interpret the requirements of the Rules in the light of the requirements of that Convention.[4]

1–3 The administration and supervision of the arbitral process by the ICC Court and its Secretariat is generally subject to the overall and ultimate control of the national courts at the place of arbitration. As discussed under arts 18 and 34, in many countries national courts tend to be supportive of international arbitration. However, there are differences in treatment of arbitration by the courts of various places of arbitration and, in what would appear to be very exceptional circumstances Tribunals have decided to disregard the decisions of the national courts of the place of arbitration.[5]

The International Chamber of Commerce

1–4 Article 1 sets out basic elements relating to this form of arbitration that are used throughout the Rules and this book and therefore are discussed in detail below.

1–5 The "ICC" is the International Chamber of Commerce. The ICC is a private non-governmental organisation established, in 1919, as a non-profit association under French law. The ICC is made up of National Committees from 90 countries and national trade organisations, industrial companies and associations from various areas or countries that are referred to as "Groups" but which fulfill the same role. The National Committees and Groups of the ICC are themselves generally non-governmental organisations.[6] In some instances, they are associated with the local chambers of commerce. The purpose of the ICC is to promote open international trade and investment around the world. The ICC is not solely or even principally devoted to arbitration. The ICC's constitution and a description of its functions can be found at its website http://www.iccwbo.org [accessed November 12, 2013].

1–6 The ICC's funding comes from membership fees, the sale of various publications[7] and organisation of seminars,[8] the administrative fees for ICC arbitrations[9] and the interest on the cash deposits made by parties involved in ICC arbitrations. The ICC's costs include in particular the costs related to the Court and its Secretariat.

[3] Pt III App.4.
[4] See also art.41.
[5] See the discussion under art.18.
[6] A list of ICC National Committees and groups can be found at http://www.iccwbo.org/worldwide-membership/national-committees/ [accessed November 12, 2013].
[7] See http://www.iccbooks.com [accessed November 12, 2013].
[8] The ICC Institute of World Business Law organises seminars throughout the year via ICC Events; see http://www.iccwbo.org [accessed November 12, 2013].
[9] The ICC's administrative fees are discussed in connection with arts 36 and 37.

Article 1(1): "The International Court of Arbitration (the "Court") of the International Chamber of Commerce (the "ICC") is the independent arbitration body of the ICC. The statutes of the Court are set forth in Appendix I."

1–7 The International Court of Arbitration, or the "ICC Court", created in 1923, is the body that ensures the application of the Rules as provided for in art.1(2). Set out in Pt III are the Statutes of the Court (App.I to the Rules) as well as its Internal Rules (App.II to the Rules) that are discussed under art.1(2).

1–8 Article 1(1) refers to the ICC Court as the "independent arbitration body" of the ICC. As noted above, the ICC is a French not-for-profit association. The ICC Court is not a separate legal entity from the ICC, but is part of it from a legal point of view. Therefore, it is the ICC that is responsible for the actions of the Court. The scope of this liability is discussed under art.39. The French Supreme Court has held that there is a contractual relationship between the parties and the ICC with respect to the organisation of arbitration.[10]

1–9 Despite the fact that the ICC Court is not a legal entity separate from the ICC, it is independent of other parts of the ICC, in particular the President and Secretary General of the ICC, with respect to the functions that it exercises. The decisions of the ICC Court are taken by members of the ICC Court and not by any other persons at the ICC. The Rules have been amended to specifically refer to that independence.

Statutes of the ICC Court (the "Statutes")

1–10 The Statutes are set out in App.I to the Rules and are reproduced in Pt III of this book. They deal with:

Article 1: Function (see paras 1–16 et seq. below).

Article 2: Composition of the ICC Court (see paras 1–11f below).

Article 3: Appointment (see paras 1–11 et seq. below).

Article 4: Plenary Session of the ICC Court (see para.1–69ff below).

Article 5: Committees (see paras 1–71 et seq. below).

Article 6: Confidentiality (see paras 1–37 et seq. below).

Article 7: Modification of the Rules of Arbitration.

[10] Cass Civ. 1re, February 20, 2001, *Société Cubic Defense Systems Inc v Chambre de commerce internationale* (2001) Rev Arb No.3 p.511, note Clay; Paris, September 15, 1998, *Société Cubic Defense Systems Inc v Chambre de commerce internationale* (1999) Rev Arb No.1 p.103, note Lalive; TGI Paris, May 21, 1997, *Société Cubic Defense v Chambre de commerce internationale* (1997) Rev Arb No.3 p.417. See also, Paris TGI, October 10, 2007, *Société SNF v Chambre de Commerce Internationale* (2007) Rev Arb No.4 p.847, note Jarrosson, and (2007) Dalloz No.41 p.2916, note Clay; see also Fouchard, "Les institutions permanentes d'arbitrage devant le juge étatique (a'propos d'une jurisprudence récente)" (1987) Rev Arb No.2, p.281; TGI Paris, December 16, 2004, *M. Marcel Taffin v Cour internationale d'arbitrage de la Chambre de Commerce Internationale & Société Goather Versicherungsbank VVag*, unreported. Paris TGI, January 01, 2009, *Société SNF v Chambre de Commerce Internationale*, (2009). See Jolivet, "*La Responsabilité des centres d'arbitrage et leur assurance*", Revue générale du droit des assurances 2012 Vol.1. p.216.

1–11 The President of the ICC Court is elected by the ICC World Council upon recommendation of the Executive Board of the ICC (Statutes art.3(1)). He or she is an independent consultant to the ICC (and not an employee) paid an annual consulting fee. The ICC Council upon proposal of the National Committees or Groups appoints the members of the ICC Court with one member for each Committee or Group (Statutes art.3(3)). The ICC World Council appoints the Vice-Presidents of the ICC Court who may but need not otherwise be members of the ICC Court (Statutes art.3(2)). In practice the Vice-Presidents are not otherwise members of the Court and are appointed upon proposal of the President. The members of the ICC Court are independent from the National Committee or Group that proposed them (Statutes art.1(3)). The members of the ICC Court are generally appointed for a term of three years (Statutes art.3(5)). The National Committee or Group can propose that the term be renewed. If a member of the ICC Court resigns or is unable to carry out his functions, he or she may be replaced by another member nominated by the same National Committee or Group for the remaining period of appointment of the original member (Statutes art.3(5)). The ICC Court also has alternate members for several countries. Alternate members are appointed by the ICC Council upon proposal of the President of the ICC Court (Statutes art.3(4)).

1–12 A list of the members and alternate members of the ICC Court can be found on the ICC's website. At the end of mid-2013, there were 137 members of the ICC Court, 87 regular, 32 alternate members and 17 vice-presidents. As is reflected in that list, the members of the ICC Court come from many countries, and represent 88 different nationalities. Therefore, the legal and linguistic backgrounds of the ICC Court's members are extremely varied.

1–13 The members of the ICC Court are frequently lawyers in private practice or employees of companies with an interest in international arbitration. They are paid a nominal amount per diem for each day of meetings and are not reimbursed for their expenses.[11]

1–14 Although not referred to in the ICC Rules (or the appendices), the ICC Court has what is referred to as the "Bureau", which is composed of the President and Vice-Presidents of the Court, the Secretary General, Deputy Secretary General and General Counsel. The Bureau is an informal consultative body of the Court that is intended to provide a forum for discussion. The Bureau does not publish reports or findings. However, its discussions influence the approach of the ICC Court and publications by the Secretariat.

1–15 In addition, the ICC has recently created a Governing Board for the ICC Court to advise the ICC and the Court on all matters concerning the organisation and functioning of the ICC Court. The Governing Board was set up in particular to advise with respect to the development of ICC arbitration. As such it is intended to be a body advising on policy in general rather than on specific arbitrations.

[11] The President of the ICC Court has the status of a consultant to the ICC, and receives a substantial annual consultant's fee, plus reimbursement of expenses. The expenses of the Vice-Presidents of the ICC Court are treated differently by the ICC as far as their expenses are concerned, due to their respective roles.

Article 1(2): "The Court does not itself resolve disputes. It administers the resolution of disputes by arbitral tribunals, in accordance with the Rules of Arbitration of the ICC (the "Rules"). The Court is the only body authorized to administer arbitrations under the Rules, including the scrutiny and approval of awards rendered in accordance with the Rules. It draws up its own internal rules, which are set forth in Appendix II (the "Internal Rules")."

1–16 Article 1(2) refers to the limited and administrative role that the ICC Court plays under the Rules. In the *Cubic* case,[12] the French Supreme Court noted that the Rules maintain a distinction between the function of organising the arbitration and the "judicial function".

1–17 The ICC Court does not settle disputes itself. It has an administrative function with respect to the Rules. The Tribunal decides the actual procedure for an ICC arbitration and decides the merits of the disputes. The ICC Court's role is to organise and supervise the framework for arbitration under the Rules for business disputes as discussed below. The ICC Court is the entity that seeks to ensure that the procedural safeguards provided for in the Rules are correctly observed. It issues administrative decisions in this respect in accordance with the Rules. The ICC Court does not seek to ensure a uniform application of the Rules and generally leaves it to the Tribunal to interpret the Rules.

1–18 Under art.1(2), the ICC Court is to administer resolution of disputes by Tribunals in accordance with the Rules. Therefore, both the ICC Court and Tribunals are to apply the Rules. In certain areas, the ICC Court has sole responsibility for applying the Rules (prior to constitution of the Tribunal, for example or with respect to decisions on challenges). In other areas, it is the Tribunal that has the basic responsibility for the application of the Rules (such as with respect to conducting the hearings). The ICC Court can only intervene in the areas that are within the domain of the Tribunal where the Rules so provide (such as by appointing or removing an arbitrator under arts 13, 14 and 15).

1–19 The amendments in the new Rules were intended to focus on the ICC Court's administrative role and to avoid the implication that the ICC Court was responsible for ensuring that the Rules were properly applied by Tribunals.

1–20 Article 1(2) also provides that the ICC Court is the only body authorised to administer arbitrations under the Rules. This provision was inserted in the most recent version of the Rules because in some instances, parties had sought to have arbitrations under the ICC Rules without the involvement of the ICC Court. This is not possible under the Rules. As noted in art.1(2), the ICC Court is in particular the sole entity authorised to scrutinise and approve ICC Awards.

1–21 These provisions raise two related issues. The first issue is to what extent the parties are permitted to adapt the ICC Rules and to still be entitled to conduct an ICC arbitration. The second issue is what the legal effect is of an agreement that purports to have an ICC arbitration but without the involvement of the ICC Court.

1–22 As regards the extent to which modifications are possible to the Rules, the basic principle is that the Rules provide the overall framework for an ICC arbitration. The standard ICC arbitration clause set out is straightforward:

[12] See para.1–8 n.10.

> "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."[13]

1–23 As noted by the ICC in connection with the standard arbitration clauses, the parties may wish to set out as well the law governing the contract, the number of arbitrators, the place of arbitration and the language of the arbitration. The parties may also wish to take into account the national laws applicable at the place of arbitration or at the place of probable enforcement, the potential participation of more than two parties and the use of other dispute resolution mechanisms such as ICC Pre-arbitral Referee Procedure, ICC Amicable Dispute Resolution (ADR), ICC Expertise and ICC Dispute Boards.

1–24 As discussed under art.18, most arbitration clauses establish the place of arbitration. Many clauses refer to the language of the arbitration if that is not clear from the context. Arbitration clauses frequently specify the applicable law.

1–25 Parties are permitted to agree on additional provisions with respect to the arbitration and do so, in particular in the more complex transactions. There is nothing wrong with these provisions that supplement the Rules provided that the parties give careful thought to the consequences of those changes in each specific case.

1–26 A somewhat different issue arises where the arbitration clause purports to modify a provision of the Rules itself. Article 1(1) states that part of the ICC Court's function is to provide for arbitration "in accordance with the Rules". This proviso applies to both the ICC Court and to the parties. The ICC Court cannot intervene in matters that go beyond its function defined in art.1. For instance, the ICC Court could not act as an adjudicator or a mediator in a given dispute.[14] Nevertheless, it would be possible for parties to agree that certain more limited decisions could be taken by the ICC Court. For example, although art.20 provides that, in the absence of an agreement of the parties, the Tribunal shall decide the language(s) of arbitration, the parties could agree to have the ICC Court decide that issue.

1–27 Article 1(1) restricts the freedom of the parties to depart unilaterally from the arbitral system contained in the Rules. Based on art.1(1), the ICC Court may decline to administer a given case where parties seek to deviate significantly from the Rules. This issue is often referred to under the somewhat misleading reference to "mandatory" and "non-mandatory" provisions in the Rules.

1–28 By issuing the Rules, the ICC makes an offer to parties to agree upon the use, in case of disputes, of its arbitration services, as embodied in its Rules.[15] To the extent that the Rules specifically give the power to the parties to agree on certain

[13] For arbitration clauses agreed to after January 1, 2012, if the parties wish to exclude the emergency arbitrator provisions, the standard ICC clause is as follows: "All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules. The Emergency Arbitrator Provisions shall not apply."

[14] The ICC does provide for alternative dispute resolution. See http://www.iccwbo.org/index-adr.asp. However, that is a procedure distinct from the arbitration procedure.

[15] Fouchard, "Final Report on the Status of the Arbitrator" (1996) ICC ICArb Bull Vol.7 No.1, p.27; see also the discussion under art.6(1).

matters that may arise in the course of an ICC arbitration, such as the number of arbitrators, the method of their selection, or the place of arbitration, the ICC Court is obviously bound by such agreement.

1–29 In all other cases, it would seem that parties cannot impose unilaterally any deviation from the Rules without the acceptance of the ICC Court. It then becomes a policy question for the ICC Court whether or not to accept such change. The ICC has its reputation to protect regarding both how satisfactorily the arbitration procedure is conducted, and the enforceability of Awards rendered under its auspices.

1–30 The general policy of the ICC Court is not to accept modifications to its Rules that would eliminate or significantly alter the provisions relating to matters such as the following:

—the establishment of the Terms of Reference;
—the fixing of arbitrators' fees by the ICC Court;
—the scrutiny and approval of draft Awards by the ICC Court.

Those matters are viewed as being the cornerstones of ICC arbitration, and the corresponding rules are often referred to as being of "mandatory" nature.

1–31 There are many cases where the ICC Court has accepted a modification of its Rules, so long as they were considered compatible with the ICC arbitral system as such. In practice, the ICC Court decides upon the admissibility of deviations/variations from the Rules on a case-by-case basis. Thus, the drafters of ICC arbitration clauses and agreements must be aware that they depart from the Rules at their own risk, and that the ICC Court is not obliged to agree.

1–32 The ICC Court has accepted, for example, arbitration clauses that provided that the arbitrators determine the place of arbitration, rather than the ICC Court itself. This is despite the fact that, under art.18, the choice of the place of arbitration is generally the responsibility of the Court in the absence of an agreement between the parties.

1–33 In other cases, for example where parties have provided in their arbitration clause a short time limit for the arbitrators to render the final Award, the ICC Court would normally explain to the parties the difficulty of implementing such a time limit, and seek to ensure that the parties agree that the ICC Court may extend this time limit (see art.30).[16]

1–34 As regards cases where parties have entered into an agreement adopting the Rules but to be administered by a body other than the ICC Court, the effect of that

[16] Article 38 allows the parties to shorten the time limits provided in the Rules. The issue is therefore when a proposed shortening of the time limits could give rise either to concerns about due process or that the Tribunal would not have adequate time to conduct the proceedings and render the Award. In a recent case, the three-month time limit for rendering the Award was extended by the ICC Court, but the Tribunal conducted the proceedings on an expedited basis. The Terms of Reference were signed within five weeks of transmission of the file to the Tribunal and the Award was rendered four months after the signing of the Terms of Reference. In some instances, the agreement of the parties may not be enough. In one ICC Case No.17489, the arbitration clause provided that the Award was to be issued within six months after the signing of the Terms of Reference. The government Respondent offered to extend that period. The Claimant rejected this offer on the basis that the Award might be attacked in the local courts of the Respondent due to the extension. The Tribunal managed to issue a unanimous Award, which was complied with by the parties, within the six-month period.

agreement will depend on applicable law. The ICC is naturally opposed to parties agreeing to an arbitration under the Rules but providing for decisions by a body other than the ICC Court.[17] However, parties and courts are not necessarily bound by the restriction in the second sentence of art.1(2). In a recent case in Singapore under the current Rules, the court upheld a provision calling for an arbitration under the Rules but without the involvement of the ICC Court. The Court held as follows[18]:

> "10 Where the words 'Arbitration Committee' used in the arbitration clause do not refer to any particular arbitral institution, it was in my view, unnecessary to limit the options of the parties in resolving the dispute. Although Art 1(2) of the ICC Rules claims for the International Court of Arbitration the sole authority to administer ICC arbitrations, the power of the rules to bind emanates from the consent of the parties. Art 1(2) cannot curtail the freedom of the parties to agree to be bound by the result of an arbitration administered by a different arbitral institution applying the ICC Rules, neither can it curtail the power of the court to give an interpretation to a pathological arbitration clause, where that clause uses language which admits the possibility of different arbitral institutions, which provides a wider range of solutions to the parties.
> 11 I must emphasise, however, that leaving open this possibility of a hybrid arbitration as part of a range of solutions to resolve the problems created by the pathological arbitration clause is in no way a judicial endorsement of a hybrid arbitration. I had noted the inconvenience associated with a hybrid arbitration"

1–35 As noted by the court in the above case (and as illustrated by the decision in which the court sought the parties' agreement to another arbitral institution), in many if not most instances, those arbitration clauses create serious issues due to the complex nature of the duties of the ICC Court. For example, the ICC Court has a duty in scrutinising draft Awards that may be difficult to entrust to one person or to a body other than the ICC Court itself. Therefore, although the decision in *HKL* is logical from the point of view of the agreement between the parties itself, it is of course preferable if parties do not wish to have the ICC Court involved for the parties to agree on the application of an entirely different set of arbitration rules, such as the UNCITRAL Arbitration Rules and to provide for the appointing authority rather than to seek to adapt the ICC Rules.[19]

[17] *HKL Group Co Ltd v Rizq International Holdings Pte Ltd* [2013] SGHCR 5. The arbitration clause provided that: "Any dispute shall be settled by amicable negotiation between two Parties. In case both Parties fail to reach amicable agreement, all dispute out of in connection with the contract shall be settled by the Arbitration Committee at Singapore under the rules of The International Chamber of Commerce of which awards shall be final and binding both parties. Arbitration fee and other related charge shall be borne by the losing Party unless otherwise agreed".

[18] *HKL Group Co Ltd v Rizq International Holdings Pte Ltd* [2013] SGHCR 5.

[19] For example, it is possible to designate the ICC Court as an appointing authority under the UNCITRAL Arbitration Rules. For a discussion of the ICC Court and other entities acting as appointing authorities under the UNCITRAL Arbitration Rules, see Webster, *Handbook of UNCITRAL Arbitration* (Thomson/Sweet & Maxwell, 2010).

Article 12 Constitution of the Arbitral Tribunal

Number of Arbitrators

1 The disputes shall be decided by a sole arbitrator or by three arbitrators.

2 Where the parties have not agreed upon the number of arbitrators, the Court shall appoint a sole arbitrator, save where it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators. In such case, the claimant shall nominate an arbitrator within a period of 15 days from the receipt of the notification of the decision of the Court, and the respondent shall nominate an arbitrator within a period of 15 days from the receipt of the notification of the nomination made by the claimant. If a party fails to nominate an arbitrator, the appointment shall be made by the Court.

Sole Arbitrator

3 Where the parties have agreed that the dispute shall be resolved by a sole arbitrator, they may, by agreement, nominate the sole arbitrator for confirmation. If the parties fail to nominate a sole arbitrator within 30 days from the date when the claimant's Request for Arbitration has been received by the other party, or within such additional time as may be allowed by the Secretariat, the sole arbitrator shall be appointed by the Court.

Three Arbitrators

4 Where the parties have agreed that the dispute shall be resolved by three arbitrators, each party shall nominate in the Request and the Answer, respectively, one arbitrator for confirmation. If a party fails to nominate an arbitrator, the appointment shall be made by the Court.

5 Where the dispute is to be referred to three arbitrators, the third arbitrator, who will act as president of the arbitral tribunal, shall be appointed by the Court, unless the parties have agreed upon another procedure for such appointment, in which case the nomination will be subject to confirmation pursuant to Article 13. Should such procedure not result in a nomination within 30 days from the confirmation or appointment of the co-arbitrators or any other time limit agreed by the parties or fixed by the Court, the third arbitrator shall be appointed by the Court.

6 Where there are multiple claimants or multiple respondents, and where the dispute is to be referred to three arbitrators, the multiple claimants, jointly, and the multiple respondents, jointly, shall nominate an arbitrator for confirmation pursuant to Article 13.

7 Where an additional party has been joined, and where the dispute is to be referred to three arbitrators, the additional party may, jointly with the claimant(s) or with the respondent(s), nominate an arbitrator for confirmation pursuant to Article 13.

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 regards as suitable to act as arbitrator, applying Article 13 when it considers this appropriate.[1]

Introductory remarks

Article 12 deals with the number, nomination and appointment of arbitrators. Article 12 deals in particular with whether there shall be one arbitrator or three, the failure by a party to appoint an arbitrator and the appointment of arbitrators in multiple party cases. The main substantive change in the Rules has been the addition of art.12(7) dealing with additional parties. The provisions of art.12(8) regarding multiple parties are very close to art.10 of the 1998 Rules. **12–01**

[1] Article 12 corresponds to arts 8 and 10 of the 1998 Rules. The main changes are discussed under the Introductory remarks.

Number of arbitrators

12–02 The Tribunal decides the dispute, not the ICC Court. This means that the Tribunal has the basic responsibility to establish the appropriate procedure to establish the facts of the case and to decide the case. The ICC Court's role is to ensure the application of the Rules.[2] Both the Rules and the standard ICC arbitration clause leave open the number of arbitrators. At first sight, this may seem odd; however, the overall objective is to permit the ICC Court and the parties to adapt the ICC arbitration procedure not just to the parties and the contract but also to the dispute itself.

12–03 A contract in a relatively small amount may give rise to a substantial and complex claim for damages. Large contracts may give rise to apparently intractable disputes as to smaller amounts that the parties to the contract may wish to have adjudicated, especially if they have an ongoing relationship. As a result, the amount in dispute may be relatively small although the contract itself is large. In other cases, the parties may wish to have an issue of principle decided without specifying the financial consequences of the resolution of the dispute.

12–04 This flexibility sometimes results in the first dispute between the parties being with respect to the arbitral procedure. One party may see an advantage in having a sole arbitrator and the other party may prefer to have three arbitrators. In case of dispute as to the number of arbitrators, the ICC Court will decide the issue in accordance with art.12.

12–05 Article 12 also provides for appointment by the ICC Court in certain circumstances of sole arbitrators and presidents. Those appointments are generally made at Committee Sessions of the ICC Court.

Multiparty arbitration

12–06 Article 12(6)–(8) deal with issues relating to multiparty arbitration, including joinder of additional parties under art.7. The 1998 Rules had dealt with multiparty arbitration briefly in art.10 of those Rules. The new Rules deal much more extensively with multiparty arbitration.

12–07 Arbitration under the ICC Rules is generally based upon the model of a single contract concluded by two parties who agree to arbitrate differences with respect to that contract. However, roughly 30 per cent of the arbitrations under the Rules involve multiple parties or multiple contracts or both. The situations are so diverse that it would be impossible to deal with them in detail and maintain the structural simplicity of the Rules. Moreover, one of the keystones of ICC arbitration is to adapt the procedure to the particularities of each case and this is particularly appropriate in multi-party and multi-contract arbitration.

12–08 Dealing with multiparty arbitration remains a problem in international commercial arbitration. The objective is a "one stop" resolution of disputes. However, to be able to resolve a dispute it may be necessary or desirable to have a number of parties appear in the same forum at the same time. This basic problem has given rise to both the "group of companies" doctrine (which appears to have been abandoned by the French courts) and, more recently, to the "chain of contracts"

[2] See para.1–18.

doctrine of the French Supreme Court.[3] Article 12 deals with one aspect of the problem where there is a basis for multipartite arbitration, the appointment of the members of the Tribunal if there is a three-person Tribunal.

12–09 Article 12 does not deal with all multiparty arbitrations. Article 12 is limited to cases where either the arbitration agreement provides that there shall be three arbitrators or where the ICC Court has decided in accordance with art.8(2) that there shall be three arbitrators. In situations where there is to be a sole arbitrator, the issue of equal treatment does not arise with respect to the nomination of the sole arbitrator. Either all the parties agree on the nominee or the arbitrator is appointed by the ICC Court.

12–10 Article 12(8) is the direct result of the famous *Dutco* case of the French Supreme Court.[4] In that case, a Claimant brought proceedings against two Respondents. The Claimant nominated an arbitrator. The Respondents jointly agreed on a co-arbitrator but under protest and reserving their rights on the basis that the Claimant had been able to nominate a co-arbitrator on its own behalf. The Respondents sought to annul the Award based on breach of due process and succeeded at the level of the French Supreme Court, which held that "the principle of equal treatment of the parties in the designation of arbitrators is a matter of public policy that can only be waived after the dispute has arisen" and that by accepting the 1988 version of the Rules the Respondents had not waived the right to have the same treatment as the Claimant with respect to the nomination of a co-arbitrator.

12–11 For some practitioners, the *Dutco* decision is a stark confirmation of the difference between the role of a co-arbitrator and that of a president. As discussed in art.11(1), all arbitrators are required to be independent of the parties. However, the *Dutco* decision is based on the realistic perception that, in the international context in particular, even if they are independent of the parties, the parties may have legitimate preferences for the approach of one co-arbitrator or another. This difference in approach is discussed below. It is the basic justification for the concern of equal treatment in multiparty arbitration.

Article 12(1): "The disputes shall be decided by a sole arbitrator or by three arbitrators."

12–12 The reference to the "disputes" covers all matters submitted by the parties to the Tribunal for a decision. If there is a sole arbitrator, then that person decides the dispute. If there is a Tribunal of three arbitrators then, subject to art.31, the matter is decided usually by unanimity or by a majority. Under the Rules, whatever the number of Claimants or Respondents, there are never more than three arbitrators, but the parties can, to some extent, derogate from such rule, as reflected in art.11(6).

12–13 Article 12(1) states that an uneven number of arbitrators is required under the Rules, at least in the absence of a contrary agreement under art.11(6) and subject to the provisions of the applicable law which can limit the choice of the parties.

[3] Cass. 1re civile, March 27, 2007, 04–20.842, Arrêt No.513.
[4] Cass. 1re civ., January 7, 1992, Bull. civ. I, No.2.

(ii) fact that the subject matter (i.e., non-payment of commissions) does not appear to be overly complex."

12–22 The Secretariat will transmit the ICC Court's decision to the parties. The ICC Court does not provide any reasons for its decision. Moreover, it is difficult to imagine any recourse with respect to the decision. As stated in art.11(4), the ICC Court's decisions as to the appointment of an arbitrator are final, and that would seem to include the fixing of the number of arbitrators.

12–23 Where the ICC Court has decided that there should be three arbitrators, the Claimant has a period of 15 days to proceed with its nomination after it has received the Secretariat's notification of the decision of the Court. The Respondent then has 15 days after receipt of the Claimant's nomination to nominate a co-arbitrator. The Secretariat will generally extend these periods, upon request, and good cause, for a limited period of time, for example for 8–15 days. If a party fails to nominate a co-arbitrator then the ICC Court may appoint the co-arbitrator for that party. Prior to making such appointment, the ICC Court usually first consults with the National Committee or Group that it considers appropriate in accordance with art.12(4) (although it may appoint an arbitrator directly under art.13(4)). The ICC Court will review the issue of the appropriate National Committee or Group particularly with regard to the place of arbitration, nationality of the parties, the language of the arbitration and complexity of the dispute.[12] The ICC Court members will wish to be satisfied that the National Committee or Group will propose a person who is appropriate for this particular arbitration. Therefore, in choosing the National Committee or Group, the track record of that National Committee or Group and their approach to the proposal of arbitrators will be a factor that will be taken into account by the ICC Court. Many National Committees and Groups understand the importance of this factor and therefore seek to have a dialogue with the Secretariat as to who would be appropriate for a particular case. However, as discussed below, the decision as to whether to approve the proposal of the National Committee or Group is made solely by the ICC Court. Once the National Committee has been chosen, then the initial contact will be between the Secretariat and the National Committee, although the decision whether or not to confirm the proposed arbitrator will be made by the ICC Court at another Committee Session.

12–24 The ICC Court's right to appoint an arbitrator on behalf of the party that has failed to nominate an arbitrator within the required time limit, does not normally prevent the ICC Court from providing that party a further chance to nominate an arbitrator. In accepting the late nomination of an arbitrator by a party, the ICC Court tacitly extends the time limit it has previously set, and/or recognises that the

[12] In one example, the Secretariat stated as follows in its submission to the ICC Court: "[in] the light of the nationality of the parties (Czech and Bulgarian), the language of the arbitration (English), the applicable substantive law (Bulgarian law), the Secretariat suggests that the Court invite the Austrian National Committee to propose the Chairman in this matter". In another example, the Secretariat stated as follows: "[i]f the two co-arbitrators do not agree on a joint nomination for the Chairman of the Arbitral Tribunal, in light of the nationality of the parties (German and Algerian), of their legal advisors (Germany, France and Switzerland) and of the co-arbitrators (French and Swiss), of the place of arbitration (Geneva, Switzerland), of the language of the arbitration (French), the Secretariat suggests that the Court invite the Spanish National Committee to propose the Chairman of the Arbitral Tribunal". These examples are only indicative as to how the ICC Court is being put in a position to exercise its discretion.

time limits fixed by the ICC Court are purely administrative. In fact, if, even after the expiration of the time limits, a party nominates a co-arbitrator, the ICC Court would probably accept the nomination provided that it had not already appointed a co-arbitrator on behalf of the party.

Sole Arbitrator

Article 12(3): "Where the parties have agreed that the dispute shall be resolved by a sole arbitrator, they may, by agreement, nominate the sole arbitrator for confirmation. If the parties fail to nominate a sole arbitrator within 30 days from the date when the claimant's Request for Arbitration has been received by the other party, or within such additional time as may be allowed by the Secretariat, the sole arbitrator shall be appointed by the Court."

12–25 The parties may have agreed in the arbitration agreement that a sole arbitrator hear the matter. In addition, after the dispute has arisen, the parties may agree on a sole arbitrator. In the latter case, the parties will frequently seek to agree on the person to act as sole arbitrator. If the parties are unable to agree on the sole arbitrator within the time limit specified by the Rules or extended by the Secretariat, then the ICC Court will appoint the sole arbitrator in accordance with art.12. During the period from 2007–2011, 77 per cent of the Sole Arbitrators were appointed by the Court.[13] Upon the parties' joint request, the Secretariat will assist the parties in agreeing upon a sole arbitrator by providing a list of suitable arbitrators, from which the parties can choose one within a given time period. By proceeding in this way, the parties obtain proposals of suitable names from a neutral source, which often is found more attractive than to have to consider the name of a sole arbitrator proposed by one party to the other.[14]

Three Arbitrators

Article 12(4): "Where the parties have agreed that the dispute shall be resolved by three arbitrators, each party shall nominate in the Request and the Answer, respectively, one arbitrator for confirmation. If a party fails to nominate an arbitrator, the appointment shall be made by the Court."

12–26 As revised, art.12 is only applicable where the parties have agreed that there are to be three arbitrators. Therefore, where there is no agreement, art.12(2) is applicable and there is no requirement that a party nominate an arbitrator in either the Request or the Answer. The parties are free to wait until the ICC has decided on the number of arbitrators. However, where a Respondent is granted an extension to file an Answer, then in applying for the extension the Respondent is required under art.5(2) to nominate a co-arbitrator.

12–27 The nomination of an arbitrator is best viewed as an unilateral act of the party providing the nomination. The arbitrator only commits him or herself to the arbitration with the statement of acceptance and availability. The ICC Court only

[13] See Fry, Greenberg & Mazza, *op. cit.*, para.3–445.
[14] See Seppala, "Obtaining The Right International Arbitral Tribunal: A Practitioner's View" (2007) Mealey's IAR Vol.22 No.10, p.26.

designates the arbitrator when it confirms the arbitrator at a Court Session. The ICC has permitted withdrawal of a nomination where a nominee has not yet been confirmed.[15] There may be timing issues with respect to withdrawal of a nomination but it may be preferable to challenging a nominee once confirmed.[16]

12–28 Article 12(4) raises two main issues. The first is the timing for the nomination of the co-arbitrators. The second is how to select the co-arbitrator.[17]

The procedure for nomination of the arbitrators

12–29 Article 12(4) covers situations where the arbitration agreement provides for three arbitrators. If the arbitration agreement expressly provides for three arbitrators, then the Claimant will usually nominate an arbitrator in its Request, unless it has a prior agreement with the Respondent that there should be a sole arbitrator. If there is no such express provision as to the number of arbitrators, but the Claimant is seeking to have a Tribunal composed of three arbitrators, frequently the Claimant will nominate an arbitrator in the Request as well. If there is no such express provision and the Claimant is seeking to have a sole arbitrator, usually the Claimant will not nominate an arbitrator in its Request as, in any event, the Claimant will have the possibility of nominating an arbitrator subsequently under art.12(2) once the ICC Court has decided on the number of arbitrators.

12–30 If a Respondent contests jurisdiction but makes submissions on jurisdiction, one would expect that it would nominate an arbitrator. However, if a Respondent has decided to ignore the proceedings then the Respondent is unlikely to nominate an arbitrator. In such a case, art.12 provides that the ICC Court will appoint the co-arbitrator for the Respondent. The Respondent's failure to nominate an arbitrator will therefore not prevent the Tribunal from being constituted.[18]

12–31 Article 12(4) provides for nominations of arbitrators in the Request or Answer. However, this provision is subject to other provisions of the agreement between the parties. The parties may agree on the timing of such nominations (as well as the qualifications of the arbitrators, for example) and in such circumstances the agreed timing is applicable.

[15] As to the ICC Court's practice, see Fry, Greenberg & Mazza, *op. cit.*, para.3–456.

[16] In one case, a party nominated as co-arbitrator a lawyer who the nominating party subsequently learned had worked with opposing counsel on a case, and was proposing to agree on a president who also had a prior relationship with opposing counsel. In such a case, the new information was the reason to withdraw the nomination, although the nominee withdrew on his own.

[17] Calvo, "The appointments, duties and rights of the ICC arbitrators (revisited under the new ICC rules)" (1999) RDAI/IBLJ No.3, p.361.

[18] For an example of the problems that can arise in ad hoc arbitration, see Cass civ 1re, *State of Israel v National Iranian Oil Company* (NIOC), February 1, 2005, case No.404. In that ad hoc case, the arbitration clause did not set the place of arbitration. Nor did it provide a default mechanism for appointment of a co-arbitrator, although it did provide that the president would be chosen by the president of the ICC Court. The State of Israel refused to appoint a co-arbitrator and, after an initial refusal, the French courts appointed an arbitrator in its stead on the basis that France was the least inappropriate jurisdiction to do so and that it would be a denial of justice not to do so. For a discussion of the case, see Tattevin, "NIOC v. Israel: 'The End' . . . Or Is It?" and Train, "Denial of Justice in International Arbitration: How the French 'Juge d'appui' Extends Its Jurisdiction', SIAR 2005:2, p.221 and p.230; Lazareff, "De l'amour du juge", Les Cahiers de l'arbitrage 2005/1 p.3 and Gazette du Palais, Special Arbitrage, October 21–22, 2005, p.3.

Selecting a co-arbitrator

12–32 One of the principles of ICC arbitration is that each party should have the right to nominate an arbitrator. In the international context, this possibility is seen as a safeguard to ensure that the arbitration will be conducted in a manner that takes best into consideration the positions of the parties.

12–33 Parties nominate arbitrators usually because they are known to their lawyers or to the in-house counsel either on a professional level, because they have been involved in prior arbitrations, or because of publications, conferences, or other channels. Parties may seek the assistance of the ICC National Committee of their country to obtain a list of names of potential arbitrators. If they do so, the Secretariat of the ICC Court will not get involved in that type of discussion. The ICC does not maintain a list of approved arbitrators.

12–34 In addition, lawyers (and sometimes parties) often wish to interview potential arbitrators either in person, by telephone or by videoconference. Most arbitrators accept interviews, although a diminishing group of arbitrators refuses them.[19]

12–35 At the least, these interviews or at least some form of discussion are entitled in order to ensure that the potential co-arbitrator has no conflict of interest, is capable of acting, and wishes to act as arbitrator. Moreover, familiarity with the co-arbitrator is accepted and expected. The parties have opted for a system in which they nominate one arbitrator and are entitled to have some awareness of his or her approach to arbitration.

12–36 In an effort to outline what a party can and cannot discuss with a co-arbitrator, the IBA has published the Guidelines on Party Representation in International Arbitration in 2013. These Guidelines are not binding unless adopted by the parties but they do provide a point of reference to judge contacts. As regards co-arbitrators, the Guidelines state:

> "8. It is not improper for a Party Representative to have Ex Parte Communications in the following circumstances:
>
> (a) A Party Representative may communicate with a prospective Party-Nominated Arbitrator to determine his or her expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest.
>
> (b) A Party Representative may communicate with a prospective or appointed Party-Nominated Arbitrator for the purpose of the selection of the Presiding Arbitrator.
>
> [. . .]
>
> (d) While communications with a prospective Party-Nominated Arbitrator or Presiding Arbitrator may include a general description of

[19] See Aksen, "The Tribunal's Appointment" in *The Leading Arbitrators' Guide to International Arbitration, op. cit.*, p.31; Lowenfeld, "The Party-Appointed Arbitrator: Further Reflections" in *The Leading Arbitrators' Guide to International Arbitration, op. cit.*, p.41; Bishop and Reed, "Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration" (1998) Arb Int Vol.14 No.4, p.395 at p.423; Webster, "Selection of Arbitrators in a Nutshell", *op. cit.*, at p.262.

the dispute, a Party Representative should not seek the views of the prospective Party-Nominated Arbitrator or Presiding Arbitrator on the substance of the dispute.
Comments to Guidelines 7–8
[. . .]
The following discussion topics are appropriate in preappointment communications in order to assess the prospective Arbitrator's expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest:
(a) the prospective Arbitrator's publications, including books, articles and conference papers or engagements; (b) any activities of the prospective Arbitrator and his or her law firm or organisation within which he or she operates, that may raise justifiable doubts as to the prospective Arbitrator's independence or impartiality; (c) a description of the general nature of the dispute; (d) the terms of the arbitration agreement, and in particular any agreement as to the seat, language, applicable law and rules of the arbitration; (e) the identities of the Parties, Party Representatives, Witnesses, Experts and interested parties; and (f) the anticipated timetable and general conduct of the proceedings."[20]

12–37 The concern is that a party should not select an arbitrator in a manner that will result in a biased co-arbitrator. This can arise, for example, if an arbitrator has taken a position with regard to the dispute.[21] As a result, discussion of the merits in any interview should be limited to the nature of dispute.

12–38 As noted in the Guidelines there is no prohibition on a party interviewing a potential arbitrator to discuss the name of a potential president. Indeed, this is both necessary and expected because in choosing an arbitrator one is affecting the appointment of a president.

12–39 This occurs on several levels. Under ICC practice, if a party chooses an arbitrator with the nationality of the other party and the other party picks an arbitrator with the same nationality, the ICC will consider that there is no objection to having a president with the same nationality. For example, if a French company has an arbitration with a Swiss company and the French company and the Swiss company both nominate Swiss co-arbitrators, the ICC Court will assume that there is no objection to appointing a Swiss president.[22] This reflects in fact the view in many quarters that nationality is less important a factor than it may have once been.

12–40 With regard to the procedure, it is generally not appropriate to discuss specific issues of procedure that a party knows will arise in the arbitration. However, discussion of the general procedural approach would not appear to raise the same problems. One of the variants from arbitration to arbitration is the procedure to be

[20] See also the "green list" of the IBA Guidelines on Conflict of Interest in International Arbitration set out in Pt. III.
[21] See IBA Guidelines on Conflict of Interest in International Arbitration, s.4.5.1, Pt III App.11.
[22] This may be reinforced if both parties are, in the example, acting through Swiss counsel. Whenever doubts exist, the Court will normally make sure that there is no objection from the parties to having a president sharing the same nationality as one of the parties.

adopted. Indeed, under national law the Tribunal may be required to adapt the procedure to the circumstances of the case.[23] For example, it would not appear to raise any ethical issues to discuss the potential arbitrator's use of the IBA Rules of Evidence. Another aspect that one could reasonably discuss with a potential arbitrator is his general concept of the use of panels of witnesses or panels of experts or the appointment of Tribunal-appointed experts. It, however, would be wrong to assume that an arbitrator could or should not take a different approach, if he assumes that the circumstances of the case warrant so. Thus, while there is nothing wrong in asking these types of general questions, it is not certain that they will much help in the conduct of the actual case.

12–41 There is also a difference in approach among arbitrators as to the role of the Tribunal with respect to settlement. Lawyers with civil law backgrounds believe that it is the duty of the Tribunal to encourage settlement.[24] Other lawyers believe that this should be avoided at all costs. The IBA Guidelines now seek to address the issue. However, there would appear to be nothing wrong with discussing a potential arbitrator's views regarding the Tribunal's involvement in settlement discussions.

12–42 It is expected that the parties will consider the technical competence and approach of the potential arbitrators in selecting them. Usually, a detailed résumé of the potential arbitrator is made available. That résumé should provide details as to the types of arbitrations that the arbitrator has dealt with. However, the summaries are usually without the names of the parties and usually brief. Therefore, it may be appropriate to discuss exactly the type of issues that the potential arbitrator has dealt with in past arbitrations (or litigations). Some relevant factors include the languages and legal systems that the arbitrator is familiar with.

12–43 Another technical issue relates to how to manage the arbitration. There is a considerable difference in approach among arbitrators. Some are very computer literate; others are not. If a party wishes to make a computer-oriented presentation of its case, then it may be disappointed to realise that the Tribunal is reviewing only paper copies. If that is the case, it is unfortunate if it comes as a surprise at the hearings as it can be raised in the interview.

Article 12(5): Where the dispute is to be referred to three arbitrators, the third arbitrator, who will act as president of the arbitral tribunal, shall be appointed by the Court, unless the parties have agreed upon another procedure for such appointment, in which case the nomination will be subject to

[23] Section 33(1)(b) of the English Arbitration Act 1996 states that the Tribunal shall "adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters failing to be determined".
[24] See Schneider, "Combining Arbitration with Conciliation" (1996) *ICCA Congress Series No.8*, p.57 at p.77, summarising the results of a survey as follows: "with respect to the question whether it was appropriate for an arbitrator, at both parties' request, (a) to actively participate in settlement negotiations and (b) to propose a settlement formula, a predominantly negative answer came from American Respondents (71% and 58% respectively), an overwhelmingly positive answer from the German Respondents (92% and 100%) and a positive answer from the rest of continental Europe (65% and 58%)". In a situation where the practices vary widely, it is important to canvass the attitude of the potential arbitrator.

confirmation pursuant to Article 13. Should such procedure not result in a nomination within 30 days from the confirmation or appointment of the co-arbitrators or any other time limit agreed by the parties or fixed by the Court, the third arbitrator shall be appointed by the Court.

12–44 Article 12(5) is based on the second part of art.8(4) of the 1998 Rules with the addition of a default time limit of 30 days for the co-arbitrators to agree on the president.

12–45 Article 12(5) provides that the ICC Court shall appoint the president "unless the parties have agreed on another procedure for such appointment". Therefore, art.12(5) recognises expressly the autonomy of the parties,[25] subject to the time limit fixed by the parties or the ICC Court and the confirmation requirements in art.13. Depending on the circumstances, the president of the Tribunal can therefore be appointed by the ICC Court, the parties, the co-arbitrators or pursuant to any other procedure agreed by the parties.

12–46 For arbitrations between 2007–2011, in 39 per cent of the cases, the ICC appointed the president of the Tribunal. In 51 per cent of the cases, the co-arbitrators jointly proposed the president. In 8 per cent of the cases, the parties jointly proposed the president.[26] These figures demonstrate the importance of the procedures discussed below and those discussed under art.13 with respect to the selection and appointment of presidents.

12–47 As discussed below, usually the selection of the president is carried out through the co-arbitrators. However, in some instances, the parties deal directly with potential presidents. The IBA Guidelines on Party Representation in International Arbitration provide as follows with respect to party communications regarding a president:

> "8. It is not improper for a Party Representative to have Ex Parte Communications in the following circumstances:
>
> . . .
>
> (c) A Party Representative may, if the Parties are in agreement that such a communication is permissible, communicate with a prospective Presiding Arbitrator to determine his or her expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest."

12–48 As regards the substance of the communications, the same rules would apply as with respect to co-arbitrators. Those rules are discussed above.

12–49 However, it is more frequent for the co-arbitrators to seek to agree on a president or a list of potential candidates for president and submit those lists to the parties. Some ICC arbitration clauses expressly authorise the co-arbitrators to select the president of the Tribunal, and thereby modify the ICC standard arbitration clause. But even where this is not the case, many parties will agree at the start of the arbitration to defer the selection process first to the co-arbitrators, and only

[25] Regarding party autonomy under the Rules, see above, para.0–46 (Re: Principle No.6).

[26] In 2 per cent of the cases, presidents were appointed by another method. Fry, Greenberg & Mazza, *op.cit.*, para.3–465.

if they cannot reach agreement on a president have the ICC Court make the choice. The reasoning is very simple: if the co-arbitrators select the president, he or she will have their full support and trust, and often, although certainly not always, the co-arbitrators would know the prospective president.

12–50 The appointment of the president by the ICC Court usually involves an element of surprise for both the parties and the arbitrators. The main incentive for the parties to agree on the president is a concern about the unknown. Many lawyers are satisfied with the presidents appointed by the ICC Court after the parties have failed to agree on the president. Others are much more reserved. Moreover, the position of the parties will vary based on the circumstances and the nature of the arbitration. If the parties are involved in a very technical or specialised field of arbitration, they may prefer to agree on a president.

12–51 Frequently, the party-appointed arbitrators will, with the agreement of counsel, seek to agree on a list of possible candidates for president. Usually, the co-arbitrators will agree that they can discuss the persons on that list with the party appointing them. Therefore, in many cases, the discussion of who the president should be is done by the parties indirectly through the co-arbitrators. There is some discussion as to whether the co-arbitrators should be permitted to have these separate conversations with the lawyers who appointed them. Provided that the system is clear and applies to both parties, it is difficult to see the objection as art.12(4) gives the priority to agreement on the appointment procedure by the parties. However, there is generally no obligation of the co-arbitrators to review the names of the potential president with the party appointing them, unless this obligation has been specifically imposed on the co-arbitrators.[27] Nevertheless, the authors view it as far preferable for the co-arbitrators to obtain the approval of a nominee for president from the lawyers who nominated them.

12–52 The importance of the agreement between the parties as to the method of appointment of the president is underlined in the case of *Encyclopaedia Universalis SA v Encyclopaedia Britannica*.[28] In that case, the co-arbitrators were to seek to agree on a president and if they were unable to agree the president was to be appointed by a court in Luxembourg.[29] The co-arbitrators were appointed and were in contact with regard to the arbitration and the procedure but failed to

[27] TGI Paris, April 4, 2003, *SA Loris Azzaro v société Clarins et autre*, (2005) Rev Arb No.1 p.162, note Jaeger ("If it is common practice, in an arbitral proceeding, that the arbitrators have the parties' agreement on the choice of the third arbitrator, there is no such obligation on the contrary; indeed, the independence of the arbitrators towards the parties must lead them, where there is a difficulty, to find an agreement among themselves without having necessarily to take into account the opinion of the parties.") (Authors' translation).

[28] *Encyclopaedia Universalis SA v Encyclopaedia Britannica*, 2005 US App LEXIS 5157 (2d Cir., 2005). See also *Appellationsgericht Kanton Baselstadt*, September 6, 1968, (1976) YBCA p.200; Schweizerische Juristenzeitung Vol.64 (1967), p.378; Corte di Appello di Firenze, April 13, 1978, *Rederi Aktiebolaget Sally v S.r.l. Termarea* (1979) YBCA p.294. More generally, see Jarvin, "Irregularity in the composition of the Arbitral Tribunal and the Procedure" in *Enforcement of Arbitration Agreements and International Arbitral Awards—The New York Convention 1958 in Practice* edited by E. Gaillard and D. di Pietro (Cameron May, 2007). See also para.13–4 n.4.

[29] The contract provided "[u]pon the failure of the two arbitrators to reach agreement upon the choice of a third arbitrator, the third arbitrator, who must be fluent in French and English, shall be appointed by the President of the Tribunal of Commerce of the Seine from a list of arbitrators maintained by the British Chamber of Commerce in London at the request of the arbitrator who is first to make such a request".

the hearings are organised smoothly and effectively and that any issues that can be dealt with prior to the hearings are so dealt with. In addition, there may be hearings, either by telephone, videoconference or in person to deal with specific procedural issues, such as disclosure of documents. However, these are generally oriented to the procedural issues and not case management.

24–18 The main aspect of art.24(3) is the recognition that the Tribunal may adopt further procedural measures and modify the procedural timetable. Usually, Tribunals will adopt a series of procedural orders to deal with issues as they arise (such as production of documents). In addition, there may be issues as to the timing of submissions and the need to modify the procedural timetable as a result. The Tribunal has the right to adopt such measures and change the procedural timetable after it has consulted with the parties and subject to the overriding duty to ensure that each party has a reasonable opportunity to present its case as discussed under art.22(4).

Article 24(4): "Case management conferences may be conducted through a meeting in person, by video conference, telephone or similar means of communication. In the absence of an agreement of the parties, the arbitral tribunal shall determine the means by which the conference will be conducted. The arbitral tribunal may request the parties to submit case management proposals in advance of a case management conference and may request the attendance at any case management conference of the parties in person or through an internal representative."

24–19 To be cost effective, it may be advisable to hold a case management conference by telephone or video conference. The second sentence of art.24(4) provides the Tribunal with the right to determine the method of holding the conference.

24–20 Tribunals can and usually do request that parties comment on the proposed organisation of the case management conference prior to it being held. The comments are usually intended to cover all matters to be dealt with at the case management conference including comments on the draft Terms of Reference, on the procedural issues to be adopted pursuant to art.22(2), the procedural timetable and, in some cases, whether the parties wish to consider the case management techniques in App.IV. The priority for many arbitrators is to encourage the parties not only to comment, but also to confer with or among each other with a view to arriving at joint proposals for the procedure.

Article 25 Establishing the Facts of the Case

1 The arbitral tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means.

2 After studying the written submissions of the parties and all documents relied upon, the arbitral tribunal shall hear the parties together in person if any of them so requests or, failing such a request, it may of its own motion decide to hear them.

3 The arbitral tribunal may decide to hear witnesses, experts appointed by the parties or any other person, in the presence of the parties, or in their absence provided they have been duly summoned.

4 The arbitral tribunal, after having consulted the parties, may appoint one or more experts, define their terms of reference and receive their reports. At the request of a party, the parties shall be given the opportunity to question at a hearing any such expert.

5 At any time during the proceedings, the arbitral tribunal may summon any party to provide additional evidence.

6 The arbitral tribunal may decide the case solely on the documents submitted by the parties unless any of the parties requests a hearing.[1]

Introductory remarks

25–1 To decide a dispute in an ICC arbitration, the Tribunal has to ascertain the facts and will receive submissions from the parties. Article 25 refers to "establishing the facts of the case", but the procedure will deal with both facts and law. Since the rules of law applicable to the merits of the dispute will frequently not be that of one or more of the arbitrators, legal submissions will usually be detailed. This is particularly the case if the dispute raises not just questions of

[1] Article 25 corresponds to art.20 of the 1998 ICC Rules. No substantive changes have been made.

contractual interpretation and/or the principle of good faith but defences based on applicable law. In ICC arbitrations, there is no generally accepted concept that "foreign law is an issue of fact" or that specific rules of law must be proven by expert evidence.[2] However, in many cases the parties will submit expert reports on the rules of the governing law, particularly with respect to the law applicable to part of a dispute.[3]

25–2 The Terms of Reference provide the framework for the arbitral proceedings, but, as discussed under art.23, they generally do not set out the detailed procedure to be followed during the arbitral proceedings. That procedure is usually decided upon by the Tribunal and set out in procedural orders in accordance with art.22, after having solicited the view of the parties through written or oral submissions in accordance in particular with arts 22 and 24. The basic principle in international arbitration is that the parties, within certain limits, may agree on the procedure. Where the parties do not agree, the Tribunal generally sets the procedure. In practice, the Tribunal usually decides upon the procedure after consultation with the parties.

25–3 The fact that there is no procedural code for international arbitration makes this an area that varies the most from arbitration to arbitration. That is, perhaps, hardly surprising. International arbitration is flexible and evolving, as are the disputes that it aims to resolve.

25–4 However, within that broad framework, there are guidelines as to how the arbitral procedure may be arrived at. In the context of ad hoc arbitration, such a procedure is described in the UNCITRAL Notes on Organising Arbitral Proceedings.[4] Those principles can be adapted to ICC arbitration, which also provides comments on procedure. More importantly, a group of international practitioners developed the IBA Rules on Evidence, which are discussed further below (and which are set out in Pt III, App.10) and which are often referred to in ICC arbitration.[5] In addition, a Task Force created by the ICC Commission on Arbitration published a report updated in 2012 entitled "Techniques for Controlling Time and Costs in Arbitration".[6] That report provides comments on procedural aspects of arbitration, particularly with a view to reducing costs and time involved in the proceedings.

25–5 In previous editions of this Handbook, we have referred extensively in particular to the IBA Rules on Evidence. Since the first edition of the Handbook these rules or principles based on them have been increasingly accepted in international arbitration to the point, where in international arbitration

[2] On the subject of *iura novit euria*, see Kaufmann-Kohler, " 'Iura Novit arbiter'—est-ce bien raisonnable? Réflexions sur le statut du droit de fond devant l'arbitre international" in *De Lege Ferenda Réflexions sur le droit désirable en l'honneur du Professeur Alain Hirsch, op. cit.*

[3] For example, if Swiss law is the substantive governing law but one of the issues relates to corporate formalities under Cayman Islands law, parties may submit expert evidence on Cayman Islands law, while dealing with Swiss law as the law to be argued.

[4] *http://www.uncitral.org* [accessed November 20, 2013].

[5] Admittedly, many parties and their counsel who are not actively involved in international arbitration hear about the IBA Rules on Evidence for the first time when they are being referred to in an arbitration.

[6] http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2012/ICC-Arbitration-Commission-Report-on-Techniques-for-Controlling-Time-and-Costs-in-Arbitration [accessed November 2, 2013].

generally, and not just in ICC arbitration, these principles have become a standard point of reference.

Nevertheless, there is still an underlying theme with regard to procedure which 25–6
is sometimes the relative influence of the common law and civil law approaches.[7] Article 25 provides that the Tribunal shall proceed to establish the facts of the case by all appropriate means. This provision reflects an obligation on the Tribunal to direct the proceedings, as one would expect in civil law proceedings given the inquisitorial approach of the judge in a civil law jurisdiction.[8] However, the reference to appropriate means gives the Tribunal the latitude—which most Tribunals use—to ensure that the parties take the proper steps to furnish the memorials and evidence required to establish the facts of the case. As discussed below, the appropriate means to establish the fact is frequently a hybrid of methods using elements from various civil and common law systems.

As mentioned above, the Tribunal will consult with the parties prior to estab- 25–7
lishing the procedure and should do so at the case management conference discussed under art.24. When the Tribunal submits a draft of the Terms of Reference to the parties, it may well submit either a list of procedural points for consideration by the parties or a draft procedural order.[9] This permits the parties to comment on the proposed procedure in advance of the Terms of Reference or procedural hearing. To the extent that the parties agree on the procedure, the Tribunal will usually give this agreement considerable weight. Indeed, a failure to follow a procedure agreement by the parties may give rise to an objection under

[7] The common law/civil law nomenclature is, in some respects, misleading. There are very significant differences in procedure between that in the United States and in England, for example, or between the procedure in France and Germany or Switzerland. However, to the extent that the terms are shorthand for differing national procedural approaches in certain jurisdictions, they are useful. Moreover, the view that international arbitration procedure is now independent of national procedure, while understandable, fails to reflect the ongoing interaction between national procedure and international arbitration. One of the advantages of international arbitration is that it can continue to adapt procedure to the requirements of each arbitration and it may be that national procedure provides very useful tools in this respect. For a general discussion, see for example Paulsson, "The Timely Arbitrator: Reflections on the Böckstiegel Method" (2006) Arb Int Vol.22 No.1, p.19 ("What the presiding arbitrator needs to do is to consult with counsel in order to understand their desiradata and expectations, and to explain those of the arbitral tribunal"; Lazareff, "L'arbitre singe ou comment assassiner l'arbitrage" in *Liber Amicorum in honour of Robert Briner, op. cit.*, p.477, at p.485, emphasising the necessity to make a distinction between the rules of procedure which must be respected by the Tribunal failing which the Award may be challenged and set aside (art.15) and the instruction of the case itself which is within the power and control of the Tribunal unless contractual restrictions have been imposed in the Terms of Reference (art.20); Pietrowski, "Evidence in International Arbitration" (2006) Arb Int Vol.22 No.3, p.373; Cordero Moss, "Is the Arbitral Tribunal Bound by the Parties' Factual and Legal Pleadings?" SIAR 2006:3, p.1; de Boisséson, "Comparative Introduction to the System of Producing Evidence in Common Law Countries and Countries of Roman Law Tradition" in ICC Publication no.440/8, *Taking of Evidence in International Proceedings* (1990); Reymond, "Civil and Common Law Procedures: Which is the More Inquisitorial? A Civil lawyer's Response" (1989) Arb Int Vol.5 No.4, p.357; see also Blessing, "The ICC Arbitral Procedure Under the 1998 ICC Rules—What Has Changed?" (1997) ICC ICArb Bull Vol. 8 No.2, p.16 at p.28 and "The ICC Arbitral Process (Part III): The Procedure before the Arbitral Tribunal" (1992) ICC ICArb Bull Vol. 3 No.2, p.18.

[8] Reymond, "Civil and Common Law Procedures: Which is the More Inquisitorial? A Civil lawyer's Response", *op. cit.*, p.357.

[9] An example of such a list is provided in Pt II, Document 14.

art.19 and art.22, the applicable law of arbitration[10] and/or the New York Convention.[11]

25–8 Tribunals will often ask the parties to comment on procedural aspects such as the following which are discussed under the provisions of arts 25 and 26 referred to in parenthesis:

(1) the number of memorials and the time required for their preparation (art.25(2));

(2) the timing and method of submission of documents (art.25(2));

(3) the use of witness statements and interviewing of factual witnesses (art.25(3));

(4) expert evidence through the Tribunal or the parties (art.25(4));

(5) whether and when there should be disclosure of documents, (art.25(5));

(6) confidentiality of documents submitted (art.22(3));

(7) whether there should be hearings and how the hearings are to be conducted and the use of cross examination (art.25(6) and art.26);

(8) whether there should be a transcript of the hearing (art.26);

(9) the submission of post-hearing briefs and/or the holding of a separate hearing for legal argument (art.26).

Article 25(1): "The arbitral tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means."

25–9 Under art.25(1), it is the obligation of the Tribunal to establish the facts of the case. Article 30(1) imposes a further obligation on the Tribunal as it states that the Tribunal is to render its final Award within six months from the Terms of Reference. This time frame is very difficult to follow and is not met in most cases submitted to ICC arbitration. Article 30(1) therefore provides for extensions. But the requirement that the Tribunal take the initiative to complete the proceedings within a certain time frame is unlike that in most national courts.

25–10 Management of the proceedings is important at all stages of the arbitration. Arbitral proceedings may have to be adapted to changing circumstances, and the parties may perceive ever more diverging interests as the procedure develops. Therefore, on each occasion on which the Tribunal changes the procedure, it should ensure that the result is not to derail subsequent proceedings.

25–11 The detailed means for establishing the facts of the case are discussed under the various other subsections of art.25. However, it should be noted that establishing the facts of the case depends basically on evidence provided by the parties and their counsel in ICC arbitration. It is seldom that a Tribunal will take the initiative

[10] Article 19(1) of the UNCITRAL Model Law gives priority to an agreement between the parties as to the procedure; s.34(1) of the English Arbitration Act 1996 is to the same effect: "It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter."

[11] Article V(1)(d) provides, inter alia, that recognition of an Award may be refused where "the arbitral procedure was not in accordance with the agreement of the parties [. . .]".

to collect and review evidence from sources other than the parties. Nevertheless, Tribunals may do so at the request of a party or to some extent even through a Tribunal-appointed expert.

25–12 In deciding on the appropriate means to establish the facts of the case, the Tribunal will have to take into account the basic procedural requirements discussed under arts 19 and 22 above. The Tribunal will also have to decide on several basic differences that may arise between the parties and between counsel and the Tribunal.

25–13 The first difference is that Claimants (or counter-claimants) usually wish to pursue their claims actively. Claimants have the initiative as to bringing the proceedings and usually will do so after they have prepared for it. Claimants (or counter-claimants) stand to receive a payment if they win. Therefore, their financial incentive is to complete the proceedings rapidly.

25–14 Respondents usually have not chosen the timing of the dispute, although they may well have advance warning of it and have had an adequate time to prepare. Respondents without a counterclaim are faced with a financial incentive to delay if there is a real risk of loss, although terminating legal proceedings may after all also be in a Respondent's interest from a cost and time point of view. However, in many cases there is at least the perception that Respondents may seek to delay matters. Additional parties joined pursuant to art.7 may have particular procedual concerns as they may be peripheral or have conditional claims.

25–15 The second difference is that ICC arbitration is applicable in a wide range of situations with parties having varying financial resources. The parties may be major groups or companies with substantial turnovers and revenue, governments or state enterprises. But the parties may also be relatively small distributors, contractors or buyers (for example, of industrial equipment), sometimes acting as individuals, or through small companies, of which these individuals are the sole or main shareholders. Funding the costs of an international arbitration, including the legal costs of foreign counsel and the travel of the party, its witnesses and experts to a foreign (and sometimes distant) place of arbitration will strain smaller parties and even more so when they come from developing countries. The appropriate means to establish the facts of the case for one company with large resources may be totally out of reach for smaller companies or individuals. As a result, an important issue in some arbitrations is providing dispute resolution that is accessible for smaller companies or individuals.[12]

25–16 The third difference is that the Tribunal deals in general with counsel of the parties and not directly with the parties. Therefore, issues as to timing and expense are affected by the commitments—and preferences—of counsel. If both counsel agree on additional time periods, it will be difficult for the Tribunal not to respect that agreement. But if the additional time periods are requested by one counsel,

[12] The issue has been reviewed in the consumer context in the *Gateway computer* cases in the United States. Gateway proposed AAA arbitration as a less costly alternative. See *Brower v Gateway* (and also *Klocek v Gateway*) case, cited at para.0–32, n.22 rejecting the enforceability of an ICC arbitration clause based on unconscionability. Section 33(1)(b) of the English Arbitration Act 1996 provides that the Tribunal shall "adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined."

the Tribunal must keep in mind its obligation to establish the facts of the case "in as short a time as possible".

25–17 The fourth difference is that the parties may disagree strongly on whether to separate out legal issues to be decided: whether to bifurcate proceedings. The issue of whether the Tribunal holds separate, initial hearings on threshold matters that may make further evidence unnecessary is one of the early basic differences that may arise between the parties. But typical issues that are decided at the outset include decisions as to the applicable language, the applicable law and the jurisdiction of the Tribunal.[13]

25–18 The parties and their representatives are under a good faith obligation to cooperate in the arbitration procedure. The duty of party representatives has been the subject of a working group of the IBA that has resulted in the IBA Guidelines on Party Representation in International Arbitration. These Guidelines are not binding as such although they may be adopted by Tribunals. Moreover, the Guidelines deal with very sensitive issues such as the duty of the lawyers involved with respect to facts and provide for consequences for a failure to comply. Whether or not these will be widely-adopted, it is worth noting some of the principles that the Guidelines set out with respect to establishing the facts of the case. They include the following:

> 9. A Party Representative should not make any knowingly false submission of fact to the Arbitral Tribunal.
> 10. In the event that a Party Representative learns that he or she previously made a false submission of fact to the Arbitral Tribunal, the Party Representative should, subject to countervailing considerations of confidentiality and privilege, promptly correct such submission.
> 11. A Party Representative should not submit Witness or Expert evidence that he or she knows to be false. If a Witness or Expert intends to present or presents evidence that a Party Representative knows or later discovers to be false, such Party Representative should promptly advise the Party whom he or she represents of the necessity of taking remedial measures and of the consequences of failing to do so. Depending upon the circumstances, and subject to countervailing considerations of confidentiality and privilege, the Party Representative should promptly take remedial measures, which may include one or more of the following:
>
> (a) advise the Witness or Expert to testify truthfully;
> (b) take reasonable steps to deter the Witness or Expert from submitting false evidence;
> (c) urge the Witness or Expert to correct or withdraw the false evidence;
> (d) correct or withdraw the false evidence;
> (e) withdraw as Party Representative if the circumstances so warrant.

[13] Tallerico and Behrendt, "The Use of Bifurcation and Direct Testimony Witness Statements in International Commercial Arbitration Proceedings" (2003) J Int Arb Vol.20 No.3, p.295.

Many of these principles are in fact applicable amongst members of national bar associations. And there is no reason why a similar standard should not be applicable in international arbitration, although the issue of enforcement is a real one.[14] The main sanction for perceived misbehaviour in this respect is most likely to be in costs. 25–19

Article 25(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."

Article 25(2) requires that the Tribunal "hear the parties" after review of the submissions and documents. The Tribunal is therefore required to meet with the parties and receive their oral submissions. The wording of art.25(2) renders a hearing necessary, even if the parties have previously held an organisational hearing, unless the parties dispense with the hearing. As discussed under art.25(3), the Rules do not require the Tribunal to hear witnesses, although this may be necessary to meet due process requirements of the law of the place of arbitration for example. 25–20

The written submissions of the parties referred to in art.25(2) are usually the memorials of the parties. In a medium-size or large ICC arbitration, often each party will have the opportunity to submit two memorials prior to the hearing. The parties normally submit documents as exhibits with their memorials.[15] The details as to the organisation of the documents are set out in the procedural order. Witness statements are sometimes filed in connection with parties' memorials, although they are also frequently filed after the memorials themselves. The timing of filing witness statements is an important procedural step that the Tribunal will have to decide unless the parties have agreed on how to deal with it. 25–21

The Tribunal is required to hold the hearing after studying the parties' written submissions and all the documents that they rely on. However, this does not prevent the Tribunal from requesting additional documents pursuant to art.25(5) after the hearing and then deciding the case. The issue in each case will be whether the additional documents are of such a character and importance that the Tribunal should, under the Rules or applicable law, give the parties an opportunity to express their position orally with respect to them. 25–22

[14] The IBA Guidelines on Party Representation provide in part as follows regarding enforcement:
"26. If the Arbitral Tribunal, after giving the Parties notice and a reasonable opportunity to be heard, finds that a Party Representative has committed Misconduct, the Arbitral Tribunal, as appropriate, may:
(a) admonish the Party Representative;
(b) draw appropriate inferences in assessing the evidence relied upon, or the legal arguments advanced by, the Party Representative;
(c) consider the Party Representative's Misconduct in apportioning the costs of the arbitration, indicating, if appropriate, how and in what amount the Party Representative's Misconduct leads the Tribunal to a different apportionment of costs;
(d) take any other appropriate measure in order to preserve the fairness and integrity of the proceedings."

[15] See App.IV suggesting that the Tribunal and the parties consider "requiring the parties to produce with their submissions the documents on which they rely".

25–23 The requirement of a hearing pursuant to art.25(2) appears to apply to the issue of any Awards, which includes a partial Award. Therefore, and although art.25(2) does not require that the Tribunal has to accept every request for a hearing by a party, there is an argument in such cases that the Tribunal must hold a hearing prior to rendering any Award under the Rules, including a partial Award on applicable law, for example.

25–24 Technically, the requirement of hearing the parties is probably best viewed as at least an opportunity to hear both parties at the same time and providing the parties with the opportunity to respond orally to the position of the other side and to comments and questions of the Tribunal. It is not clear that the requirements would be met with telephone conferences or video communication, let alone with online comments. If one party insists on a physical meeting for the hearing, that may be necessary to meet the requirements of art.25(2).[16]

25–25 Article 25(2) is silent as to whether and how the Tribunal should deliberate after having studied the parties' written submissions and prior to hearing the parties orally. In the authors' experience, the efficiency of the subsequent proceedings and sometimes even the quality of the ultimate Award is often improved if the Tribunal meets to discuss the issues raised by the parties' written submissions prior to attending the hearing. This holds true in particular if the Tribunal puts specific questions to the parties and/or sets out the areas or issues where it feels no further submissions are required or where the parties should put their focus. In setting out those areas or issues, Tribunals will usually seek to balance the enquiries so as to provide each party with an indication of the matters of concern to it with respect to their cases. The Tribunal's guidance and queries will always be preliminary and without prejudice to the Tribunal's ultimate determination of the case. However, the caveat is that such meetings require detailed preparation by the members of the Tribunal prior to the hearings and this may not be practical in some circumstances.

Article 25(3): "The arbitral tribunal may decide to hear witnesses, experts appointed by the parties or any other person, in the presence of the parties, or in their absence provided they have been duly summoned."

25–26 Article 25(3) is permissive. The Tribunal may decide whether or not to hear witnesses, experts or more generally any other person. However, a Tribunal must meet the requirements of the law of the place of arbitration discussed under art.19 and art.22(4) and should meet the due process requirements of the place of probable enforcement if that is ascertainable. Therefore, the permissive nature of art.25(3) is subject to limitations on due process, but also to the parties' agreement. If both parties request that the Tribunal hear witnesses, it will usually be obliged to do so and in light of the consensual nature of arbitration, it will normally be well advised to do so.[17] The key factor is that a Tribunal must balance its discretion under art.25(3) with the general requirement that it respect the parties' agreement as to the procedure.

[16] Videoconferencing has improved significantly, but it is not universally available. In addition, most practitioners prefer personal contact at hearings.

[17] But due to the lack of relevance, a Tribunal may refuse hearing a given witness.

25–27 The ICC Rules do not give a definition of the term "witness" and do not state whether any person can be a witness or not. The current practice, as reflected in art.4(2) of the IBA Rules on Evidence is that "any person may present evidence as a witness, including a Party or a Party's officer, employee or other representative".[18] Indeed, in an ICC arbitration, anyone capable of describing facts based on his own perception may be a witness, irrespective of his status as a party, employee, agent and the like. Any person can act as a witness under the ICC Rules. This only subject to the *lex arbitri*, and more precisely a mandatory rule of law applicable at the place of arbitration.

25–28 The ICC Rules do not give a definition either of the term "expert", and art.25(3) does not distinguish between experts appointed by the Tribunal and those by the parties, although the IBA Rules of Evidence do draw a distinction (in arts 5 and 6). The categories of expert evidence are very broad.

25–29 The Tribunal has a discretion to decide on its own initiative to hear a person if it believes that it is important for the outcome of the case. In such as case, the Tribunal will need however to seek the assistance of national courts having no coercive power or *imperium* vis-à-vis the third parties who refuse to appear before it. Although the situation is not clear in various circuit courts in the United States, it may be possible in some US states to use s.28 U.S.C. s.1782 to require a person to provide oral evidence (as well as documentary evidence as discussed below) in support of foreign arbitration.[19]

[18] See Oetiker Ch., "Witnesses before the International Arbitral Tribunal" (2007) ASA Bull Vol.25 No.2, p.253; Schlosser discussing the legal relationships between arbitrating parties and witnesses-whether witnesses of act or expert witnesses in "Generalizable Approaches to Agreements with Experts and Witness Acting in Arbitration and International Litigation" in *Liber Amicorum in honour of Robert Briner, op. cit.*, p.775; Derains, "Le témoin en matière d'arbitrage" in *Mélanges en l'honneur de François Knoepfler, op. cit.*, p.227; Gélinas, "Evidence through witnesses" in *Arbitration and Oral Evidence*, ICC Dossier No.689, *op. cit.*, p.29, at p.31; Bühler/Dorgan, "Witness Testimony Pursuant to the 1999 IBA Rules of Evidence in International Commercial Arbitration—Novel or Tested Standards?" (2000) J Int'l Arb Vol.17 No.1, p.3, at p.7.

[19] See the decision in *Re Oxus Gold PLC*, Misc:06–82, 2006 US Dist. LEXIS 74118 (D.N.J. Oct. 10, 2006) and in *Re Oxus Gold PLC*, 2007 WL 1037387, D.N.J., 2007. See also *Re Roz Trading Ltd.*, No.1:06–cv–02305–WSD, 2006 U.S. Dist. LEXIS 91461 (N.D. Ga. Dec. 19, 2006). However, it is not clear that this decision will be followed elsewhere. See Fellas, "Using Section 1782 In International Arbitration" (2007) Mealey's IAR Vol.22 No.2, p.39. Under s.1782 of Title 2 of the United States Court, a party to a proceeding in a foreign or international tribunal is allowed to apply directly to a United States court to take evidence in the United States for use in such proceedings ("The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court"). Wessel and Eyre, "US Discovery in Aid of Foreign or International Proceedings: the Rise of 28 USC, s.1782", The Journal of the Dispute Resolution Section of the International Bar Association June 2007 Vol.1 No.1, p.23; Ostertag and Brosnik, "Stchottdorf: para.1782(a) in Discovery in Foreign Actions" in *New York Law Journal*, April 6, 2007. Lindsey, Hosking and Lahlou, "Application of US Discovery Law To Arbitration Upheld On Appeal" (2007) Mealey's IAR Vol.22 No.5, p.26. Sheppard, "US Discovery Can Be Obtained For Use in Foreign BIT Arbitration Proceedings" (2007) ASA Bull Vol.25 No.2, p.402. See also Dimolitsa, "Giving Evidence: Some reflections on oral evidence vs documentary evidence and on the obligations and rights of the witnesses" in *Arbitration and Oral Evidence*, ICC Dossier No.689, *op. cit.*, p.11, at p.16 and "Quid encore de la confidentialité?" *in Mélanges en l'honneur de François Knoepfler, op. cit., p.249*. See also the discussion in para.25–78 *et seq*.

25–30 If a Tribunal decides that certain evidence is not necessary to decide the arbitration, then the refusal to hear the witness or expert should be based on relevance.[20] If the Tribunal decides that a witness statement or expert report is relevant, and therefore intends to rely on it, the decision not to hear the witness or expert would raise serious procedural issues, as a witness should be made available for cross examination unless the opposing party waives the right to cross-examine the witness.

25–31 Cross-examination or questioning of witnesses is viewed as an important element in determining whether evidence is reliable or not. Cross-examination originated with the common law systems and is viewed as an essential element of due process in those systems. However, the importance of questioning of witnesses by counsel is now a widely accepted practice in international arbitration, although the method of questioning of witnesses and, above all, the time allowed for that questioning varies with the Tribunal.

25–32 In civil law countries, it is a basic principle that the due process ("*contradictoire*") must be respected. Therefore, the concept that one party could work with a witness or expert to prepare a statement or report and that the other party would not have the opportunity of questioning the witness or expert appears problematic, if much weight is to be given to such testimony.

25–33 The better view is that art.25(3) is permissive in the sense that it permits a Tribunal to rule that certain witness or expert testimony is not required for deciding the case.[21] However, art.25(3) does not permit the Tribunal to take written evidence of witnesses or experts into account and then refuse to hear the witness or expert, unless, of course, both parties would have waived such hearing.

25–34 Article 25(3) provides that the Tribunal can hear witnesses and experts in the absence of one of the parties if the party has been duly summoned. This provision is intended to preclude a defaulting party from blocking the procedure. If one party defaults, the Tribunal must, however, hear the relevant evidence, reach a decision and reflect that decision in a reasoned Award. In ICC arbitration, there is no possibility of "default Award", as there is in national court proceedings.

25–35 Article 25(3) does not set out any details as to how witness evidence should be presented. This is in part because the manner of presenting evidence will vary from case to case. However, the IBA Rules of Evidence provide an outline as to how witness evidence is often taken and the rules that Tribunals often apply in international arbitration. As noted above, the IBA Rules of Evidence do not appear to be adopted as such by most Tribunals, but provide useful guidelines, particularly so that parties receive equal treatment.[22]

25–36 Article 4(1) of the IBA Rules of Evidence provides that "within the time ordered by the Tribunal, each Party shall identify the witnesses on whose testimony it

[20] Article 19 of the UNCITRAL Model Law provides: "The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence". See also Derains, "La pratique de l'administration de la preuve dans l'arbitrage commercial international" (2004) Rev Arb, No.4, p.781, at p.797; Pinsolle and Kreindler, "Les limites du rôle de la volonté des parties dans la conduite de l'instance arbitrale" (2003) Rev Arb No.1, p.41.

[21] Derains, "La pratique de l'administration de la preuve dans l'arbitrage commercial international", *op. cit.*, at p.796.

[22] See Lévy, "Witness Statements" in *De Lege Ferenda—Réflexions sur le droit désirable en l'honneur du Professeur Alain Hirsch, op. cit.*, p.95.

intends to rely and the subject matter of that testimony". Parties exchange either witness summaries or witness statements discussed below. Usually this will take place with or after the exchange of memorials and well prior to the evidentiary hearings.

25–37 Unlike in some civil law jurisdictions, parties or their representatives may be witnesses under art.4(2) of the IBA Rules of Evidence and it is not improper for the parties to interview witnesses and to discuss their testimony with them under art.4(3) of the IBA Rules of Evidence.[23]

25–38 Article 4(4) of the IBA Rules of Evidence provides for witness statements and art.4(5) of those Rules states that each witness statement shall contain:

> "(a) the full name and address of the witness, a statement regarding his or her present and past relationship (if any) with any of the Parties, and a description of his or her background, qualifications, training and experience, if such a description may be relevant to the dispute or to the contents of the statement;
> (b) a full and detailed description of the facts, and the source of the witness's information as to those facts, sufficient to serve as that witness's evidence in the matter in dispute. Documents on which the witness relies that have not already been submitted shall be provided;
> (c) a statement as to the language in which the Witness Statement was originally prepared and the language in which the witness anticipates giving testimony at the Evidentiary Hearing;
> (d) an affirmation of the truth of the Witness Statement; and
> (e) the signature of the witness and its date and place."[24]

25–39 The ICC Rules contain no requirement of that sort and in practice, the format, content and quality of witness statements varies greatly. Counsel of the parties may seek to follow the prescription of art.4(4) of the IBA Rules of Evidence when submitting witness statements.

25–40 Article 4(6) of the IBA Rules of Evidence provides for supplemental witness statements. In many ICC arbitrations, parties sometimes submit two sets of witness statements. As discussed under art.20, witness statements must be provided in the language of the arbitration, although this is not expressly stated in the IBA Rules of Evidence. If the witness is not sufficiently competent in that language, a translation of his statement into the language of arbitration by the party providing the statement has to be submitted.

25–41 In the Working Group's Commentary on Witness Statements for the 2010 version of the IBA Rules, it was noted in particular that:

> "If witness statements are used, the evidence that a witness plans to give orally at the hearing is known in advance. The other party can thereby

[23] Bühler and Dorgan, "Witness Testimony Pursuant to the 1999 IBA Rules of Evidence in International Commercial Arbitration—Novel or Tested Standards?", *op. cit.*, at p.7; Thorens, "L'arbitre international au point de rencontre des traditions du droit civil et de la common law" *in Etudes de droit international en l'honneur de Pierre Lalive, op. cit.*, p.693.

[24] The IBA Rules of Evidence do not require that the witness statement be sworn.

better prepare its own examination of the witness and select the issues and witnesses it will present. The tribunal is also in a better position to appreciate the testimony and put its own questions to these witnesses. Witness statements may in this way contribute to a shortening of the length of oral hearings. For instance, they may be considered as the 'evidence in chief' ('direct evidence'), so that extensive explanation by the witness becomes superfluous and examination by the other party can start almost immediately.

In order to save on hearing time and expense, witnesses need not appear unless their presence is requested by a party or the arbitral tribunal (Article 8.1). Often the arbitral tribunal and the parties may agree that a witness whose statement is either not contested or not considered material by the opposing party need not be present at the oral hearing. [. . .]

Article 4.4 of the IBA Rules of Evidence leaves it to the arbitral tribunal to specify when the written statements have to be submitted. There is a basic choice to be made in this respect: the parties may exchange their statements simultaneously or consecutively. The second round of witness statements should address only information contained in witness statements, expert reports or submissions submitted by another party in the first round or otherwise not previously presented in the arbitration (see Article 4.6)."

25–42 Simultaneous witness statements provide for a more rapid procedure, but in some cases, a Respondent may feel that this is unfair, as he should see the Claimant's testimony first. It will ultimately be for the Tribunal to decide the sequence of witness statements, and in doing so, it will seek to strike a balance between efficiency and fairness. To the extent that the parties have, or are supposed to have set out all relevant factual allegations in their written pleadings, a Respondent should in the normal case suffer no prejudice if a simultaneous exchange of written statements is ordered. Having two rounds of witness statements permits the Tribunal to have the comments of the witnesses on the evidence submitted by the other side, but adds to the duration and costs of the proceedings.[25] A further variant, is to permit counsel who has filed one or more witness statements to question that witness to a limited extent in his introduction on evidence that has been submitted since the last witness statement has been filed. In that manner, the outstanding factual or expert issues may be narrowed for the Tribunal and the witness can present in person his or her evidence on these limited points in person.

25–43 Article 4(7) of the IBA Rules of Evidence makes provision for excusing witnesses, usually where their evidence is not contentious. Where there are numerous witnesses, it is not infrequent that witnesses of secondary importance are not heard, as the failure to hear the witness does not mean that the evidence as such is accepted (and it may well be contradicted by documentary evidence).

[25] See Bühler, "Costs in arbitration. Some further considerations" in *Liber amicorum in honour of Robert Briner; op. cit.*, p.179.

25–44 Article 4(9) of the IBA Rules of Evidence provides for seeking to obtain evidence of a witness who will not voluntarily testify. The possibility of this will depend in most instances on the national law of the place where the person is located or perhaps the law of the place of arbitration. It is relatively seldom that a Tribunal seeks to compel testimony due to the complications involved and in particular the delay that can result in the proceedings.[26]

25–45 Article 4(10) of the IBA Rules of Evidence provides the Tribunal with the possibility of requiring a party to assist in obtaining evidence. However, most Tribunals are more reluctant to seek to require testimony than to order production of documents.

25–46 A related issue is how to treat a third party or former party who is in effect providing evidence against the interests of his or her former employer. The often-repeated expression is that "there is no property in a witness". However, witnesses may be subject to confidentiality undertakings that effectively limit their ability to testify. Frequently, if these issues are raised, the parties seek to work out some form of arrangement so that the witness can testify subject to limitations to protect issues such as trade secrets. However, the issue of testimony of these witnesses can rapidly become complex and a Tribunal may be faced with witness statements from the same witness being filed by both parties.[27]

Article 25(4): "The arbitral tribunal, after having consulted the parties, may appoint one or more experts, define their terms of reference and receive their reports. At the request of a party, the parties shall be given the opportunity to question at a hearing any such expert."

25–47 In many ICC arbitrations involving technical matters, the parties designate experts and submit expert reports. As discussed below, the Tribunal may designate an expert as well, but in ICC arbitration Tribunals seldom do so. This is the case whether the parties originate in common law or civil law jurisdictions. The usual procedure is to have party-appointed experts.[28]

[26] Bühler and Dorgan, "Witness Testimony Pursuant to the 1999 IBA Rules of Evidence in International Commercial Arbitration—Novel or Tested Standards?", *op. cit.*, at p.18.

[27] In examining the competing witness statements from the same witness, the role of the lawyers in the preparation of the witness statement may become an important issue.

[28] With respect to party-appointed experts, art.5(2) of the IBA Rules of Evidence states that the report of the expert shall contain:

"(a) the full name and address of the Party- Appointed Expert, a statement regarding his or her present and past relationship (if any) with any of the Parties, their legal advisors and the Arbitral Tribunal, and a description of his or her background, qualifications, training and experience;

(b) a description of the instructions pursuant to which he or she is providing his or her opinions and conclusions;

(c) a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal;

(d) a statement of the facts on which he or she is basing his or her expert opinions and conclusions;

(e) his or her expert opinions and conclusions, including a description of the methods, evidence and information used in arriving at the conclusions. Documents on which the Party-Appointed Expert relies that have not already been submitted shall be provided;

(f) if the Expert Report has been translated, a statement as to the language in which it was originally prepared, and the language in which the Party Appointed Expert anticipates giving testimony at the Evidentiary Hearing;

Article 40 Limitation of liability

The arbitrators, any person appointed by the arbitral tribunal, the emergency arbitrator, the Court and its members, the ICC and its employees, and the ICC National Committees and Groups and their employees and representatives shall not be liable to any person for any act or omission in connection with the arbitration, except to the extent such limitation of liability is prohibited by applicable law.[1]

Introductory remarks

40–1 Article 40 is the provision in the Rules dealing with limitations on liability for the ICC, its constituent elements, its employees, as well as the persons, such as arbitrators appointed or confirmed by the ICC Court, or the emergency arbitrator appointed by the ICC Court's President. Article 40 has been modified from the corresponding provision of the 1998 Rules. The title has been changed from exclusion of liability to limitation of liability. The text of the article has been broadened as to the scope. And the last phrase has been added stating that the exclusion on liability is not applicable to the extent such limitation of liability is prohibited by applicable law. This is a recognition in the Rules that, there can be no absolute exclusion of liability; that whatever limitation in liability the Rules seek to introduce, there are limitations on liability under the law applicable to the various actors in an ICC arbitration. As pointed out in the prior editions of this Handbook, these limitations were applicable in any event.[2] The Rules have been amended to reflect that fact.

[1] Article 40 corresponds to art.34 of the 1998 Rules. The scope of the persons covered by the provision has been broadened and an exception has been inserted to cover situations where limitation of liability is prohibited by applicable law.

[2] See Bühler/Webster, *Handbook of ICC Arbitration* (2nd edn), paras 34–5 et seq.

40–2 Arbitrators are individuals, who are entrusted by parties with a private mission under the Rules. As discussed under art.1, the ICC is a private entity, which performs its services at the request of parties seeking such services under and in accordance with the ICC Rules of arbitration.[3] In an ICC arbitration, the arbitrators as well as the ICC, through the ICC Court and its Secretariat,[4] act in a private capacity, as a result of an agreement between parties to submit their disputes to the ICC Rules of arbitration. The ICC's realtionship with the parties is a contractual one.

40–3 As the French Supreme Court confirmed in the *Cubic* case,[5] the role of the ICC is to provide through the ICC Court administrative services and to render administrative decisions in connection with arbitration.[6] The arbitrators are also providing services, but of a judicial nature. The basic purpose of art.40 is to set out the principle that, to the extent possible, the arbitrators, the ICC and the various other actors involved in arbitration under the Rules should not be liable for acts or omissions in connection with the arbitration.

40–4 The policy justification for art.40 is the need to avoid obstruction of the ICC arbitration system by claims of liability against arbitrators, the ICC or other persons involved.[7] With national courts, this need is reflected in the immunity of judges in many jurisdictions from claims by parties to national court proceedings. As far as arbitrators act in a judicial function, there seems to exist no reason why they should be less protected than the judge of a state court. The judicial immunity should apply to arbitrators as well in order to protect as much as possible the integrity of the arbitral process.

40–5 The exclusion of liability has to be analysed as to its validity, scope and limitations under national law, as will be discussed below. However, it is important to note from the outset what art.40 does not cover despite its broad wording.

40–6 Article 40 does not operate to exclude or limit any recourse to challenge or remove arbitrators. The effect of such a challenge or removal, if successful, may be to deprive the arbitrator of substantial fees, which he or she would have earned, if the challenge had been rejected by the ICC Court.[8] Article 40 seeks to exclude claims against the arbitrator or the ICC for further amounts, for example relating to costs that were incurred due to the successful challenge.

40–7 Article 40 does not limit any right to annul any resulting Award or to challenge its enforcement. The grounds for annulment or a refusal to enforce an Award may be directly related to failures by the arbitrators or the ICC. The party objecting to such actions has the basic remedy (against the Award), but does not have the follow-up remedy (against the arbitrators or the ICC).

[3] See above at para.1–55.

[4] See para.1–8 regarding the structure of the ICC and the absence of legal autonomy of the ICC Court.

[5] See the *Cubic* case, para.1–8 n.10 and confirmed recently in the *SNF* case, *op. cit.*, para.1–8 n.10.

[6] See also above, para.1–16.

[7] Fouchard, "Final Report on the Status of the Arbitrator—A Report of the ICC's Commission on International Arbitration", *op. cit.*, p.27; see also ICC Special Bulletin (1995), *The Status of the Arbitrator*. For an analysis of the comparable provision under the UNCITRAL Arbitration Rules, see Webster, *Handbook of UNCITRAL Arbitration* (Thomson/Sweet & Maxwell, 2010), paras 16–1 et seq.

[8] As noted under art.11, most challenges submitted to the ICC Court are in fact rejected. If successful, the arbitrator will normally receive a fee for the services rendered until the challenge.

40–8 Article 40 does not limit claims by one party against another party. Therefore, to the extent that the other party has contributed to an action by the Tribunal or the ICC that a party feels is wrongful, the party may have recourse against the other party depending on the terms of their contract and the underlying legal principles.

Liability with respect to "any act or omission in connection with the arbitration"

40–9 Article 40 is phrased in broad terms provided that the act or omission is "in connection" with the arbitration. The act or omission can therefore be a procedural act or a failure to act, including the rendering of an Award or matters relating to the organisation of the hearings for example.[9] The phrase would not cover acts or omissions that have no relationship with the arbitration, such as where they relate to another, non-ICC arbitration. The reference to "act or omission" should cover claims of whatever nature, whether contractual or in delict (tort).

40–10 Article 40 covers in one provision the liability limitation of arbitrators, as well as of emergency arbitrators on the one hand, and of the arbitral institution and its constituents on the other hand. While arbitrators act in a judicial (or at least quasi-judicial) function, the arbitral institution does not. Its acts are administrative in nature, and yet, it is well accepted that both arbitrators and the arbitral institution act on a contractual basis.[10]

Limitation of liability of (emergency) arbitrators and any person appointed by the arbitral tribunal

40–11 Article 40 covers arbitrators, irrespective of who has appointed them. Before being appointed by the ICC Court, or confirmed by the latter or by the Secretary General,[11] a prospective arbitrator needs to sign a statement of acceptance, and provide certain information, which the ICC Court will consider when making the appointment or confirmation. The ICC Court/Secretary General will rely on the veracity of that information as much as the parties.

40–12 With the introduction of the emergency arbitrator in art.29, the liability protection of art.40 was extended to cover the emergency arbitrator as well.

40–13 The liability protection now also extends to persons appointed by the Tribunal, such as experts, but also, albeit less relevant, court reporters, interpreters or other auxiliaries. In some instances, the Tribunal will designate its own expert. The Tribunal's expert would therefore benefit from this limitation in liability, although party-appointed experts would not.

40–14 Professional experts will often make their appointment subject to an express liability limitation, for example linking monetary damages to the amount of their

[9] Van Houtte/McAsey, "The Liability of Arbitrators and Arbitral Institutions," in: Habegger *et al.*, (eds), *Arbitral Institutions under Scrutiny* (Juris 2013) p.133 (146 et seq.), distinguishes types of duties in the context of the contractual basis for an arbitrator's liability: (i) the duty to render an award, (ii) the duty to render a "good" decision, and (iii) the duty to behave diligently.
[10] See van Houtte/McAsey, *op.cit.*, pp.137 et seq., and pp.161 et seq.
[11] See art.13(1) and (2).

fees. Before making the appointment, the Tribunal will normally seek the Parties' agreement with the terms of their engagement.

40–15 The law applicable to liability of the arbitrators is not entirely clear but the most appropriate appears to be the law of the place of arbitration.[12] The law of the place of arbitration is the law of the place where the Award is deemed to have been made and where often, although not always, the hearings are conducted. The law of the place of arbitration governs many other aspects of arbitrations, including imposing the minimum procedural standards. The law of the place of arbitration applies to all three arbitrators, who may be based in three different countries and their liability could thus be subject to three different laws, if the law of the place of arbitration were not to apply to their status as arbitrator under the ICC Rules.

40–16 Liability of arbitrators under the various national legal systems differs significantly. As the UNCITRAL Working Group on International Arbitration has stated:

> "93. National arbitration laws, including a number of laws enacting the Model Law, have added provisions dealing with liability of the arbitrator. These provisions differ on whether arbitrators should be immune from professional liability and on the parameters of the immunity. There is a tendency amongst common law jurisdictions to equate arbitrators with judges and extend an equivalent immunity, and amongst civil law jurisdictions to focus on arbitrators' contractual function as experts. Nevertheless, there is considerable diversity even within the same legal families, and no clear line of distinction can be drawn between the approaches taken by each."[13]

Liability of "the Court and its members, . . . the ICC and its employees, . . . the ICC National Committees and Groups and their employees and representatives"

40–17 As discussed under art.1, the ICC is a private legal entity established under French law. The ICC Court is the part of the legal entity that deals with arbitration under the Rules.[14] Therefore, art.40 covers the ICC as a legal entity and specifically refers to the ICC Court as part of that entity. The ICC as such is responsible for the administrative acts of the ICC Court and of the Secretariat of the ICC Court.[15] Article 40 also expressly covers the members of the ICC Court, including its President (and the Vice-Presidents), who actually review the matters and decide the various issues, such as the validity of challenges and whether to approve the terms of an Award. Under the 2012 Rules, the powers of the ICC Court's President have been increased, in particular as regards the appointment of the emergency arbitrator.[16]

40–18 Article 40 also covers the employees of the ICC, and in particular the Secretary General, the General Counsel and the counsel and staff employed by the Secretariat

[12] This view is also shared by Reiner & Aschauer, *op. cit.*, para.787 n.488.
[13] United Nations Commission On International Trade Law Thirty-second session, Vienna, May, 17—June, 4 1999 Document A/CN.9/460 April 6, 1999.
[14] See para.1–8 n.10.
[15] For a recent confirmation, see the Paris Court of Appeal decision of January 22, 2009 in the *SNF* case cited at para.1–8 n.11 and discussed below.
[16] See discussion under art.29 and see also paras 13–46 to 13–50.

of the ICC Court.[17] This is in keeping with most limitation of liability provisions that seek to cover employees as well as entities themselves.[18]

40–19 Article 40 goes one step further in covering the ICC National Committees and Groups and their employees and representatives. The ICC National Committees and Groups are involved in ICC arbitration as they propose arbitrators for appointment by the ICC Court as sole arbitrators, presidents, and, sometimes co-arbitrators. They assist the ICC Court in fulfilling its obligations under the Rules, and act as mere auxiliaries of the ICC.[19]

Relationship between the parties and the ICC

40–20 The existence of art.34 in the 1998 Rules, now replaced by and amended by art.40 of the 2012 Rules, has not discouraged parties from suing the ICC, in particular before the French courts, by seeking damages and/or a refund of the administrative charges. The limitation of liability under the Rules is one way for the ICC to protect itself from lawsuits of disgruntled parties. The predecessor provision of art.40 has been tested in court, in particular before the Paris Court of Appeal in the 2009 *SNF* case, which will be discussed below.

40–21 The French Supreme Court has confirmed in the *Cubic* and *SNF* cases that the relationship between the ICC and the parties is a contractual one.[20] Moreover, the court held that the decisions of the ICC Court were administrative in nature.

40–22 To determine the effect of an exclusion of liability clause in the contractual context, one must first determine the applicable rule of law and the limits of exclusion of liability clauses under that national law.[21] However, as mentioned above,[22] art.40 extends beyond purely contractual claims and would extend to claims in delict (tort). Therefore, another issue that may arise under the relevant national system is the extent to which a party can limit its liability in tort.

40–23 As regards the ICC, the Paris Court of Appeal took the view in the 2009 *SNF* case that the arbitration contract that is formed between the ICC and the parties to an ICC arbitration, is governed by French law, since the ICC furnishes its services in Paris via the intermediary of the ICC Court.[23] *SNF* had sued the ICC in 2005. In October 2007, the Paris Court of First Instance issued a judgment in a case brought by the Respondent (SNF) in an ICC arbitration against the ICC. An award had been rendered against SNF. Both parties sought an interpretation of the award under art.29 (now art.35) of the Rules. The Tribunal issued an Addendum. Following receipt of the Addendum, SNF sought clarification on procedural points with respect to the Addendum from the ICC relating to a missing signature and as to the date on which the Award should be considered final. The ICC did not

[17] Technically speaking, the President of the ICC Court is not an employee of the ICC, but has a consultancy agreement with the ICC.
[18] See for example s.74 of the English Arbitration Act 1996.
[19] Reiner & Aschauer, para.794 n.498.
[20] See the discussion on the *Cubic* and the *SNF* cases cited above at para.1–8 n.11.
[21] See for a discussion of the applicable law and competent country in relation to the civil liability of arbitral institutions, van Houtte/McAsey, *op. cit.*, pp.163 et seq.
[22] See para.40–10.
[23] Paris Court of Appeal, January 22, 2009, (2010) Rev Arb No.2, p.314 at 317; (2009) Yearbook Com Arb, p.262.

respond. SNF then brought proceedings in France against the ICC for allegedly breaching the Rules, particularly with respect to scrutiny of the Award and Addendum.[24] The Paris Court of First Instance rejected SNF's claims, essentially considering that art.34, the predecessor of art.40, was a valid exclusion of liability in an international contract, and that SNF had not proven a fault on the part of the ICC, whether in contract or in tort, and any damages resulting therefrom. SNF's appeal was unsuccessful, although the Paris Court of Appeal declared art.40 to be at least partially void. It held:

> "The clause exclusive of liability, which authorizes the ICC not to perform its essential obligation as provider of non–judicial services has to be considered as non-written [void] as regards the relations between the ICC and SNF inasmuch as the clause contradicts the scope of the arbitration contract." (Authors' translation)[25]

40–24 The French Arbitration Act, unlike the arbitration laws in some other countries, such as England or Singapore,[26] contains no provision dealing with liability of arbitral institutions. This may be surprising since the ICC Court is based in Paris. It is, however, to be noted that to date, the French courts have not held the ICC liable for breach of contract for an alleged violation of the Rules. Although the ICC Commission was of course familiar with the view taken by the Paris Court of Appeal when revising the 1998 Rules, it essentially maintained the limitation of liability clause, albeit by adding a reference to the prohibition by applicable law of such limitation of liability.

40–25 In the authors' view, it would be from a legal perspective more sensible, and in the better interest of the ICC, as the service provider, to expressly submit its relations, with the parties that accept the ICC Arbitration Rules, to French law as the governing law, and to provide for the exclusive jurisdiction of the Paris Courts in case of any claims brought against the ICC in relation to the arbitration services performed by the ICC Court and its Secretariat.[27] This would allow the ICC to more clearly and better limit its liability. This could be done in an article in the Rules separate from the article dealing with the arbitrator's immunity.

40–26 The situation in the United States is different, as arbitration institutions are generally entitled to the same type of immunity as arbitrators (as discussed below). As summarised in the commentary to the Revised Uniform Arbitration Act:

> "Section 14(a) [of the Revised Uniform Arbitration Act] also provides the same immunity as is provided to an arbitrator to an arbitration organisation. Extension of judicial immunity to those arbitration

[24] See the *SNF* case cited at para.1–8 n.11. Paris TGI, October 10, 2007, *Société SNF v Chambre de Commerce Internationale*, and the Paris Court of Appeal decision of January 22, 2009.
[25] Paris Court of Appeal, January 22, 2009 (2010) Rev Arb No.2, p.314 at 317/318; (2009) Yearbook Com Arb, p.262.
[26] See s.74 of the English Arbitration Act 1996, and s.25A of the Singapore International Arbitration Act as amended and revised on December 31, 2002. For further examples see van Houtte/McAsey, *op.cit.*, pp.158 et seq. Interestingly, the UNCITRAL Model Law does not limit the liability of arbitral institutions.
[27] From a policy perspective, and possibly for other reasons, the ICC may wish to avoid of being suddenly seen as a French institution, even though the French Courts have qualified it as a NGO recognised by the United Nations.

organisations is appropriate to the extent that they are acting 'in certain roles and with certain responsibilities' that are comparable to those of a judge. *Corey v New York Stock Exch.*, 691 F.2d 1205, 1209 (6th Cir. 1982). This immunity to neutral arbitration organisations is appropriate because the duties that they perform in administering the arbitration process are the functional equivalent of the roles and responsibilities of judges administering the adjudication process in a court of law. There is substantial precedent for this conclusion."[28]

40–27 This principle was illustrated in 2008 in the *Global Gold Mining* case,[29] a decision of the United States District Court of the Southern District of New York. In that case, the ICC Court rendered a decision under art.6(2). That decision permitted the arbitration to proceed against certain signatories of an agreement containing an arbitration clause but refused to permit the arbitration to proceed against an individual who was a non-signatory of the agreement. The Claimant brought proceedings in New York to compel the ICC to permit the arbitration to proceed so that the issue of jurisdiction could be decided by the Tribunal. The District Court rejected the application stating in part as follows (footnote deleted):

"[P]arties seeking 'review' of an arbitrator's ultimate decision do not normally sue the arbitrator; instead, they bring an action against the counterparties to the arbitration seeking to confirm or vacate the arbitrators' decision. See 9 U.S.C. §§ 9–12. As the Second Circuit mentioned in passing in Shaw, where the ICC Court had determined, pursuant to Rule 6(2), that a petitioner had an arbitrable dispute against one party but not others, an action in federal court involving both that petitioner and those other parties—but not the ICC Court or the ICC—would satisfy Rule 6(2) by allowing the petitioning party 'to seek review of the arbitrator's [i.e. the ICC Court's] decision' that the petitioner's dispute against the other parties was not prima facie arbitrable. Shaw, 322 F.3d at 122 n. 3. Here, therefore, in order to put the question whether a binding arbitration agreement with Ayvazian exists before a court, GGM must bring a motion to compel arbitration against Ayvazian himself, not in injunctive action against the ICC respondents.

[. . .]

The rationale of arbitral immunity is that such immunity 'is essential to protect the decision-maker from undue influence and protect the decision-making process from reprisals by dissatisfied litigants.' Austern v. Chicago Bd. of Options Exch., Inc., 898 F.2d 882, 886 (2d Cir. 1990), quoting Corey v. New York Stock Exch., 691 F.2d 1205, 1211 (6th Cir.1982); see also Pfannenstiel v. Merrill Lynch, Pierce, Fenner & Smith, 477 F.3d 1155, 1158 (10th Cir.2007), quoting New England Cleaning Servs., Inc. v. American Arbitration Ass'n, 199 F.3d 542, 545 (1st Cir.1999). In order to protect the decision-making process, courts should be wary of 'claim[s] [which], regardless of [their] nominal title, effectively seek to challenge [a] decisional act' made during the arbitration process. Pfannenstiel, 477 F.3d at 1159. That rationale extends equally to claims against arbitral administrative institutions, when they perform 'functions that are integrally related to the arbitral process.' Austern, 898 F.2d at 886. Nor does that rationale apply only to suits for damages. If administrative institutions such as the ICC or the ICC Court can be required to defend their decisions in the national courts of any country in the world, the expenses of defending such potentially far-flung suits could constrain their judgment, and increase the costs of arbitration procedures, every bit as much as potential liability for damages. The real parties in interest to litigate the question of arbitrability are the parties seeking and resisting arbitration, not the arbitrators or arbitral administrators, whose role is solely to render neutral judgment. Any action to ask this or another court 'whether or not there is a binding arbitration agreement' must be brought as a motion to compel arbitration against the party resisting arbitration."

[28] The Revised Uniform Arbitration Act (2000) is not generally applicable to international arbitrations which are governed by the Federal Arbitration Act. However, the commentary provides a useful and authoritative summary of the case law, see also below fn.44.

[29] *Global Gold Mining, LLC v Peter Robinson & the ICC*, 533 F. Supp. 2d 442 S.D.N.Y., 2008.

Liability to "any person"

40–28 Article 40 is not limited to the parties to the arbitration. It is expressed to cover "any person". This would cover any successor in interest to a party to the arbitration. In addition, it would presumably cover any person claiming through a party to an ICC arbitration. Whether the limitation on liability provision binds parties who have never agreed to arbitrate under the Rules will depend on national law. If a third party makes a claim based on an ICC arbitration, there appears to be no reason not to apply art.40, as well as the other Rules that may be relevant to that claim.

France

40–29 Under French law, an arbitrator may be liable to the parties for his conduct in the arbitration.[30] In one case involving an international arbitration, an arbitrator accepted employment from one of the parties immediately after rendering his Award. The Award was annulled and a claim was filed against the arbitrator for the costs. The court held the arbitrator liable for a portion of the costs.[31]

40–30 Besides, under French law, if a party disagrees with the Award, it should attack the Award and not the arbitrators. In the *Bompard* case,[32] the Paris Court of Appeal described the status of the arbitrator and potential liability in the framework of a domestic arbitration as follows:

[30] For a detailed discussion, see Fouchard, "*Le statut de l'arbitre dans la jurisprudence française*" (1996) Rev Arb No.3, p.325.

[31] Paris, October 12, 1995, *V v société Raoul Duval* (1999) Rev Arb No.2 p.327, note Fouchard; TGI Paris, May 12, 1993, *Société Raoul Duval v V* (1996) Rev Arb No.3 p.411.

[32] Paris, May 22, 1991, *Bompard v Consortis C* (1996) Rev Arb No.3 p.476.

> "Whereas the regime of liability of the arbitrator cannot therefore be strictly of a contractual nature due to the double nature of the arbitral institution, contractual in its basis and judicial in its function;
> In the current situation the criticism of the arbitrators of having made a grave error in calculations in attributing a debit to Mr Bompard without any reason or logical ground could as such only provide grounds for annulment under Article 1482 of the New Code of Civil Procedure.
> Thus, the alleged fault is related directly to the content of the judicial act and constitutes a criticism of the reasons in the award and does not constitute personal fault which is the sole type [of fault] permitting an action for liability against the arbitrators." (Authors' translation)

40–31 Failure to disclose a relationship with the parties may result in personal liability of the arbitrator. In the *L'Oréal* case,[33] which concerned an international arbitration, an arbitrator was held personally liable based on art.1382 of the French Civil Code where he failed to disclose his relationship with the parties as a result of which the Award was annulled. Moreover, the arbitrator was ordered to reimburse the amount of his fees.

40–32 In one case, the French court appeared to suggest that an arbitrator could be held liable for a sudden resignation that apparently had the effect of delaying the proceedings. However, the case did not directly concern the liability of the arbitrator.[34]

40–33 In the *Consorts Juliet* case, concerning a domestic ad hoc arbitration, the French Supreme Court held the arbitrators liable on a contractual basis for having failed to seek an extension of time to render the Award.[35] However, in a more recent case, *Conselho National de Carregadores*,[36] the French Supreme Court held that arbitrators were only subject to an obligation of means (*de moyens*) and not of results and that the arbitrators were not liable for the procedural delays or for suspension of their work as that had been demanded by the parties.

Switzerland

40–34 There appears to be little authority on the liability of arbitrators in Switzerland. One would generally expect that their liability would be decided on the same basis as for judges given the similarity of the mandate.[37] There are limits to the immunity applicable to the arbitrators for non-judicial acts. As an example, an arbitrator could in some circumstances be held liable for breach of the obligation to disclose information that might affect his or her independence in the eyes of the parties.[38]

[33] TGI Paris, December 9, 1992, *Société Annahold BV et D Frydman v société L'Oréal et B* (1996) Rev Arb No.3 p.483.
[34] TGI Paris, February 15, 1995, *Société chérifienne des pétroles v Société Mannesmann Industria Iberica* (1996) Rev Arb No.3 p.503.
[35] See the *Consorts Juliet* case: Civ 1e, December 6, 2005, No.03–13.166. The question of the arbitrator's liability has been referred back to the Court of Appeal of Orléans.
[36] Cass. Civ 1e, November 17, 2010, No.12352.
[37] See Lalive, Poudret & Reymond, *op. cit.*, p.93; Poudret & Besson, *op. cit.*, para.446, p.373.
[38] Zuberbühler, Müller & Habbeger, *Swiss Rules of International Arbitration—Commentary* (Kluwer, Schulthess, 2005), para.N 2–5, p.370.

United States

40–35 Under American law, the Federal Arbitration Act does not specifically address the issue of liability of arbitrators,[39] but case law establishes the principle of immunity comparable to that of judges (sometimes referred to as "quasi-judicial" immunity). The limitation on liability is based on and limited to the exercise by the arbitrators of judicial authority. As a result art.40 appears to be consistent with the strong policy of immunity for arbitrators in the exercise of their functions in the United States. The *Global Gold Mining* case referred to above dealt with the liability of the ICC Court and not the liability of arbitrators. However, the premise to that decision is that the arbitrators are generally immune from liability.[40]

England

40–36 The issue of the nature of an arbitrator's role was extensively canvassed in the case leading to the judgment of the UK Supreme Court in *Jivraj v Hashwani* [2011] UKSC 40. In that case, Lord Clarke described the role as follows (at para.45):

> "Further, in so far as dominant purpose is relevant, I would hold that the dominant purpose of appointing an arbitrator or arbitrators is the impartial resolution of the dispute between the parties in accordance with the terms of the agreement and, although the contract between the parties and the arbitrators would be a contract for the provision of personal services, they were not personal services under the direction of the parties."

40–37 As a result, under English law, the issue of liability of the arbitrators would begin with a contractual analysis, subject to the provisions of applicable law, the arbitration agreement and the relevant arbitration rules.

40–38 Section 29 of the English Arbitration Act 1996 provides:

[39] Article 14(a) of the Revised Uniform Arbitration Act (2000), which is generally not applicable to international arbitrations, provides: "An arbitrator or an arbitration organisation acting in that capacity is immune from civil liability to the same extent as a judge of a court of this State acting in a judicial capacity". The commentary summarises the position as follows: "Arbitral immunity has its origins in common law judicial immunity; most jurisdictions track the common law directly. The key to this identity is the 'functional comparability' of the role of arbitrators and judges. See *Butz v Economou*, 438 U.S. 478, 511–12 (1978) (establishing the principle that the extension of judicial-like immunity to non- judicial officials is properly based on the 'functional comparability' of the individual's acts and judgments to the acts and judgments of judges); see also *Corey v New York Stock Exch.*, 691 F.2d 1205, 1209 (6th Cir. 1982) (applying the 'functional comparability' standard for immunity); *Antoine v Byers & Anderson, Inc.*, 508 U.S. 429, 435–36 (1993) (holding that the key to the extension of judicial immunity to non-judicial officials is the 'performance of the function of resolving disputes between parties or of authoritatively adjudicating private rights')".
[40] There has been discussion in arbitration circles of the case of *Gulf Petro Trading Company, Inc v Nigerian Nat Petroleum Corp*, 2008 WL 62546 (CA 5 (Tex.)). In that case, Gulf Petro made various claims, including the claim that the arbitrators had been bribed. The US Court of Appeals for the 5th Circuit did not have to consider the issue of the arbitrators' liability (which is generally not applicable for bribery) as it upheld the lower court decision rejecting the claim as a collateral attack on an arbitration Award rendered in Switzerland.

"29.—(1) An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith.
(2) Subsection (1) applies to an employee or agent of an arbitrator as it applies to the arbitrator himself.
(3) This section does not affect any liability incurred by an arbitrator by reason of his resigning (but see section 25)."[41]

40–39 Section 29 is a mandatory provision of the Arbitration Act 1996. Therefore, it appears that a limitation on liability of an arbitrator would not be effective if it were shown that the arbitrator acted in bad faith.

40–40 To the extent that art.40 does not provide an effective protection against liability, the issue of insurance coverage for arbitrators is sometimes raised, in particular by individual arbitrators who may not have general professional liability insurance.

[41] Section 25 of the English Arbitration Act 1996 is reproduced in full in Pt III App.9.

Article 41 General Rule

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.[1]

Introductory remarks

Article 41 addresses two distinct issues. The first issue is dealing with matters "not expressly provided for in these Rules". The second issue is the requirement to "make every effort to make sure that the Award is enforceable at law". The provisions of Art.41 apply to the ICC Court as well as to the Tribunal with respect to filling in gaps in the Rules, i.e. in all matters not expressly provided for in the Rules.[2] **41–1**

The Rules are not a comprehensive code of civil procedure, and are not intended to be one. Nor are the Rules a detailed list of principles applicable to arbitration in general. The Rules provide a flexible framework for arbitration that is intended to be adapted to the requirements of each case. Article 41 addresses matters that are "not expressly provided for" in the Rules, and how to address situations when there is a gap in the Rules.[3] The gap is to be filled by acting in the spirit of the Rules, and by ensuring the award's enforceability. Applying certain provisions of the Rules by analogy may be one way of filling a gap. In such cases, Art.41 requires the ICC Court and Tribunals to act "in the spirit of" the Rules in dealing with issues arising in the arbitration. **41–2**

In rendering the various decisions at the Plenary Sessions and Committee Sessions discussed in Annex 1 Pt I, the ICC Court will frequently refer to the spirit of the Rules and its duty to seek to ensure that there is an enforceable Award. This is one of the particular concerns in scrutiny of Awards under Art.33, as well as in constituting the arbitral tribunal. Following the coming into force of the 2012 Rules, the need for the ICC Court to fill gaps in the Rules should be limited, as one of the very objectives of the Rules revision was precisely to fill such gaps.[4] **41–3**

The *Behr* case, which is discussed at paras 35–37 to 35–41, represents a prominent example of a case where the ICC Court expressly relied on the predecessor provision of Art.41 to allow a remission of the award, even though the 1998 Rules did not contain an express provision to this effect.[5] **41–4**

[1] Article 41 corresponds to Art.35 of the 1998 Rules. There have been no changes to the text of the article.
[2] Fry, Greenberg, Mazza, *op. cit.*, para.3–1537; see also Reiner & Aschauer, *op. cit.*, para.797 n.500, which refers to a comprehensive gap-filling competence.
[3] Derains & Schwartz, *op. cit.*, p.385.
[4] See also Fry, Greenberg, Mazza, *op. cit.*, para.3–1539.
[5] See para.35–39 fn.37, where the US Court of Appeals, Sixth Circuit, stated that it read the predecessor of Art.41 "to permit remand in this case, given that clarification by the original arbitrator is critical in order to make the Eight Award enforceable at law".

The Spirit of the Rules

41–5 The spirit of the Rules is based on several concepts. The Rules are based on party autonomy to adapt the procedure to the requirements of each case; on neutrality towards the parties and their equal treatment, the independence and impartiality of the members of the Tribunal and generally the requirement that the procedure be fair to both parties, and that they are both given a reasonable opportunity to present their case. The Rules are also based on the application of the rules of law agreed upon by the parties, or applicable pursuant to the Tribunal's decision, unless the parties have agreed that the Tribunal is to act *ex aequo et bono* or as *amiable compositeur*.[6]

Ensuring enforceability of the Award

41–6 Article 41 also requires the ICC Court and the Tribunal to "make every effort to make sure that the award is enforceable at law". Article 41 recognises the importance of the law applicable to the arbitration. That law may be the law of the place of arbitration, the law of the arbitration agreement (if different from that of the law of the place of arbitration) and the law of the place of enforcement. Therefore, it is important, and indeed essential to consider the Rules, the administrative practice of the ICC Court and the actions of the Tribunal in the light of those legal requirements.

41–7 The wording of Art.41 is strong in referring to "every effort", but, as noted above, it addresses primarily matters not expressly covered by the Rules. In all other matters, if the arbitrator acts in accordance with the Rules, there is normally no reason to believe that the Award would not be enforceable. This does not mean that, although the arbitrator acted fully in accordance with the Rules, the award might not be declared enforceable in a specific country.[7]

41–8 Article 41 refers only to the Tribunal, not the Emergency Arbitrator.[8] Appendix V of the Rules, i.e. the EAR, contains, however, a similar provision which in Art.8(3) expressly refers to the Emergency Arbitrator, and the acting in the spirit of the Rules and of App.V, for all matters concerning the emergency arbitrator proceedings "not expressly provided for in [that] Appendix".

41–9 Article 41 refers to enforceability and not validity, which seems to suggest that the ICC Court and the Tribunal should take into account not only the law of the place of arbitration, but, to the extent practicable, also the law of the probable place of enforcement. In that context, one of the basic elements that any Tribunal should take into consideration is the New York Convention. However, the extent to which the Tribunal or the ICC Court can take such matters into account depends on the facts of the case and the briefing by the parties. The parties have the most accurate view of where enforcement may take place and, if they are concerned about a particular aspect, they can then seek to have it covered in the Award in particular by raising it as an issue to be decided under the Terms of Reference.

[6] As to the power to act as *amiable compositeur*, see the discussion under Art.21(3) at para.21–__.
[7] See van Houtte/McAsey, *op. cit.*, p.147.
[8] This is true for Art.17 as well as regards the proof of authority, see para.17–7.

41–10 A Tribunal should meet the legitimate expectation of the parties at the time they agreed to submit their disputes to arbitration. Presumably, the expectation was that the Award would be enforceable and would not be set aside at the place of arbitration. For this reason a Tribunal should, in principle, always take into account the law prevailing at the seat of arbitration. This being said, if local courts at the place of arbitration make a travesty of justice by denying an international Tribunal from enforcing the parties' legitimate expectations, a Tribunal may decide to ignore the decision of those courts. In such cases, it will be for the Tribunal to decide whether, as a matter of fairness and of providing access to (arbitral) justice, it is appropriate to follow a local court's decision if doing so would frustrate the arbitration agreement.

41–11 Some parties who challenged the jurisdiction of a Tribunal have argued that a Tribunal would breach its obligation to render an enforceable Award if it concluded that it had jurisdiction over the parties, as the courts would hold to the contrary. On that basis, the parties have suggested that the Tribunal deny jurisdiction. In an interim Award of 1984, an ICC Tribunal in case No.4695 dealt with this rather circular argument in the context of Art.26 of the 1988 Rules (predecessor of Art.41):

> "Art. 26 of the ICC Rules must be understood as requiring every arbitral tribunal to avoid any grounds of nullity, since if the award is unenforceable the whole arbitration proceeding will have been a waste of time and energy.
> But this requirement of Art. 26 is not relevant to the question of jurisdiction. It is obvious that if a tribunal would decline to exercise jurisdiction on the basis of the possible difficulties of a future enforcement in a given country, then there would be no award at all, susceptible of being enforced in other jurisdictions.
> In this case there may be difficulties, perhaps not insuperable, in the enforcement of this tribunal [sic] awards, in some national jurisdictions.
> But if the tribunal finds, as it does, that it has jurisdiction, it cannot fail to exercise it. Otherwise, it would be concurring in a failure to exercise jurisdiction and could even be accused of a denial of justice."[9]

41–12 Some 15 years later, another ICC Tribunal in ICC case No.10623 followed that view, in its interim Award of 2001. The case dealt with an arbitration between state "X" and a private party. The place of arbitration was in state "X". The Tribunal commented as follows on the requirements of Art.35 (which is the predecessor under the 1998 Rules to Art.41):

> "[140.] A generally accepted principle of international arbitration, reflected in Article 35 of the ICC Rules, compels the Arbitral Tribunal to make every effort to ensure that any award it renders is enforceable at law. In this contact, complying with the law and the judicial decisions of the seat is clearly an important objective, in light of the fact that the

[9] ICC case No.4695 (1986) in *Collection of ICC Arbitral Awards, Vol. II, op. cit.*, p.33.

courts have the power to set aside an award rendered in their country [. . .].

[142.] This does not mean, however, that the arbitral tribunal should simply abdicate to the courts of the seat the tribunal's own judgment about what is fair and right in the arbitral proceedings. In the event that the arbitral tribunal considers that to follow a decision of a court would conflict fundamentally with the tribunal's understanding of its duty to the parties, derived from the parties' arbitration agreement, the tribunal must follow its own judgment, even if that requires non-compliance with a court order.

[143.] To conclude otherwise would entail a denial of justice and fairness to the parties and conflict with the legitimate expectations they created by entering into an arbitration agreement. It would allow the courts of the seat to convert an international arbitration agreement into a dead letter, with intolerable consequences for the practice of international arbitration more generally.

[144.] This conclusion is consistent with principles that are already well established in international arbitration. In particular, it is clear from arbitral case law that the obligation to make every effort to render an enforceable award does not oblige an arbitral tribunal to render awards that are fundamentally unfair or other- wise improper. An arbitral tribunal should not go so far as to frustrate the arbitration agreement itself in the interests of ensuring enforceability. Such an outcome would be, to say the least, a paradox."[10]

41–13 A key factor for the Tribunal in the above case was that the arbitration involved the state and the courts of a state are an emanation of that state. Therefore, in this exceptional case, the Tribunal decided to ignore the anti-arbitration injunction of the courts of the place of arbitration. The reference in the Award to cases where annulled Awards have been enforced is the litmus test. If a Tribunal does not believe that any Award it renders will be enforced either at the place of arbitration or elsewhere, then it will hardly ignore the courts of the place of arbitration.

41–14 The Tribunal's duty under Art.41 is to ensure that it abides by the procedural requirements of the law of the place of arbitration, but also take into consideration the parties' legitimate procedural expectations with respect to the jurisdictions of enforcement.

41–15 For example, if a Tribunal is sitting in Switzerland, but the probable place of enforcement is in the United States, then it may be appropriate to deal expressly with certain issues relating to the power of the Tribunal to award costs in the Award. As discussed under Art.37, the basic rule in the United States is that the power to award costs must have been conferred on the arbitrators by the arbitration agreement, the relevant rules of arbitration or the law of the place of arbitration.

[10] ICC case No.10623, *op. cit.*, paras 0–57 n.42, 18–37 n.25.

41–16 A more complex issue relates to the duty of a Tribunal to consider mandatory principles of law that may affect enforcement.[11] In the *Eco Swiss* case for example,[12] neither party raised issues of EU competition law during the course of the arbitration. Nor did the Tribunal. The result was that the Award was annulled on public policy grounds based on EU competition law. This suggests that the Tribunal may, and possibly should raise issues of public policy if they appear to be relevant to the validity or the enforceability of the Award.

41–17 With regard to the law of the probable place of enforcement, the degree to which a Tribunal may take into account the local requirements may be subject to limitations and is the subject of discussion in arbitration circles. The practical limitation is that the Tribunal may not be aware of local requirements to the extent that they are not those common under the New York Convention. Another limitation may be the concern of the Tribunal to resolve a dispute in accordance with the applicable rules of law in an appropriate period of time notwithstanding legal issues in a potential or probable place of enforcement.

41–18 In ICC case No.6474,[13] the Tribunal dealt with the argument that the Award rendered in Switzerland would not be enforceable in the "territory" against a state entity in a country because the country was not recognised, the documents were not validly signed by a representative of the state entity and the transaction was illegal due to bribery. The Tribunal stated with respect to Art.26 of the 1988 Rules corresponding to Art.41:

"[134] "As to the 'dilemma' which, in defendant's submission, is created by the co-existence of Art. 26 of the ICC Rules and Art. 177(1) PILA,[14] it must be considered as non-existent or purely theoretical, in the following sense: it is not the purpose of Art. 26 of the ICC Rules[15] to be in any way a substitute for the law governing the international arbitration under the common will of the Parties or to bypass the law of the seat of the arbitration. It is at most, as recognised by the defendant's language, a 'general directive' and not a rule of law in the sense of Art. 177(1), which, in any case, would have to prevail over the ICC Rules if a real contradiction arose, which is not the case.

[135] "Moreover, it is not enough to state that an application of Art. 177(1), 'could result in an arbitral award not being enforceable elsewhere'—which is undeniable and has been intentionally accepted as a risk, although a limited one, by the Swiss legislator. It would fall upon the defendant to establish that an application of Art. 177(1), did result or would result in the arbitral award not being enforceable, not

[11] See for a discussion of the latter above at para.41–6.

[12] European Court of Justice, *Eco Swiss China Time Ltd v Benetton International NV*, Case C–126/97.

[13] ICC case No.6474 (1992) (Partial Award), ICC ICArb Bull Vol.15 No.2, p.102; *Collection of ICC Arbitral Awards, Volume IV, 1996–2000, op. cit.*, p.341; (2000) YBCA Vol. XXV p.11.

[14] Article 177(1) of the Swiss PILA provides: "Any dispute of a financial nature may be the subject of an arbitration". Article 177(2) of the law limits the right of a state entity to invoke its own law to maintain it does not have capacity to be a party in international arbitration. Footnote added by the authors.

[15] Article 26 of the 1988 Rules is the predecessor to Art.41 of the Rules. Footnote added by the authors.

'elsewhere'—which is undeniable and has been intentionally accepted as a risk, although a limited one, by the Swiss legislator. It would fall upon the defendant to establish that an application of Art. 177(1), did result or would result in the arbitral award not being enforceable, not 'elsewhere' in general, but in the country or countries having the closest connection with questions of enforcement. In the Arbitral Tribunal's opinion, the territory's law, just as the law of the European country, may prima facie have to be taken into consideration, especially or exclusively if and when the Tribunal comes to decide on the merits of the case.

[136] "Be that as it may, the defendant has not satisfied the Tribunal that a decision affirming the Arbitral Tribunal's jurisdiction in the present case could not be recognised or would not be recognised in the territory. Even if that had been established, however, the question would remain open whether the Claimant does not have a legitimate interest in obtaining an award which would be enforceable in some other countries, though not in the territory." [Footnotes added by the authors.]

41–19 ICC case No.6474 reflects the secondary role of the law of the country of the place of enforcement, even where the parties have directly raised that issue. The primary goal is usually to meet the requirements of the law of the place of arbitration. However, Tribunals may even, in some instances, be led to disregard issues under the law of the place of arbitration.

ANNEX 1

THE ICC COURT'S SESSIONS IN A NUTSHELL

Ann–01 Article 1(2) of the Rules provides that: "[t]he Court does not itself resolve disputes. It administers the resolution of disputes by arbitral tribunals, in accordance with the Rules of Arbitration of the ICC (the 'Rules')". The ICC Court ensures the application of the Rules in particular by taking decisions provided for in the Rules. The decisions of the ICC Court relate to many different aspects of an ICC arbitration.[1] However, the ICC Court's power is that of an administrative body. It is the Tribunal that decides the merits of each case.

Ann–02 To understand how the ICC Court functions in practice set out below is a description of the ICC Court's sessions, first of the monthly "Plenary Session" (A.), followed by its weekly "Committee Sessions" (B.) at which most material decisions are taken.[2] In addition to these sessions, there is an annual working session of the ICC Court, usually in September, which reviews developments with respect to international arbitration in general and ICC arbitration in particular.

Ann–03 All sessions of the ICC Court are confidential. Except with the consent of the President of the ICC Court only Court Members are permitted to attend. Members of the Secretariat also attend. Moreover, the ICC Court does not provide the parties with reasons of its decisions. Some users have therefore complained about what they consider to be an opaque decision-making process. The following comments are intended to render this process more transparent.

Ann–04 The comments set out below are based on the authors' experience with respect to the sessions of the ICC Court. These comments should be read together with the commentary regarding the relevant articles of the Rules dealing with the functions and prerogatives of the ICC Court. The comments are for the purpose of illustrating how the administrative body of ICC arbitration functions in practice. Each case which comes before the ICC Court is different from another, and decisions taken by the ICC Court in one case can for that reason alone not be binding in another. Each decision taken by the ICC Court involves the exercise of some discretion, and that discretion is exercised by the members attending a specific session of the ICC Court.

[1] The decisions to be taken by the ICC Court under the Rules are referred to in Arts 6(4), 10, 12(2), 12(3), 12(4), 12(5), 12(8), 13(1), 13(3), 13(4), 14(3), 15(1)–(5), 18(1), 23(2), 23(3), 30(1), 33, 35(1), 35(2), 37 and 38.

[2] As discussed below, the President of the ICC Court is entitled to take certain decisions which are then communicated to the ICC Court. In addition, the Rules provide that the Secretariat may take certain administrative decisions.