2. Written Notifications or Communications; Time Limits (Art. 3)

Article 3 of the Rules of Arbitration reads:

> 'Written Notifications or Communications; Time Limits
>
> 1. All pleadings and other written communications submitted by any party, as well as all documents annexed thereto, shall be supplied in a number of copies sufficient to provide one copy for each party, plus one for each arbitrator, and one for the Secretariat. A copy of any communication from the arbitral tribunal to the parties shall be sent to the Secretariat.
>
> 2. All notifications or communications from the Secretariat and the arbitral tribunal shall be made to the last address of the party or its representative for whom the same are intended, as notified either by the party in question or by the other party. Such notification or communication may be made by delivery against receipt, registered post, courier, email, or any other means of telecommunication that provides a record of the sending thereof.
>
> 3. A notification or communication shall be deemed to have been made on the day it was received by the party itself or by its representative, or would have been received if made in accordance with Article 3(2).
>
> 4. Periods of time specified in or fixed under the Rules shall start to run on the day following the date a notification or communication is deemed to have been made in accordance with Article 3(3). When the day next following such date is an official holiday, or a non-business day in the country where the notification or communication is deemed to have been made, the period of time shall commence on the first following business day. Official holidays and non-business days are included in the calculation of the period of time. If the last day of the relevant period of time granted is an official holiday or a non-business day in the country where the notification or communication is deemed to have been made, the period of time shall expire at the end of the first following business day.'

a) General Remarks

Article 3 contains essential rules relating to exchanges of correspondence and the setting of time limits in ICC arbitration proceedings. These details are necessary in order to establish a uniform framework of provisions that are as far as possible independent of any national arbitration law or legal system that may be applicable. They set clear legal parameters for the parties from the outset of the proceedings, which would otherwise be lacking if the place of the arbitration has at that stage not been agreed or fixed. Parties and arbitral tribunal are, however, free to agree on specific methods for notifications and communications in the course of an arbitration. This is often done when the arbitral tribunal and the parties establish the Terms of Reference.

b) The Number of Copies to be Filed (Art. 3(1))

It goes without saying that all pleadings and correspondence concerning the arbitral proceedings must be supplied, at least in the form of photocopies, to all the members of the arbitral tribunal and all the parties concerned. If an additional party is joined in the course of the arbitration, this additional party will also need to receive a copy of all pleadings and correspondence submitted by the other parties in the arbitration. If a

party is represented by more than one law firm, the Secretariat will usually request that a copy of the pleadings and correspondence be provided for each law firm.

It is obvious that the Secretariat must also receive a copy of these documents until such time as the file is transmitted to the arbitral tribunal. Thereafter, the need to send documents to the Secretariat is explained by the ICC International Court of Arbitration's role in overseeing the time limits set for rendering the award, ruling on challenges of arbitrators and approving awards. The files held by the Secretariat may also serve as a repository of evidence, although the restrictions resulting from the need to maintain confidentiality must be fully respected.

This obligation does not of course cover correspondence between the parties in connection with amicable negotiations conducted at the same time as the proceedings or as part of their discussions on the appointment of arbitrators. Also, it does not apply to internal correspondence between the members of the arbitral tribunal. It is an obligation which applies only to documents that are part of the adversarial proceedings as such.

c) The Delivery of Documents (Art. 3(2))

It is important for documents to be delivered to the address of a party as last indicated by that party itself or the other party, especially when a party does not take part in the proceedings. If a party ceases to participate in the proceedings after the Terms of Reference have been signed, the address to be used will be the one mentioned in the Terms of Reference. It is the responsibility of the party that has initiated the proceedings, not ICC or the arbitral tribunal, to provide the last known address for the delivery of documents. Parties should be particularly attentive to this point, as many national arbitration laws, as well as Article V(1)(b) of the New York Convention, allow an award to be set aside or not to be recognized if the party concerned has not been properly informed of the appointment of an arbitrator and of the arbitration proceedings.

The Rules contain an important provision indicating how to deliver documents effectively. No difficulties arise with those methods of delivery where an acknowledgment of receipt is issued or returned, as there is proof of delivery in these cases. However, caution is today still required when it comes to delivery by electronic means, whereby only a journal is created and this is thought to suffice. No objections can in theory be made on legal grounds to the use of such procedures, which the parties have accepted and agreed upon by the very fact of referring to the Rules of Arbitration. However, the electronic transmission of procedural documents electronically currently still may occasionally give rise to problems in some countries on account of the case law on this subject, which continues to be restrictive. Besides, from a purely technical viewpoint, it can be said that a journal does not automatically imply that the document sent has in fact been received. The appropriate level of care therefore needs to be taken when choosing such means of communication, given the difficulty of predicting what an arbitral tribunal's attitude will be as to whether or not delivery has actually been accomplished, especially in the light of the aforementioned Article V(1)(b) of the New York Convention.

Sooner or later, all participants in proceedings will be forced by the distance separating them to use the electronic means available. In practice, this happens frequently and uneventfully in ICC arbitral proceedings. The liberal stance taken by the Rules of Arbitration in this regard corresponds to practical experience. However, it is recommended that this provision be expanded in the Terms of Reference so as to neutralize as far as possible any objections that may be made later. If delivery gives

rise to problems, if there is doubt as to whether procedural documents and other communications have reached their destination, or if a party does not take part in the proceedings, it is worthwhile taking the precaution of delivering by traditional means as hard copies anything procedurally relevant that has been transmitted electronically, so as to be able to provide evidence that delivery has been accomplished.

Whereas the 1998 Rules still provided that notifications or communications could be made by 'facsimile transmission, telex, telegram', the mention of these communication methods has not been maintained, although 'facsimile transmission' can still be used. The new Rules wish to reflect the evolution in the communication and information technology, and therefore inserts 'email' as possible method for notifications and communications. The Rules do not refer to other electronic devices or methods, such as the use of USB-sticks or electronic platforms where various participants can log-in and file or consult documents, but it is not excluded to use such techniques in an arbitration. The use of such techniques will, however, need to be discussed between the parties and the arbitral tribunal and may need to be accompanied by certain security measures to restrict access and to avoid computer viruses.

d) The Date of Delivery and Time Limits (Art. 3(3)-(4))

The date of delivery is the day on which the document was actually received or the date on which delivery should have taken place if carried out in accordance with Article 3(2) of the Rules. The notification date can be important if a discussion arises as to the starting date or expiry date of a time limit provided in the Rules or set by the arbitral tribunal. For example, Article 5(1) provides that the respondent shall submit an answer to the request for arbitration within 30 days from the receipt of the request from the Secretariat.

The hypothetical situation contemplated in the second part of Article 3(3) does not cover cases in which, as far as the other participants are aware, the items sent have gone astray before reaching their destination or have been destroyed. It refers to situations in which no proof of delivery can be obtained or in which delivery has been made to the last known address of a party no longer participating in the proceedings. Given the risks involved and despite this fiction to which the parties have agreed, the reader is referred back to the explanations given above in connection with Article 3(2) of the Rules.

Time limits should be expressed in a simple and consistent way. When stating the length of the time limits, consideration should always be given to public holidays and non-business days in the country where documents are to be delivered, although this may be difficult to determine in individual cases.

B. COMMENCING THE ARBITRATION

1. The Request for Arbitration (Art. 4)

Article 4 of the Rules reads:

> 'Request for Arbitration
>
> 1. A party wishing to have recourse to arbitration under the Rules shall submit its Request for Arbitration (the "Request") to the Secretariat at any of the offices specified in the Internal Rules. The Secretariat shall notify the claimant and respondent of the receipt of the Request and the date of such receipt.

> 2. The date on which the Request is received by the Secretariat shall, for all purposes, be deemed to be the date of the commencement of the arbitration.
>
> 3. The Request shall contain the following information:
> a) the name in full, description and address and other contact details of each of the parties;
> b) the name in full, description and address and other contact details of any person(s) representing the claimant in the arbitration;
> c) a description of the nature and circumstances of the dispute giving rise to the claims and of the basis upon which the claims are made;
> d) a statement of the relief sought, together with the amounts of any quantified claims and, to the extent possible, an estimate of the monetary value of any other claims;
> e) any relevant agreements and, in particular, the arbitration agreement(s);
> f) where claims are made under more than one arbitration agreement, an indication of the arbitration agreement under which each claim is made;
> g) all relevant particulars and any observations or proposals concerning the number of arbitrators and their choice in accordance with the provisions of Articles 12 and 13, and any nomination of an arbitrator required thereby; and
> h) all relevant particulars and any observations or proposals as to the place of the arbitration, the applicable rules of law and the language of the arbitration.
>
> The claimant may submit such other documents or information with the Request as it considers appropriate or as may contribute to the efficient resolution of the dispute.
>
> 4. Together with the Request, the Claimant shall:
> a) submit the number of copies thereof required by Article 3 (1); and
> b) make payment of the filing fee required by Appendix III ("Arbitration Costs and Fees") in force on the date the Request is submitted.
>
> In the event that the claimant fails to comply with either of these requirements, the Secretariat may fix a time limit within which the claimant must comply, failing which the file shall be closed without prejudice to the claimant's right to submit the same claims at a later date in another Request.
>
> 5. The Secretariat shall transmit a copy of the Request and the documents annexed thereto to the respondent for its Answer to the Request once the Secretariat has sufficient copies of the Request and the required filing fees.'

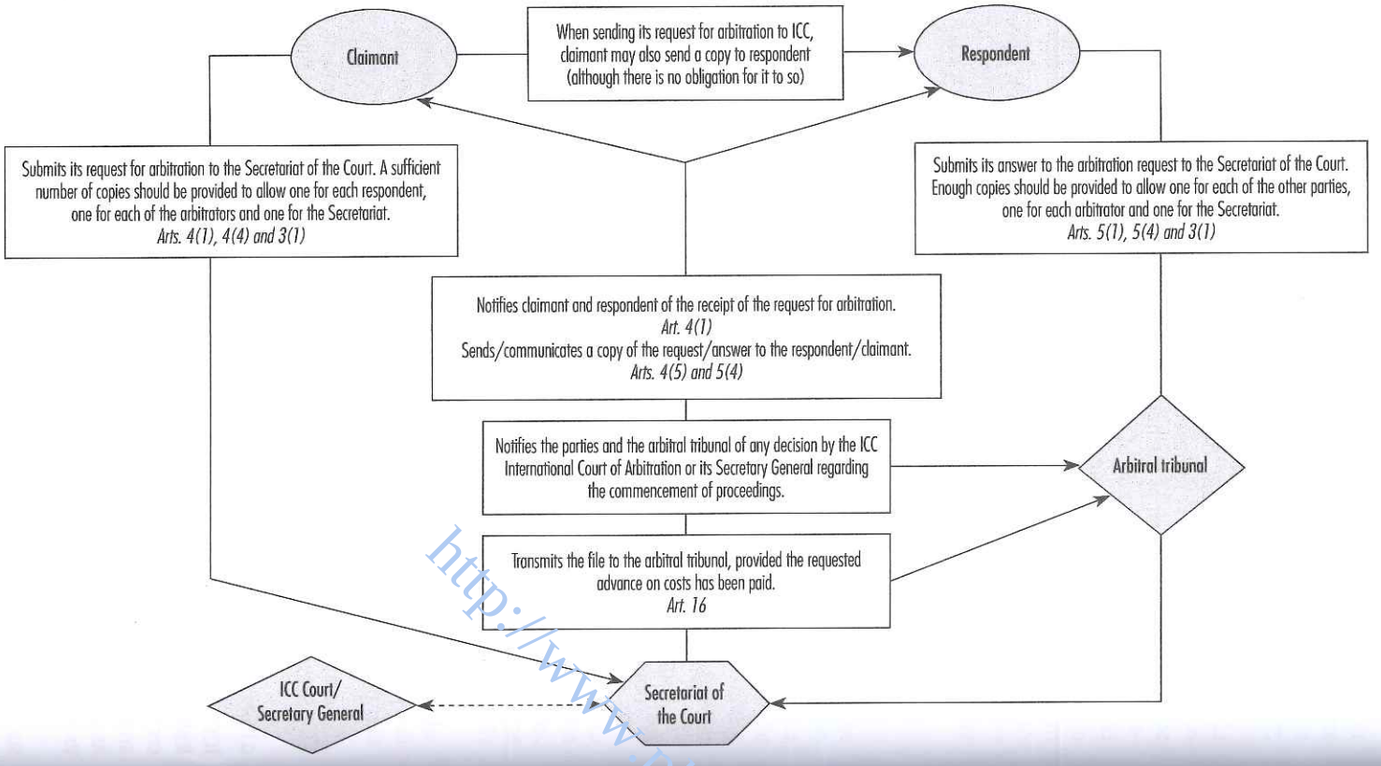
a) General Remarks

ICC arbitration proceedings begin with the filing of a request for arbitration. The ICC Rules of Arbitration, on the one hand, require more than a mere notification of the commencement of proceedings, as is sometimes provided for in '*ad hoc*' proceedings and under the rules of other institutions, where the claimant informs the other party of its intention to resort to arbitration and asks it to nominate an arbitrator, but submits its actual request for arbitration at a later stage.

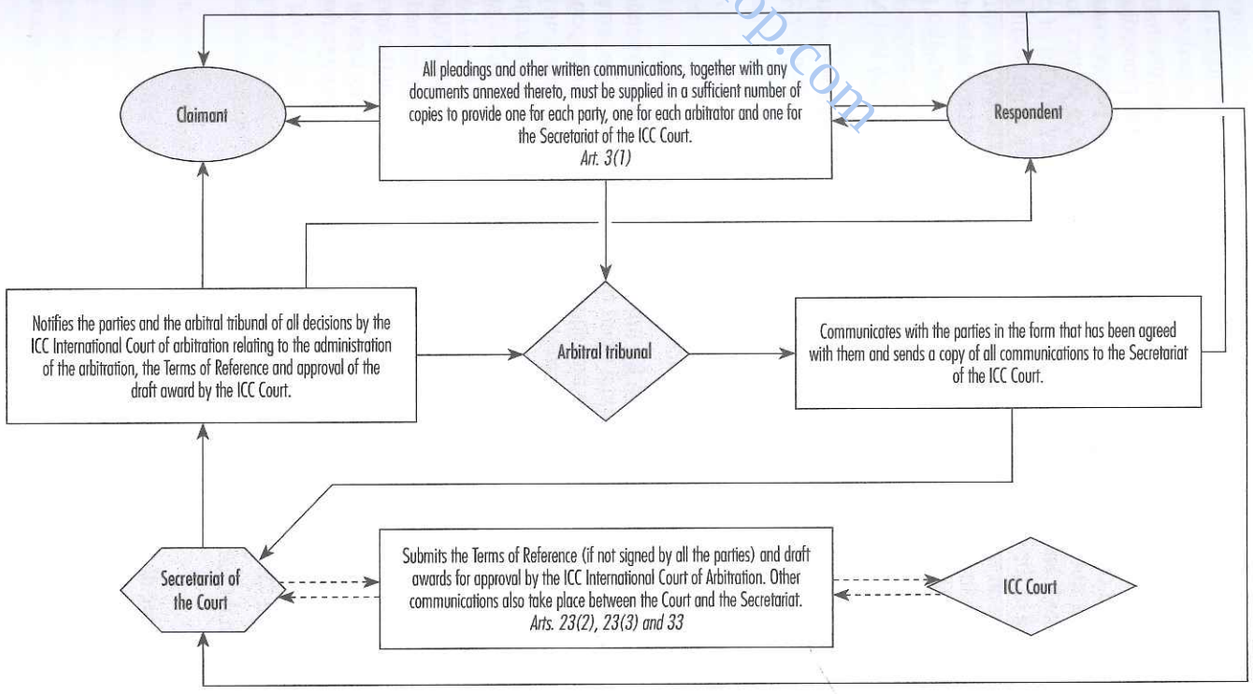
The ICC Rules, on the other hand, require the initial submission to contain only a summary of the main facts of the dispute as well as a statement of the relief sought, so

Figure 1. Communications between the parties, the Secretariat of the ICC Court and the arbitral tribunal

(a) Before the file is transmitted to the arbitral tribunal



(b) After the file has been transmitted to the arbitral tribunal



as to speed up the proceedings. The claimant may of course choose to submit a more detailed request, describing the position both in fact and at law and including supporting documents as well as evidence from witnesses and expert opinions. However, this is not compulsory and it is indeed unusual outside German-speaking jurisdictions. In international arbitration evidence is generally presented later in the proceedings. It may be noted that there are no special rules determining the style and structure of a request for arbitration, which, like all other pleadings presented during the proceedings, will in practice depend on the requirements of the courts to which the parties' counsel are accustomed. It is not unusual in ICC proceedings for pleadings to be very long and richly documented, and they may sometimes contain a summary or a list of contents at the beginning or the end to facilitate the arbitral tribunal's task when reading them.

Information on the main aspects of the dispute, as detailed below, is required for the request for arbitration, as it is useful when drawing up the Terms of Reference and helps the proceedings to be conducted more quickly. This information also enables the ICC International Court of Arbitration and its Secretariat to set the proceedings in motion without delay, and gives the respondent a clear idea of the action that has been brought against it.

Moreover, as the filing of a request for arbitration will stop the prescription period for certain claims, the facts asserted in the request for arbitration may be relevant when determining whether or not this is the case.

b) The Request for Arbitration

(1) Submission of the Request for Arbitration (Art. 4(1)).

The claimant does not send its request for arbitration directly to the respondent but to the Secretariat of the ICC International Court of Arbitration, as it is the Secretariat's responsibility under the Rules to notify the request for arbitration to the respondent(s) (Article 4(1)). Of course, there is nothing to stop the claimant at the same time informing the respondent of its action by sending it a copy of the request for arbitration.

The request for arbitration must be sent to the Secretariat of the ICC Court and can no longer be sent to an ICC national committee, as was possible prior to 1 January 1998. The request for arbitration can be filed with the Secretariat's headquarters in Paris or with its office in Hong Kong or in New York. As the Secretariat opened offices in Hong Kong and New York and as there are fully constituted teams of the Secretariat working in these offices, the teams in these offices are in a position to receive the request for arbitration and take the necessary administrative steps pursuant to the Rules.

The addresses of the Secretariat are:

International Court of Arbitration

International Chamber of Commerce

Headquarters

33-43 Avenue du Président Wilson
75116 Paris
France

Telephone: +33 1 49 53 29 05
Fax: +33 1 49 53 29 33
E-mail: arb@iccwbo.org
Web site: < www.iccarbitration.org >

Asia

Secretariat of the International Court of Arbitration of the International Chamber of Commerce
Asia Office
Suite 2, 12/F, Fairmont House
8 Cotton Tree Drive
Central
Hong Kong

Tel.: +852 3607 5600
Fax: +852 2523 1619
Email: ica8@iccwbo.org

North America

International Chamber of Commerce (ICC)
International Court of Arbitration®
SICANA Inc.
1212 Avenue of the Americas
9th floor
New York, NY 10036
USA

Tel.: +1 646 699 5704
Fax: + 1 212 221 12 95
Email: ica9@iccwbo.org

In light of Article 4(1) it is advisable to file the request for arbitration in such a way that proof of receipt by the ICC is obtained. It is possible to submit a request for arbitration by email or by fax, always provided that the originals are sent to the Secretariat immediately afterwards. The request for arbitration may be submitted by the claimant's lawyer or any other authorized person. Proof of authorization is not required at this stage under the Rules. If need be, the question may be taken up later by the arbitral tribunal, once it has been formed and entrusted with the case.

When confirming receipt of the request for arbitration, the Secretary General of the ICC Court informs the claimant and the respondent of the date on which the request was submitted (Article 4(1)).

It is not excluded for claimant and respondent parties to file a request for arbitration jointly. In practice, this is however very rarely done.

A party submitting a request for arbitration must pay the required filing fee before the request will be notified by the Secretariat to the respondent(s) (Article 4(4)(b) of the Rules and Article 1(1) of Appendix III to the Rules).

(2) Commencement of Proceedings (Art. 4(2)).

The date on which the request for arbitration is filed with the Secretariat of the ICC International Court of Arbitration marks the point at which the case becomes pending (Article 4(2)). This date is crucial: for instance, it determines the starting point of any interruption or suspension under statutes of limitation and is also a means of checking that certain other time limits are respected.

(3) Information to be Included in the Request for Arbitration (Art. 4(3)).

As already mentioned, the request for arbitration is more than a mere summons to arbitration proceedings. Article 4 (3) of the Rules sets forth the minimum information it must contain. This provision gives the claimant considerable scope to determine how it will present its case, leaving it free to decide for instance which facts and legal issues it will raise in its request.

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

(a) *Full details of the parties* (Art. 4(3)(a)).

The claimant is required to state the exact details of the parties, especially of the respondent(s). The address provided for respondent(s) in the request for arbitration will be used by the ICC Court Secretariat for the purpose of notifying the request for arbitration. Multiple claimants may file a request for arbitration jointly.

Not all the parties named in the request for arbitration will finally be the parties involved in the arbitration. If a respondent contests to be bound by an arbitration agreement and raises a plea for lack of jurisdiction, the ICC Court may have to decide pursuant to Article 6(4) whether or not the arbitration shall proceed or whether the arbitration shall proceed against all the respondents. A respondent may, pursuant to Article 7, decide to join an additional party, so that, subject to the provisions of Article 6(3)-6(7) and 9, more parties may become involved than solely those named by the claimant in the request for arbitration.

(b) *Full details of the person(s) representing the claimant(s)* (Art. 4(3)(b))

The claimant must also provide the name and address of its lawyer or other representative, if any, for the purpose of correspondence. This is explicitly stated as a new requirement in the 2012 Rules, although parties already in the past generally gave such information from the outset. It is not required for a party to be represented by a lawyer in an arbitration, but mostly parties do have a lawyer to represent them in arbitration. Parties may also be represented by several lawyers or law firms.

Pursuant to Article 17 the Secretariat or the arbitral tribunal, once constituted, may request at any time proof of authority of the person(s) representing the claimant(s).

(c) *A description of the nature and circumstances of the dispute giving rise to the claim(s) and of the basis upon which the claims are based* (Art. 4(3)(c)).

The claimant must present at least a summary of all the facts and legal arguments necessary for a decision to be made in its favor. A new requirement of the 2012 Rules is that the claimant also has to give a description of the basis upon which the claims are based. This should enable the respondent(s) to have a clearer idea as to whether the claims are based on a contract, on which contractual stipulations, in tort, or on a trust instrument or an international treaty. This is particularly important in the event that the respondent declines to participate in the proceedings.

However, the Rules of Arbitration do not require the claimant at this stage to submit a fully detailed statement of claim. For instance, it is not necessary to take into consideration the arguments that are likely to be raised in defense or to provide full evidence. Nevertheless, as is generally the case, it is recommended that all documents essential to the dispute be annexed to the request for arbitration. This helps the ICC Court and its Secretariat to understand the dispute and to identify those aspects that will be relevant to the constitution of the arbitral tribunal. A sufficiently accurate presentation of the dispute and in particular of claimant's case with supporting documentation is also very useful to the arbitral tribunal, which must draw up the Terms of

Reference once it has received the file. This information is also relevant for dealing with certain issues such as requests for document production or other procedural issues such as timing which need to be addressed early on. It is also advisable to mention in the request for arbitration any other arbitral proceedings related to those pending or any proceedings in state courts.

(d) *The relief sought, together with the amounts of any quantified claims and, to the extent possible, an estimate of the monetary value of any other claims* (Art. 4 (3) (d)).

The ICC Rules of Arbitration require the purposes of a request for arbitration to be specified, as the Terms of Reference are drawn up on the basis of the request and the respondent's answer. Once the Terms of Reference have been signed, no new claims may be allowed unless they lie within the limits of the Terms of Reference or, failing this, have been authorized by the arbitral tribunal in accordance with Article 23(4) of the Rules.

Parties filing claims are required under the 2012 Rules of Arbitration to provide the amount of any quantified claim and to estimate the monetary value of any other claims. As the scales of arbitrators' fees and ICC administrative expenses are based on the amounts in dispute, it is appropriate that parties themselves can specify or estimate the values of their claims from the start of an arbitration. This will allow the Secretary General or the Court to fix an appropriate advance to cover the costs from the outset and avoid the need for readjustment later on (see Article 36). It is the Court's practice not to include claims for interest and for costs in the calculation of the amount in dispute. If the parties have not specified the amount in dispute, in spite of the requirement to do so, the Court shall fix the arbitrators' fees and the administrative expenses at its own discretion (Article 2(1) of Appendix III to the Rules).

(e) *Any relevant agreements and, in particular, the arbitration agreement(s)* (Art. 4(3)(e)).

The claimant must provide all relevant provisions of the contract or, if the claim is made under a treaty, of the treaty in the request for arbitration. These necessarily include the arbitration agreement, as well as all other provisions relating to the arbitration proceedings covering such matters as the language and the place of the arbitration and any other relevant documents containing information on these matters. It does not suffice for claimant to cite the arbitration agreement(s), it should also attach a copy of the documents containing the arbitration agreement.

Information on the arbitration agreement is also essential to enable the ICC International Court of Arbitration to declare whether or not it is '*prima facie*' satisfied that an arbitration agreement under the Rules may exist, in the event that the respondent denies the existence of such an agreement or refuses to take part in the arbitration. If the Court's answer is positive, the Secretariat may then transmit the file to the arbitral tribunal for it to decide on the matter (Article 6(3)).

(f) *Indication of the arbitration agreement under which each claim is made, if claims are made under more than one arbitration agreement* (Art. 4(3)(f))

The 2012 ICC Rules of Arbitration explicitly provide in Article 9 that claims arising out of or in connection with more than one contract may be made in a single arbitration. The Rules accept that this can be done not only if claims are made under one arbitration agreement, but also if claims are submitted under more than arbitration agreement under the ICC Rules of Arbitration. If a claimant files claims under different arbitration agreements, it has to indicate in its request for arbitration for each of the claims under which arbitration agreement they are filed. These indications will be

relevant, if the Court will have to take a decision regarding the setting in motion of the arbitration pursuant to article 6(4)(ii).

(g) *Relevant particulars regarding the number and choice of arbitrators* (Art. 4(3)(g)).

(i) The number of arbitrators.

The claimant's request for arbitration must state whether the dispute is to be decided by a sole arbitrator or by three arbitrators, according to what has been specified in the arbitration agreement. If nothing has been agreed on this matter, the claimant should indicate whether it prefers one or three arbitrators.

(ii) The nomination of arbitrators.

If the arbitration agreement provides for the dispute to be settled by a sole arbitrator, the claimant should include in its request for arbitration any information that may be useful when, in accordance with Article 12(3) of the Rules, the parties seek to jointly nominate an arbitrator, within 30 days from the date on which the respondent is notified of the request. The claimant may therefore suggest one or several prospective arbitrator(s) already at this early stage of proceedings.

If the number of arbitrators is not indicated in the arbitration agreement and the claimant's wish is for a sole arbitrator, this should also be specified in the request for arbitration in view of Article 12(2) of the Rules. The claimant should make known to the other party the kind of person it has in mind for joint nomination by both parties, thereby enabling the respondent to react quickly to its suggestion.

A claimant wishing to have three arbitrators when nothing is specified in the arbitration agreement may speed up proceedings not only by specifying in the request for arbitration its wish for a three-member tribunal but also by nominating already one co-arbitrator. This is not compulsory, however, as Article 12(2) of the Rules merely requires the claimant to nominate an arbitrator within 15 days of being informed of the Court's decision to submit the dispute to three arbitrators. In this case, it is in the claimant's interest to nominate an arbitrator without delay, so that the arbitral tribunal may be constituted as quickly as possible.

Only if the arbitration agreement provides for a three-member arbitral tribunal is it necessary for the claimant to nominate an arbitrator in the request for arbitration in accordance with Article 12(4).

Parties are free to modify an earlier agreement on the number of arbitrators. If the claimant wishes to have a sole arbitrator, whereas the arbitration agreement provided for three arbitrators, it may indicate this in the request for arbitration. In such case, nevertheless, it will be obliged to nominate an arbitrator in the request for arbitration in accordance with Article 12(4) as long as it is not certain that respondent accepts claimant's request to alter the number of arbitrators.

If a three member arbitral tribunal must be constituted, the claimant should not only nominate an arbitrator in the request for arbitration, it may also provide already its comments and make proposals regarding the selection of the president of the arbitral tribunal, or the qualifications which in its view the president should have. The respondent will then be able to provide its comments thereto in the answer to the request for arbitration and this may accelerate the constitution of the arbitral tribunal.

(h) *Comments as to the place of the arbitration, the applicable rules of law and the language of the arbitration* (Art. 4(3)(h)).

If these points have been settled in the arbitration agreement or explicitly in a subsequent agreement, the claimant need simply refer to and briefly describe the

provisions of such agreements. The situation is more complex when the parties have not reached an agreement on these questions prior to the arbitral proceedings. Although under no obligation, the claimant would be well advised to state its position with respect to these matters, insofar as it considers them to have an important bearing on the conduct of the proceedings. The following points may be noted in this connection:

(i) The place of the arbitration.

According to Article 18(1) of the Rules, the place of the arbitration is fixed by the Court if not agreed by the parties. The Court will generally decide on a neutral place which, in the light of its knowledge of the dispute, will be acceptable to all the parties (see comments on Article 18). Therefore, if a claimant refrains from indicating the place of the arbitration that would suit it, there is a risk that, when making its decision, the Court will overlook information that is essential for the claimant but of which it has not been made aware. On the other hand, it is also true that information of this kind might cause the respondent to challenge the claimant's preference as to the place of the arbitration for tactical reasons. This might then make it more difficult for the Court to select the same place, even if it considers it to be the most appropriate place of the arbitration in the absence of any information from the claimant.

(ii) The applicable rules of law.

Under Article 21(1) of the Rules, if the parties have not themselves agreed upon the applicable rules of law, the arbitral tribunal shall apply those it considers to be appropriate (see comments on Article 21(1)). Although according to Article 4(3) of the Rules there is no requirement to give details regarding the applicable rules of law at this stage of the proceedings, such information will nevertheless be important to the Court as a criterion for selecting a sole arbitrator or president of an arbitral tribunal, as well as to the arbitral tribunal, which has the task of drawing up the Terms of Reference as soon as the file has been transmitted to it (see comments on Articles 21 and 23).

(iii) The language of the arbitration.

If the parties have not already agreed on the language of the arbitration, it is up to the arbitral tribunal to determine the language(s) to be used (see comments on Article 20). However, in the absence of a prior agreement, it is useful for the claimant to state its position on this question, even at this early stage of proceedings. This too may serve as a criterion when the Court selects a sole arbitrator or president of an arbitral tribunal. It should be borne in mind that although it is not unusual for parties to have differing opinions on the appropriate language for the arbitration at the start of the proceedings, the question is usually settled by the arbitral tribunal as soon as it receives the file (i.e. when nothing more than the request for arbitration, the answer and an exchange of correspondence have been submitted) and often even before the Terms of Reference have been drawn up. Consequently, if the claimant states its position at the outset, this will help to speed up the proceedings and clarify the issue to be determined. The factors to be taken into consideration when deciding on the language of the arbitration are discussed below in the section on Article 20.

The question remains as to what language should be used for the request for arbitration itself. When a language has been agreed, this alone should be used. Otherwise, the claimant will draft the request for arbitration in accordance with the position it has taken with respect to Article 4(3)(h) of the Rules.

(i) *Other documents or information* (Art. 4(3) last sentence)

In addition to the information claimant is required to provide in its request for arbitration, it may submit with the request for arbitration also other documents or information which it considers appropriate or which may contribute to the efficient resolution of the dispute. Such documents or information may become relevant, if the Court will have to take a decision regarding the setting in motion of the arbitration pursuant to Article 6(4).

(4) Number of Copies of the Request for Arbitration and the Advance Payment on Administrative Expenses (Art. 4(4)).

The interpretation of this provision does not raise any particular problems. The Secretariat will notify a request for arbitration only after the advance on administrative expenses was paid. According to Article 1(1) of Appendix III to the Rules, this advance is currently set at US$ 3 000. Also, the number of copies of the request for arbitration and its attachments that are supplied must be sufficient to allow one copy for each party, one for each arbitrator and one for the Secretariat (Article 3(1)). It may be, however, that the parties have not decided on the number of arbitrators. In this case, it is usually appropriate for the number of copies supplied for the arbitrators to be equivalent to the number of arbitrators specified in the request. Admittedly, this may cause some delay later if a claimant has expressed a wish for a sole arbitrator and supplied only one copy but a three-member tribunal is formed, requiring two additional copies to be supplied and possibly delaying the transmission of the file to the arbitral tribunal.

Should an insufficient number of copies of the request for arbitration have been submitted or the advance to cover administrative expenses not have been paid within the time allowed, this has no effect on the moment at which the proceedings commence under Article 4(2) of the Rules. According to the second sentence of Article 4(4), when acknowledging receipt of the request for arbitration, the Secretariat may set the claimant an appropriate time limit within which to regularize the request, failing which the file will be closed. However, the same provision clearly states that the claimant retains the right to introduce a new request with the same object at a later stage. The question of whether the statutory limitation period was suspended between the moment when the request for arbitration was filed and the moment when the file was closed will be addressed in any subsequent arbitral proceedings that may be commenced. The arbitral tribunal will make its decision in the light of the particular circumstances of the case and the applicable rules of law. However, it may rightly be argued that a limitation period is neither interrupted nor suspended in the event of an incomplete request for arbitration. This is because the respondent is not informed of such a request, which should therefore be considered as non-existent.

(5) Notification of the Request for Arbitration (Art. 4(5)).

If enough copies of the request for arbitration have been filed and the advance payment on the administrative expenses has been made, the Secretariat sends a copy of the request and its attachments to the respondent(s) for an answer, in accordance with the instructions and guidelines for notifications given in Article 3(2) of the Rules. It should be noted that the claimant is answerable for any difficulties linked to inaccuracies in the addresses and details of parties. It should therefore undertake the necessary research so as to provide the Secretariat with all information required for the notification to be effective.

In the cover letter that the Secretariat sends to the respondent when notifying the request for arbitration, the respondent is expressly requested to answer the request for arbitration within thirty days of receiving it. A copy of the Rules of Arbitration is normally sent with the notification. The respondent is also requested to state its position on all points relevant to the setting in motion of the proceedings, beginning with the constitution of the arbitral tribunal. This means that it should nominate a co-arbitrator when the parties have agreed to submit their dispute to three arbitrators. It should be noted that the Secretariat does not scrutinize the request for arbitration when notifying the respondent or later on, to check that it satisfies the requirements laid down in Article 4(3) of the Rules, mainly because there is no provision for such scrutiny in Article 4(5). In practice, the Secretariat asks the claimant to provide all information relevant to the constitution of the arbitral tribunal. However, it does not have a duty to do so, as the Rules allow the Court to constitute the arbitral tribunal when such information is lacking.

With the letter notifying the request for arbitration and the documents annexed thereto to the respondent(s) the Secretariat shall enclose some additional documents on ICC arbitration, including the Secretariat's 'Note to the Parties in Proceedings under the 2012 Rules' (see Appendix 4 below), the Secretariat's 'Note on Administrative Issues' (See Appendix 10 below) and the ICC Rules of Arbitration. At the same time, the Secretariat sends a letter to the claimant(s) with which it informs the claimant(s) that the request for arbitration is notified to the respondent(s) and invites the claimant(s) to pay the provisional advance fixed by the Secretary General pursuant to Article 36(1) of the Rules, while adding thereby a table on the financial aspect of the arbitration. Both in its letter to the claimant(s) and to the respondent(s), the Secretariat points out that the parties are free to settle their dispute amicably at any time during an arbitration and that the parties may wish to consider conducting an amicable dispute resolution procedure pursuant to the ICC Mediation Rules.

Lastly, it should be mentioned that the amount of US$ 3 000 paid as an advance on administrative costs can under no circumstances be refunded to the claimant (Article 1(1) of Appendix III to the Rules). Therefore, if the advance on costs has been paid but there is still an insufficient number of copies of the request for arbitration at the end of the period set for making up the number, or if the parties have in the meantime settled their dispute amicably, the case will be considered to have been withdrawn and the Secretariat will not refund the advance payment.

When the Secretariat informs the Claimant that the request for arbitration has been notified to the respondent(s), it requests the Claimant to pay the provisional advance pursuant to Article 36(1). This provisional advance is fixed by the Secretary General in an amount intended to cover the costs of the arbitration until the Terms of Reference are established.

(6) Amendments to the Request for Arbitration.

Although the Rules do not explicitly state that the claimant may amend its request for arbitration, it follows from Article 23(4) that a claimant, as well as any other party in the arbitration, may file new claims until the Terms of Reference have been established, without any leave from the Court or the arbitral tribunal being required. Likewise, the claimant may modify the amount of its claims. The claimant should be aware, however, that an increase of the amount in dispute may lead to an increase of the advance on costs fixed by the Secretariat. Also, it should be aware that a decrease of the amount in dispute will not necessarily lead to a reduction of the advance on

costs. If the arbitrators have accepted to act as arbitrators on the basis of information provided at the time of their appointment including the advance on costs and the expected fees, they might be unwilling to further proceed if they would not have the same fee expectations in case the advance on costs were to be decreased.

Filing claims against an additional party after the request for arbitration is submitted will only be accepted under the condition set forth in Article 7. No additional party may be joined after the confirmation or appointment of any arbitrator, unless all parties, including the additional party, otherwise agree.

2. The Answer to the Request and Counterclaims (Art. 5)

Article 5 of the Rules reads:

> 'Answer to the Request; Counterclaims
>
> 1. Within 30 days from the receipt of the Request from the Secretariat, the Respondent shall submit an Answer (the "Answer") which shall, inter alia, contain the following information:
>
> a) its name in full, description, address and other contact details;
> b) the name in full, address and other contact details of any person(s) representing the respondent in the arbitration;
> c) its comments as to the nature and circumstances of the dispute giving rise to the claim(s) and the basis upon which the claims are made;
> d) its response to the relief sought;
> e) any observations or proposals concerning the number of arbitrators and their choice in light of the claimant's proposals and in accordance with the provisions of Articles 12 and 13, and any nomination of an arbitrator required thereby; and
> f) any observations or proposals as to the place of the arbitration, the applicable rules of law and the language of the arbitration.
>
> The respondent may submit such other documents or information with the Answer as it considers appropriate or as may contribute to the efficient resolution of the dispute.
>
> 2. The Secretariat may grant the respondent an extension of the time for submitting the Answer, provided the application for such an extension contains the respondent's observations or proposals concerning the number of arbitrators and their choice and, where required by Articles 12 and 13, the nomination of an arbitrator. If the respondent fails to do so, the Court shall proceed in accordance with these Rules.
>
> 3. The Answer shall be submitted to the Secretariat in the number of copies specified by Article 3(1).
>
> 4. The Secretariat shall communicate the Answer and the documents annexed thereto to all other parties.
>
> 5. Any counterclaims made by the respondent shall be submitted with the Answer and shall provide:
>
> a) a description of the nature and circumstances of the dispute giving rise to the counterclaims and of the basis upon which the counterclaims are made;
> b) a statement of the relief sought together with the amounts of any quantified counterclaims and, to the extent possible, an estimate of the monetary value of any other counterclaims;
> c) any relevant agreements and, in particular, the arbitration agreements; and
> d) where counterclaims are made under more than one arbitration agreement, an indication of the arbitration agreement under which each counterclaim is made.
>
> The respondent may submit such other documents or information with the counterclaims as it considers appropriate or as may contribute to the efficient resolution of the dispute.
>
> 6. The claimant shall submit a reply to any counterclaim within 30 days from the date of receipt of the counterclaims communicated by the Secretariat. Prior to the transmission of the file to the arbitral tribunal, the Secretariat may grant the claimant an extension of time for submitting the reply.'

a) General Remarks on the Answer to the Request

The answer to the request is the first significant communication from the respondent. In it the respondent confronts the request and decides whether to reject to all or merely some of the claims submitted by the claimant, and whether to make other pleas in its defense. Like the request, the answer is important for constituting the arbitral tribunal, fixing the place of the arbitration and for all the other issues mentioned above in connection with the request for arbitration and the arbitral tribunal's task of drawing up the Terms of Reference. The answer to the request may be accompanied by a counterclaim. It is also possible for respondent to set off counterclaims against claims of the claimant at this early stage of proceedings.

In case the request for arbitration is filed against several respondents, the respondents may submit an answer to the request for arbitration jointly or each respondent may choose to submit an answer separately. Likewise, the respondents may submit a counterclaim jointly, or they may choose to submit counterclaims individually. If there are several claimants, the respondents may choose to submit a counterclaim against all the claimants or only against one or some of them.

Whereas under the 1998 Rules of Arbitration the respondent could only file an answer against the parties who initiated the arbitration, the 2012 Rules allow respondents to file claims also against parties other than those who initiated the arbitration through a request for joinder (see Article 7 below). A respondent may also file a cross-claim against another respondent (see Article 8 below).

b) The Contents of the Answer to the Request (Art. 5(1))

As in the case of the request for arbitration, the Rules do not require any particular form or structure for the answer. Article 5(1) merely contains a non-exhaustive list of basic points to be covered in the answer. Like the claimant, the respondent is free to decide to what extent and how it will comment on claimant's assertions regarding the subject of the dispute and how it will organize its defense. Full evidence is usually not produced at this stage of the proceedings, as the parties may submit more detailed pleadings after the file has been transmitted to the arbitral tribunal.

The remarks made in relation to the contents and language of the request for arbitration apply *mutatis mutandis* to the contents of the answer, to the extent described below.

(1) Full Details of the Parties (Art. 5(1)(a)).

The requirement to give full details of the parties implicitly allows the respondent to fill any gaps or correct any inaccuracies in the request for arbitration. This is generally done in the Terms of Reference.

(2) Full Details of the Person(s) representing the Respondent(s) (Art. 5(1)(b)).

The respondent should give the name and address of any representative it may have engaged to represent it. This is explicitly stated as a new requirement in the 2012 Rules, although parties already in the past generally gave such information from the outset. As already indicated, it is not required for a party to be represented by a lawyer in an arbitration, but mostly parties do have a lawyer to represent them in arbitration. Parties may also be represented by several lawyers or law firms.

It is advisable to mention whether subsequent communications should be sent directly to the party representative named.

Pursuant to Article 17, the Secretariat or the arbitral tribunal, once constituted, may request at any time proof of authority of the person(s) representing the respondent(s).

(3) Respondent's Position as to the Nature and Circumstances of the Dispute and the basis upon which the Claims are made (Art. 5(1)(c)).

The respondent should provide its comments on the nature and circumstances of the dispute as set out in the request for arbitration. A new requirement of the Rules is that the respondent also has to give comments as to the basis upon which the claims are based. Pursuant to the new requirement in Article 4(3)(c), claimant must set out in the request for arbitration whether its claims are based on a contract, on which contractual stipulations, in tort, or on a trust instrument or an international treaty. Respondent must provide its comments thereto in its answer to the request for arbitration.

(4) Response to the Relief Sought (Art. 5(1)(d)).

Respondent is under no obligation to give full details of its defense in the answer to the request for arbitration or to attach essential documents. This ensures that the parties are treated equally, as Article 4 of the Rules does not require the claimant either to produce full evidence in support of its claim. The extent of detail the respondent will provide in its answer may be a tactical matter and may also depend on the extent of details provided by claimant in the request for arbitration. The content and coverage of the answer to the request match those of the request itself. In any event, the respondent should give sufficient reasons to justify the prayers for relief formulated in its answer, which more often than not will be aimed at the rejection of the request.

It may be advisable for the respondent to indicate that it reserves the right to add to its pleadings with regard to both facts and law.

Article 5(1) does not expressly require the respondent to include in its response any objections it may have to the jurisdiction of the ICC International Court of Arbitration or the arbitral tribunal, or the arbitrability of the subject matter of the dispute. However, it is advisable for it to do so. Otherwise, there is little chance that the Court

would refuse to set the proceedings in motion on the basis of Article 6(4) or that these defense pleas would be included in the initial draft of the Terms of Reference. Furthermore, if a respondent omits to challenge or raise objections over the arbitral tribunal's jurisdiction in general or with respect to certain issues or claims, it risks being barred from doing so if it tries to do so later in the proceedings (see, for example, Articles 1690(2) and 1717(5) JC, Article 1466 NCPC, Article 1040(2) ZPO, Article 186(2) PILA, and Article 16(2) of the UNCITRAL Model Law), although it is only in the context of Article 19 that this question is dealt with explicitly in the Rules.

In the event of unquantified claims, for the reasons explained in connection with the request for arbitration, it is advisable for the respondent also to state its position with respect to any information on the amount in dispute provided by claimant. There is no provision in the Rules or any other text allowing or prohibiting the arbitral tribunal to fix the amount in disputes. Nevertheless, in practice and if appropriate, arbitral tribunals will often raise this issue during the case management conference or at any other appropriate moments with the parties, and seek their agreement on the monetary value of unquantified claims. When submitting prayers for relief, the respondent should not omit to request that the claimant be ordered to reimburse its costs and expenses incurred in relation to the arbitration. Despite Article 37 of the Rules and given that different countries adopt different solutions on the question of the reimbursement of costs, it cannot be assumed that an arbitral tribunal will decide and assess a party's costs if the party concerned has not requested a decision in this respect.

(5) Comments Concerning the Number and Choice of Arbitrators (Art. 5(1)(e)).

The influence the parties may have on the composition of the arbitral tribunal at the very beginning of the proceedings is an expression of one of their fundamental rights. To the extent allowed by the arbitration agreement, it is in the respondent's interest to consider carefully the proposals made by the claimant in the request for arbitration concerning the constitution of the arbitral tribunal, so as to decide whether or not they are acceptable, and, if not, to put forward other suggestions.

If the parties have not provided otherwise with respect to the number of arbitrators, an arbitral tribunal comprising one or three arbitrators will be set up by the ICC International Court of Arbitration (Article 12(1)). In this case, the respondent must consider whether or not it is desirable to have a three-member tribunal. To this end, like the claimant, it will also give consideration to the difficulty of the case, the amount in dispute, as well as the consequences on the costs of the proceedings and the advance that will be fixed. When stating its position on the number of arbitrators, the respondent will also take account of the fact that the Court generally tends not to appoint a sole arbitrator when the amount in dispute is above US$ 30 000 000, and that the Court tends not to decide for the constitution of an arbitral tribunal with three arbitrators when the amount in dispute is below US$ 5 000 000 (see J. Fry, S. Greenberg and F. Mazza, *The Secretariat's Guide to ICC Arbitration*, ICC Publication No. 729 E, Paris, 2012, p. 140. This book is on sale in the ICC store at < www.storeiccwbo.org >). This means that if the amount in dispute is less than US$ 5 000 000, the respondent must provide persuasive reasons for constituting a three-member tribunal. The same applies to cases in which the amount in dispute is more than US$ 30 000 000 and the respondent desires a sole arbitrator.

When the arbitration agreement provides that the case will be decided by a sole arbitrator, or when the respondent agrees with such a suggestion made by the claimant,

the parties may, within 30 days of the respondent being notified of the request for arbitration, jointly agree upon the nomination of a sole arbitrator for confirmation by the Secretary General or the Court, as the case may be. The 30-day time limit may be extended by the Secretariat (Article 12(3)) or by agreement between the parties. It is of course possible in such cases for the parties to agree directly on the nomination of an arbitrator without waiting for the answer to the request for arbitration.

When the arbitration agreement provides for the constitution of a three-member arbitral tribunal, or when the respondent accepts the claimant's request for such a tribunal, the respondent must nominate an arbitrator in its answer to the request for Arbitration (see Article 12(4)). Where there are multiple respondents, they should jointly nominate an arbitrator for confirmation by the Court (Article 12(6)). Where an additional party has been joined, the additional party may, jointly with the claimant(s) or with the respondent(s), nominate an arbitrator for confirmation by the Court (Article 12(7)). In the absence of a joint nomination and where all parties are unable to agree to a method for the constitution of the arbitral tribunal, the Court may appoint each member of the arbitral tribunal and shall designate one of them to act as president. In such case, the Court shall be at liberty to choose any person it regards as suitable to act as arbitrator (Article 12(8)). The respondent should also consider making comments or proposals on the selection process for the president of the arbitral tribunal or on qualifications expected from the president of the arbitral tribunal.

What, it may be asked, should be done if, when the arbitration agreement does not fix the number of arbitrators, the claimant asks for a three-member tribunal to be constituted but fails to nominate an arbitrator. The answer may be found in Article 12(2), where it is stated that the claimant shall first nominate a co-arbitrator. If the claimant fails to nominate a co-arbitrator, the respondent may initially refuse to name an arbitrator in its answer to the request for arbitration and ask the Secretariat to give the claimant a deadline for nominating 'its' co-arbitrator and only after this will the respondent in its turn nominate an arbitrator in the time limit set for it to do so.

(6) Comments Concerning the Place of the Arbitration, the Applicable Rules of Law and the Language of the Arbitration (Art. 5(1)(f)).

The place of the arbitration, the applicable substantive rules of law and the language of the arbitration may have an important part to play in the choice of the arbitrators. The respondent must state its position on all these points when they are not settled clearly in the arbitration agreement and when it finds the claimant's position fully or partly unacceptable. As far as the respondent's position with respect to the place of the arbitration, the applicable rules of law and the language(s) of the proceedings is concerned, the reader is referred to the discussion of these points in connection with the request for arbitration (compare Articles 4(3)(h), 18(1), 20 and 21).

(7) Other documents or Information (Art. 5(1) last sentence).

In addition to the information respondent is required to provide in its answer to the request for arbitration, it may submit with the answer also other documents or information which it considers appropriate or which may contribute to the efficient resolution of the dispute. Such documents or information may become relevant, if the Court has to take a decision regarding the setting in motion of the arbitration pursuant to Article 6(4).

c) The Time Limit for Filing the Answer to the Request for Arbitration (Art. 5(1)-(2))

The respondent must send its answer to the request for arbitration to the Secretariat within thirty days of receiving from the Secretariat the request for arbitration (Article 5(1)). Even if the respondent has already received a copy of the request for arbitration directly from the claimant, this time limit still remains the same. It begins at the time specified in Article 3(3) of the Rules, that is to say when the respondent receives the request for arbitration or should have done so if notification was made in accordance with Article 3(2). The end of the time limit is calculated in accordance with Article 3(4) of the Rules.

According to Article 5(2), the Secretariat may extend the time allowed for answering the request for arbitration subject to the following conditions:

- in its request for an extension, the respondent must give all the necessary information mentioned in Article 5(1)(e) of the Rules;
- the request for an extension and the necessary accompanying information must be sent to the Secretariat within the initial thirty-day period allowed for filing an answer to the request for arbitration.

This therefore means that if the respondent wishes the period for filing its answer to be extended, within thirty days it must provide all the information required for the constitution of the arbitral tribunal according to the Rules of Arbitration. If the arbitration clause provides for a three-member tribunal and the claimant has already nominated an arbitrator in the request for arbitration, the respondent is likewise required to nominate an arbitrator within thirty days. This allows the Court to proceed with the constitution of the arbitral tribunal, regardless of whether or not the respondent has filed a full answer to the request for arbitration.

If the respondent wishes to challenge the jurisdiction of the ICC or of the arbitral tribunal constituted in accordance with the Rules of Arbitration, it is advisable for it to raise this objection when applying for the time limit to be extended, especially if the extension of the time limit is conditional upon an arbitrator having been nominated. It is worth noting that in some legal systems a party's unreserved cooperation in constituting the arbitral tribunal, especially by designating an arbitrator, may bar it from raising any objections later relating to this matter.

Although Article 5(2) does not specify the length of the extension for filing an answer to the request for arbitration, the Secretariat normally allows an additional thirty days. A longer extension could be granted only if the respondent were able to put forward special reasons or the claimant were in agreement. In the past, the Secretariat has routinely granted a 30-day extension when requested to do so and provided the conditions laid down in Article 5(2) related to Article 5(1)(e) had been met. The Secretariat does not, however, have the power to decide of its own accord to extend the period of time for submitting comments concerning the constitution of the arbitral tribunal or, as the case may be, the nomination of an arbitrator. The parties may extend this kind of time limit themselves whenever they wish.

If the respondent fails to file its answer to the request for arbitration in time or omits to seek in time an extension of the time limit, there is a risk that the Court will decide on the constitution of the arbitral tribunal, the place of the arbitration and the advance to cover the costs of the arbitration without considering the respondent's position (Article 6(8)). It should be pointed out that the Rules do not 'penalize' a respondent for failing to file its pleadings in time. Respondent is therefore not prevented from presenting its defense arguments and producing evidence later in the

5. Article 5(6) of the Rules: Claimant's Reply to a Counterclaim

The claimant has **30 days** in which to respond to a counterclaim from the moment it receives the counterclaim from the Secretariat of the Court.

This time limit may be extended by the Secretariat, in which case an extension of **around 30 days** is common practice.

6. Article 11(2) of the Rules: Qualified Statement of Independence from an Arbitrator

The Secretariat of the Court will forward to the parties for their comments a qualified statement of independence submitted by an arbitrator. The Secretariat sets a time limit (**usually 15 days**) for the parties to indicate whether they are in favor of accepting the arbitrator or have objections.

7. Article 12(2) of the Rules: Nomination of Co-Arbitrators after the Court has Decided in Favor of a Three-Member Tribunal

If the parties have not agreed on the number of arbitrators and the ICC International Court of Arbitration considers a three-member arbitral tribunal to be warranted, the **claimant** nominates an arbitrator **within 15 days** of receiving notification of the Court's decision and the **respondent** nominates an arbitrator **within 15 days** of receiving notification of the person nominated by the claimant.

8. Article 12(4) of the Rules: Nomination of Co-Arbitrators where the Parties Agree on a Three-Member Tribunal

If the parties have agreed that their dispute shall be resolved by a three-member arbitral tribunal, the claimant nominates an arbitrator in the request for arbitration and the respondent nominates an arbitrator in its answer to the request for arbitration, both arbitrators being subject to confirmation (respectively Articles 4(3) and 5(1) and (2); see 3 and 4 above).

If a party fails to nominate an arbitrator, the ICC International Court of Arbitration will appoint the arbitrator instead.

9. Article 12(5) of the Rules: Nomination of the Person who will act as President of a Three-Member Tribunal

When the parties have agreed on the procedure for appointing the third arbitrator who will act as president of the arbitral tribunal, the nomination should be made 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 ICC International Court of Arbitration.

If the nomination is not made within the 30 days-time limit or within any other time limit agreed by the parties or fixed by the Court for this purpose, the third arbitrator will be appointed by the Court.

10. Article 12(3) of the Rules: Nomination of a Sole Arbitrator

When the parties have agreed that the dispute will be resolved by a sole arbitrator, they may nominate an arbitrator for confirmation, by mutual agreement, **within 30 days** of the respondent receiving notification of the request for arbitration, or within any additional time limit allowed by the Secretariat of the Court.

11. Article 13(3) of the Rules: Appointment of a Co-Arbitrator upon the Proposal of a National Committee or Group when a Party Fails to make the Necessary Nomination

When the ICC International Court of Arbitration has to appoint an arbitrator on behalf of a party that has failed to nominate one, it makes the appointment on the basis of a proposal from the ICC national committee or group that it considers to be appropriate. The proposal is to be made within the time limit set by the Court, which is usually **around 15 days**.

If the national committee or group does not make a proposal within the given time limit, the Court may repeat its request, or request a proposal from another national committee or group that it considers to be appropriate, or appoint directly any person whom it regards as suitable.

12. Article 14(2) of the Rules: Challenges of Arbitrators by Parties

To be admissible, a challenge must be made **within 30 days** of receipt of notification of the appointment or confirmation of the arbitrator, or **within 30 days** from the date on which the party making the challenge was informed of the **facts and circumstances** on which its challenge is based, if this date is later than the receipt of the aforementioned notification.

According to Article 14(3), the Court gives all those involved in the arbitration an opportunity to express their views in writing before it makes its decision. The customary time limit for this is **around 15 days**.

13. Article 15(3) of the Rules: Replacement of Arbitrators by the Court

When, on the basis of information that has come to its attention, the ICC International Court of Arbitration considers replacing an arbitrator, it makes its decision after first giving the arbitrator concerned, the parties and any other members of the arbitral tribunal a suitable time to submit written comments. The time allowed is **usually 15 days**.

14. Article 23(2) of the Rules: Terms of Reference

The Terms of Reference, signed by the parties and the arbitral tribunal, are submitted to the ICC International Court of Arbitration **within two months** of the file being transmitted to the arbitral tribunal by the Secretariat of the Court.

This time limit may be extended, if the arbitral tribunal makes a reasoned request to this effect, or upon the Court's own initiative if it considers this to be necessary.

If one of the parties refuses to sign the Terms of Reference, the arbitration proceeds according to Article 23(3) of the Rules, once the Terms of Reference have been signed in accordance with Article 23(2) or approved by the Court.

15. Article 24(1) of the Rules: Case Management Conference

When the Terms of Reference are drawn up, or as soon as possible thereafter, the arbitral tribunal shall convene a case management conference to consult the parties on procedural measures that may be adopted pursuant to Article 22(2).

16. Article 24(2) of the Rules: Procedural Timetable

During the case management conference organized pursuant to Article 24(1), or as soon as possible thereafter, and after consulting the parties, the arbitral tribunal

draws up a procedural timetable that it intends to follow for the conduct of the arbitration.

17. Article 27 of the Rules: Closing of the Proceedings

As soon as possible after the last hearing concerning matters to be decided in an award or the filing of the last authorized submissions concerning such matters, whichever is later, the arbitral tribunal declares the proceedings closed.

18. Article 27 of the Rules: Announcement of the Submission of the Draft Award to the Court

When the arbitral tribunal declares the proceedings closed, it indicates to the Secretariat of the ICC International Court of Arbitration and to the parties the date by which it expects to submit the draft award to the Court for approval in accordance with Article 33.

19. Article 30 of the Rules: The Award

The arbitral tribunal renders its award **within six months** from the date of the last signature by the arbitral tribunal or by the parties of the Terms of Reference or, if a party refuses to sign them, within six months from the date on which the Secretariat notifies the arbitral tribunal of the Court's approval of the Terms of Reference.

This time limit may be extended by the Court if the arbitral tribunal makes a reasoned request to this effect or upon the Court's own initiative, if it considers this to be necessary.

20. Article 35 of the Rules: Correction of an Award

The arbitral tribunal may, on its own initiative, correct any clerical, computational, typographical or similar error contained in the arbitral award, as long as such correction is submitted to the ICC International Court of Arbitration for approval **within 30 days from the date of the award** (Article 35(1)).

A party may apply to the Secretariat of the Court for the correction of an award **within 30 days of being notified** of such award (Article 35(2)).

The application is forwarded to the arbitral tribunal, which gives the other party a period of time, **normally not exceeding 30 days** from that party's receipt of the application, in which to submit its comments.

If the arbitral tribunal decides to correct the award, it submits its decision in draft form to the Court **no later than 30 days** after the expiry of the period of time allowed for receipt of comments from the other party or within any other time limit set by the Court.

21. Article 35 of the Rules: Interpretation of an Award

A party may apply to the Secretariat of the Court for the interpretation of an award **within 30 days of being notified** of such award (Article 35(2)).

The application is forwarded to the arbitral tribunal, which gives the other party a period of time, **normally not exceeding 30 days** from that party's receipt of the application, in which to submit its comments.

If the arbitral tribunal decides to interpret the award, it submits its decision in draft form to the Court **no later than 30 days** after the expiry of the period of time

allowed for receipt of comments from the other party or within any other time limit set by the Court.

22. Article 35(4) of the Rules: Remission of an Award

Where a court remits an award to the arbitral tribunal, the provisions of Articles 31, 33, 34 and 35 shall apply. The Court may take any steps as may be necessary to enable the arbitral tribunal to comply with the terms of such remission.

23. Article 36(1) of the Rules: Payment of the Provisional Advance on Costs

The provisional advance on the costs of the arbitration fixed by the Secretary General of the ICC International Court of Arbitration must be paid by the claimant as quickly as possible so as not to delay the transmission of the file to the arbitral tribunal once it has been constituted. As a general rule, the claimant is requested to pay this provisional advance **within 30 days**.

24. Article 36(6) of the Rules: Payment of the Advance on Costs

When a request for an advance on costs has not been complied with, the Secretary General of the ICC International Court of Arbitration may direct the arbitral tribunal to suspend its work, after first consulting it on the matter. The Secretary General may set a time limit, that must be no less than **15 days**, upon the expiry of which the relevant claims will be considered as withdrawn.

Should the party concerned wish to object to this measure, it must make a request, within the time limit mentioned above, for the matter to be decided by the Court.

25. Article 38 of the Rules: Modification of Time Limits by the Parties

The parties may agree to shorten the various time limits referred to in the Rules of Arbitration. If such an agreement is made after the arbitral tribunal has been constituted, it will become effective only if approved by the arbitral tribunal (Article 38(1)).

The ICC International Court of Arbitration may, on its own initiative, decide to extend any time limit that has been modified by the parties pursuant to Article 38(1), if it considers this to be necessary in order to allow it or the arbitral tribunal to fulfill their duties in accordance with the Rules (Article 38(2)).

26. Article 39 of the Rules: Waiver

A party is deemed to have waived its right to object to a failure to comply with any provision of the Rules, any other rules applicable to the proceedings, any direction given by the arbitral tribunal, or any requirement under the arbitration agreement relating to the constitution of the arbitral tribunal or the conduct of the proceedings, if it proceeds with the arbitration without immediately raising its objection before the arbitral tribunal.

27. Article 1(8) of Appendix II to the Rules: Return of Documents at the End of the Arbitration

Any documents, communications or correspondence submitted by the parties or the arbitrators may be destroyed unless a party or an arbitrator requests in writing, within a period fixed by the Secretariat of the Court, the return of such documents. The cost of their return is borne by the party or arbitrator making the request.

provides the necessary services of the ICC under the Mediation Rules, the Expert Rules, the Dispute Board Rules and the DOCDEX Rules, whereas the Secretariat of the ICC International Court of Arbitration provides the necessary services of the ICC under the Pre-Arbitral Referee Rules. Together, these various sets of rules, including those relating to arbitration, provide the framework for ICC's comprehensive set of dispute resolution services.

It is worthwhile looking briefly at the rules mentioned above, which are complementary to arbitration and, in certain situations, may be used in combination with arbitration to settle disputes. The official English and French texts of the rules, together with a number of translations, can be consulted on the following web pages: <www.iccarbitration.org>, <www.iccmediation.org>, <www.iccadr.org>, <www.iccexpertise.org> and <www.iccdocdex.org>. For the sake of convenience, the current English versions of the ICC Rules for a Pre-arbitral Referee Procedure, the ICC Mediation Rules, the ICC Expert Rules, the ICC Dispute Board Rules and the ICC DOCDEX Rules are reproduced in appendices at the end of this book. Readers should consult the ICC web pages for any updates following the publication of this book.

B. ICC RULES FOR A PRE-ARBITRAL REFEREE PROCEDURE

During the performance of a contract, problems can arise that need to be attended to immediately through urgent, binding measures. If the factual situation is likely to change, it may not be possible or desirable to wait for the matter to be dealt with by an arbitral tribunal once arbitration proceedings have been set in motion. The ICC Rules for a Pre-Arbitral Referee Procedure, which came into force on 1 January 1990, are intended to respond to this specific need (see Appendix 21 below). They provide for the appointment of a third person, referred to as a 'referee', who has the power to order provisional measures as a matter of urgency, before the case is heard by an arbitral tribunal or a court (Article 1(1)). The measures ordered are binding until the referee, or the court or arbitral tribunal to which the case is subsequently referred, decides otherwise (Article 6(3)). Parties may use these rules only if they have agreed in writing to do so. It is worth noting that if the parties have agreed to the ICC pre-arbitral referee procedure, this shall have as a consequence under Article 29(6) of the 2012 ICC Rules of Arbitration that the Emergency Arbitrator Provisions (contained in Article 29 of the Rules of Arbitration and in Appendix V to the ICC Rules of Arbitration) will not be applicable.

ICC has handled only ten pre-arbitral referee cases since the Rules were adopted in 1990. The ICC Rules for a Pre-Arbitral Referee Procedure may be found in Appendix 21 below.

1. Suggested ICC Pre-Arbitral Referee Clause

ICC recommends the following pre-arbitral referee clause:

> 'Any party to this contract shall have the right to have recourse to and shall be bound by the Pre-Arbitral Referee Procedure of the International Chamber of Commerce in accordance with its Rules.'

A standard clause referring to both the pre-arbitral referee procedure and arbitration is also available for use by parties wishing to provide for both procedures in their contracts.

2. Characteristics

The essential features of these rules are speed and efficiency. After being notified directly by the claimant of the request for the appointment of a referee, the respondent has eight days in which to file an answer, which is sent directly to the claimant and to any other party, as well as to the Secretariat of the ICC International Court of Arbitration, using the quickest available method of delivery (Article 3(4)). The referee is appointed by the President of the ICC International Court of Arbitration, upon the expiry of the eight-day time limit allowed for the respondent to submit an answer to the request and after having verified the '*prima facie*' existence of the agreement of the parties. Alternatively, the parties may choose a referee by agreement, before or after the filing of the request (Article 4(1)).

As with arbitrators under the ICC Rules of Arbitration, a prospective referee will first be asked to sign a statement of acceptance, availability and independence and to reveal to the Secretariat any facts or circumstances that could call into question his or her independence in the eyes of the parties (See Appendix 22 below).

The referee has thirty days in which to make an order (Article 6(2)). The Secretariat notifies the parties of the order, provided that the full amount of the advance on costs previously fixed by it has been paid (Article 6(5)). The proceedings are conducted in an adversarial manner and the respondent is given the opportunity to submit comments and documents. Before delivering an order, the referee is entitled to make any investigations, decide on any interim measures and request any expert opinions that may be considered appropriate (Article 5(3)).

3. Powers of the Referee

According to Article 2(1) of the rules, the referee can:

- order any conservatory measures or measures of restoration urgently needed to prevent immediate damage or irreparable loss, so as to safeguard any of the rights or property of one of the parties;
- order a party to make any payment that needs to be made to any other party or any other person;
- order a party to take any step required by the contract between the parties, including the signing or delivery of any document or the procuring by a party of the signature or delivery of a document;
- order any measures necessary to preserve and establish evidence.

The referee cannot make an order other than that requested by a party (Article 2(2)).

The referee's order does not pre-judge the substance of the case, nor is it binding on any arbitral tribunal or national court that may hear any question, issue or dispute in respect of which the order has been made. The order remains in force unless and until the referee or the arbitral tribunal or national court decides otherwise (Article 6(3)).

The referee's order includes the reasons on which the decision is based. The carrying out of the order may be made subject to the fulfillment of any other conditions thought fit by the referee, such as the commencement of proceedings on the merits before the arbitral tribunal or national court within a certain time limit, or the provision of adequate security by the party for whose benefit the order is made (e.g. the production of guarantees) (Article 6(4)).

By agreeing to use these rules, the parties undertake to carry out the referee's order without delay and waive their right to appeal against or oppose the implementation of

the order, insofar as such waiver can validly be made (Article 6(6)). Since the referee's order is not an award, no application can be made for it to be set aside.

If a case is referred to a court or arbitral tribunal after the referee has been appointed, the referee retains the power to make an order within thirty days of being given the file, unless the parties agree otherwise or the court or arbitral tribunal decides otherwise (Article 2(4)).

A referee is forbidden to act as arbitrator in any subsequent proceedings between the same parties or in other connected cases, unless the parties agree otherwise in writing (Article 2(3)).

4. Costs

When filing a request under the ICC Rules for a Pre-Arbitral Referee Procedure, the requesting party must pay US$ 5 000, of which US$ 2 500 constitutes a non-refundable administrative charge and US$ 2 500 an advance on the fees and expenses of the referee and any expert (Appendix – Costs and Payment for a Pre-Arbitral Referee Procedure, part B(1)). ICC will deal with the request only if it is accompanied by this payment. The Secretariat of the ICC International Court of Arbitration will then fix an advance to cover the estimated costs of the pre-arbitral referee procedure as soon as possible after the file has been sent to the referee. The advance is paid by the party or parties seeking the order (Appendix, part B(2)). No order can be notified until payment has been made in full (Article 6(5)) of the Rules; Appendix, part B(3)).

The amount of the referee's fees and expenses are fixed by the Secretary General of the ICC International Court of Arbitration at the end of the proceedings (Appendix, part A(2)). This amount is stated in the referee's order, which also indicates in what proportion these costs are to be borne by the parties (Article 7(1) of the Rules).

C. ICC MEDIATION RULES

1. Mediation / Amicable Dispute Resolution

The ICC Mediation Rules, which entered into force on 1 January 2014 and replace the 2001 ICC ADR Rules, are intended to offer business partners a means of resolving disputes amicably, in the way best suited to their needs. The ICC Mediation Rules may be found in Appendix 23 below.

Whereas the acronym 'ADR' is generally considered to stand for 'Alternative Dispute Resolution' in the sense of an alternative to litigation in the courts, for ICC, however, 'ADR' meant 'Amicable Dispute Resolution'. ICC preferred not to use the acronym ADR to mean alternative dispute resolution, which in several countries, including the USA, includes arbitration, whereas ICC has a separate set of rules for arbitration.

The ADR Rules were revised in 2014 so as to make them consistent with the 2012 ICC Rules of Arbitration, and also to update the Rules to reflect developments in ADR and mediation practice and to better reflect the current practices of the ICC International Centre for ADR under existing ADR Rules, while maintaining flexibility in the process. The first and most obvious difference between the ADR Rules and the Mediation Rules is the change of name. It reflects the fact that in the 180 cases conducted under the ADR Rules in more than 90% of these cases mediation was chosen by the parties as the settlement technique or became the settlement technique pursuant to

the default mechanism foreseen in the ADR Rules (Art. 5(1) of the 2001 ADR Rules). Consistent with the change of the name of the Rules, the term 'neutral' of the ADR Rules has been abandoned and replaced by 'mediator' throughout the Rules (see 'The New ICC Mediation Rules' published in *ICC International Court of Arbitration Bulletin*, Paris, Vol. 24/Nr. 2 – 2014, p. 6-7).

The new ICC Mediation Rules will apply to all contracts signed after their entry into force on 1 January 2014. If, prior to the date of entry into force of the Rules, the parties have agreed to refer their dispute to the former ICC ADR Rules, the parties shall pursuant to Article 10(1) be deemed to have referred their dispute to the ICC Mediation Rules, unless any of the parties objects thereto, in which case the ICC ADR Rules shall apply.

Although conciliation and mediation are often considered, broadly speaking, synonymous and may refer to the same kind of process, there are significant differences between the rules that formerly governed ICC conciliation proceedings and those that govern processes under the 2001 ICC ADR Rules or under the 2014 ICC Mediation Rules. Under the ICC Rules of Optional Conciliation, proceedings could only start if one of the parties filed a request for conciliation. ICC notified the request to the other party, which could either accept or reject it. ICC ADR proceedings and ICC Mediation proceedings, on the other hand, can be commenced with a joint request from all parties. Also, the ADR Rules and the Mediation Rules allow for the use of several different techniques of dispute resolution, whereas the conciliation rules covered conciliation as the only available method.

There is also a clear difference between mediation and arbitration. Whereas the purpose of mediation is to bring parties to a dispute to an amicable settlement, arbitration is a process in which the issues are decided by an external person, the arbitrator, whose decision is binding upon the parties.

Whilst being quite distinct mechanisms for resolving disputes, mediation and arbitration may be complementary. It is possible for parties to agree that they will first attempt to resolve their differences through mediation, failing which they will resort to arbitration (see the escalation clauses recommended by ICC in Chapter 4 above). Conversely, parties who are already engaged in arbitration proceedings or litigation may, in the course of proceedings, agree to suspend the arbitration or litigation and attempt mediation. Furthermore, a mediation process can even be considered in parallel to arbitration or litigation proceedings. An important difference between mediation and arbitration or litigation is that the mediation process can help the parties to acquire a better understanding of each other's needs and interests so that they can look for a solution which accommodates these needs and interests as far as possible. If parties attempt to reach a settlement in the course of arbitration or litigation proceedings, however, they will focus on factual and legal elements put forward in these proceedings and, in doing so, their bargaining positions may be limited.

ICC mediation is designed to be a rapid, non-contentious and inexpensive dispute resolution method. It not only allows parties to avoid the expense of contentious proceedings, but is also more likely to preserve relations, allowing them to enter into new contracts or continue ongoing or long-term relationships. It allows the parties to terminate their contracts other than by litigation or arbitration. For this to be possible, all parties should, of course, have an interest in settling their dispute in another way than by adversary proceedings. Failing such common interest, or if a party's interest is not to settle in a non-contentious manner, there is little hope for a successful outcome of the mediation.

Together with the Rules, ICC also published 'Mediation Guidance Notes', in a separate publication, numbered 870. The 'Mediation Guidance Notes' give explanations on the provisions of the rules. They set out that mediation as referred to in the ICC Mediation Rules and in the Mediation Guidance Notes is a concept sufficiently broad to encompass both mediation and conciliation ('Mediation Guidance Notes', ICC Publication No. 870, Paris, 2013, p. 4). The ICC Mediation Rules do not provide a definition for mediation. The 2014 Mediation Rules contain ten articles, whereas the 2001 ADR Rules contained only seven articles; this small number is intended to leave the parties and the mediator with as much flexibility as possible in the mediation process in trying to achieve a settlement. As set out in Article 1(3) of the Rules, mediation shall be used under the Rules unless, prior to the confirmation or appointment of the mediator, or with the agreement of the mediator, the parties agree upon a different settlement procedure or a combination of settlement procedures. The Rules are not, however, appropriate for Dispute Review Boards and Dispute Adjudication Boards, which are usually established through detailed contractual provisions specifying the rules to be followed in such cases.

The breadth and flexibility of the Mediation Rules is made clear from the outset. Article 1(4) states that the provisions of the Rules may be modified by agreement of all the parties, subject to the approval of the ICC Centre. As with arbitration and other alternatives to litigation, mediation presupposes an agreement by the parties to use this method to resolve their disputes. This agreement will typically be found in a mediation clause contained in the business contract signed by the parties. However, the parties can also agree to mediation later, once a dispute has arisen, as with arbitration. In the first case, the way the parties word their clause will determine whether mediation is optional or obligatory and whether, if unsuccessful, it will be followed by arbitration. There have recently been decisions by the courts in some countries, including France and the United Kingdom, holding that such clauses placed the parties under an obligation to attempt mediation before being able to refer their disputes to the courts.

During the first ten years when the ICC ADR Rules were in force, the ICC Centre administered over 100 cases, including corporate and State parties from all continents, disputes spanning construction, M&A, insurance, intellectual property and finance with amounts ranging from US$ 30 000 to more than US$ 450 million. The results of the cases were that approximately 80% of the cases transferred to the mediator settled less than four months after transfer of the file and after an average of one to two mediation meetings (H. Tümpel and C. Sudborough, 'ICC's ADR Rules 2001-2010: Current Practices, Case Examples and Lessons Learned', in A. Ingen-Housz (Editor), 'ADR in Business, Practice and Issues across Countries and Cultures', Vol. II, Kluwer Law International, Alphen aan den Rijn, 2011, p. 257). From 2001 until 2013, the Centre administered over 180 cases under the ADR Rues ('The New ICC Mediation Rules', ICC *International Court of Arbitration Bulletin*, Paris, Vol. 24/Nr. 2 – 2013, p. 6).

In 2013, 32 requests for ADR were filed. Mediation was the settlement technique used in 17 cases, conciliation was chosen in three cases, and the remaining 12 cases were withdrawn before the parties decided on the settlement technique. Half of the cases were initiated pursuant to a dispute resolution clause providing for ICC ADR followed in most cases by ICC arbitration if no settlement was reached. The other half were initiated by a unilateral request in the absence of a prior agreement between the parties to refer their disputes to the ICC ADR Rules. In the five cases that were settled before the end of the year, the duration of the proceedings between the transfer of the file to the neutral and the reaching of a settlement averaged 70 days (see '2013 Statistical Report' published in *ICC International Court of Arbitration Bulletin*, Paris, Vol. 25/Nr. 1 – 2014, p. 15-16).

In 2012, 21 cases were filed under the ICC ADR Rules. Mediation was the settlement technique used in 16 cases, conciliation was chosen in two cases, and in one case a combination of neutral evaluation and mediation was chosen as settlement technique. The remaining two cases were withdrawn before the settlement technique had been fixed. In 16 of the cases, the proceedings were initiated pursuant to a dispute resolution clause providing for ICC ADR followed by arbitration in the event mediation was unsuccessful. In three of the cases the proceedings were initiated pursuant to an agreement after the dispute had arisen or at the request of one party accepted by the other party. Two mediations were conducted concurrently with an ICC arbitration, which was stayed for the duration of the mediation (see '2012 Statistical Report' published in *ICC International Court of Arbitration Bulletin*, Paris, Vol. 24/Nr. 1 – 2013, p. 16).

In 2011, 27 cases were filed under the ICC ADR Rules. Mediation was the settlement technique used in 15 cases, conciliation was chosen in one case, and in one case a combination of neutral evaluation and mediation was chosen as settlement technique. The remaining two cases were either resolved or withdrawn before the settlement technique had been fixed. In 21 of the cases, the proceedings were initiated pursuant to a dispute resolution clause contained in the contract giving rise to the dispute and 17 of those clauses provided for a two-tiered dispute resolution process, with arbitration as a second step if the ADR proceedings were unsuccessful (see '2011 Statistical Report' published in *ICC International Court of Arbitration Bulletin*, Paris, Vol. 23/Nr. 1 – 2012, p. 16).

In 2010, 13 cases were filed under the ICC ADR Rules. Mediation was the settlement technique used in 9 cases, adjudication in 2 cases, conciliation in 1 case and in the remaining case both mediation and neutral evaluation was used. All but one of the cases were commenced on the basis of a clause in the parties' contract specifying ICC ADR. In 8 cases, the dispute resolution clause provided for an escalation process, with arbitration as a second step if the case could not be resolved by ADR. The parties reached a settlement in 10 of the cases commenced in 2010 (see '2010 Statistical Report' published in *ICC International Court of Arbitration Bulletin*, Paris, Vol. 22/Nr. 1 – 2011, p. 15).

In 2009, 24 requests for ADR 13 cases were filed under the ICC ADR Rules. Mediation was chosen as the settlement technique in almost 90% of the cases. Other techniques chosen included conciliation and neutral evaluation. The average duration of the proceedings, from the filing of the request for ADR to the completion of the case, was 117 days, while the cost of the proceedings, including the neutral's fees and expenses and ICC's administrative costs, averaged less than US$ 20 000 (i.e. approximately 0.1% of the average amount in dispute) (see '2009 Statistical Report' published in *ICC International Court of Arbitration Bulletin*, Paris, Vol. 21/Nr. 1 – 2010, p. 15-16).

2. Suggested ICC Mediation Clauses

Parties wishing to use proceedings under the ICC Mediation Rules should consider using one of the clauses recommended by ICC, which cover different situations and needs (see Appendix 24 below; see also Chapter 4 above):

a) Option to Use the ICC Mediation Rules:

> 'The parties may at any time, without prejudice to any other proceedings, seek to settle any dispute arising out of or in connection with the present contract in accordance with the ICC Mediation Rules.'

b) Obligation to Consider the ICC Mediation Rules:

> 'In the event of any dispute arising out of or in connection with the present contract, the parties agree in the first instance to discuss and consider referring the dispute to the ICC Mediation Rules.'

c) Obligation to Refer Dispute to the ICC Mediation Rules While Permitting Parallel Arbitration Proceedings if Required:

> '[x] In the event of any dispute arising out of or in connection with the present contract, the parties shall first refer the dispute to proceedings under the ICC Mediation Rules. The commencement of proceedings under the ICC Mediation Rules shall not prevent any party from commencing arbitration in accordance with sub-clause [y] below.
>
> [y] 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 of Arbitration.'

d) Obligation to Refer Dispute to ICC Mediation Rules, Followed by ICC Arbitration if Required:

> 'In the event of any dispute arising out of or in connection with the present contract, the parties shall first refer the dispute to proceedings under the ICC Mediation Rules. If the dispute has not been settled pursuant to the said Rules within [45] days following the filing of a Request for Mediation or within such other period as the parties may agree in writing, such dispute shall thereafter 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 of Arbitration.'

Parties are free to amend the chosen clause for their particular requirements. Parties may wish to specify the use of a settlement procedure other than mediation. Further they may wish to stipulate the place of any mediation and/or arbitration proceedings (ICC Publication No. 865-0 E, Paris, 2013, p. 88).

If the parties choosing clauses c) and d) above wish to exclude any recourse to the Emergency Arbitrator Provisions, they must expressly opt out by adding the following wording to the standard arbitration clause:

> 'The Emergency Arbitrator Provisions shall not apply.'

At all times, care must be taken to avoid any risk of ambiguity in the drafting of the clause. Unclear wording causes uncertainty and can hinder or delay the dispute resolution process.

3. Commencement of Mediation Proceedings

The Rules distinguish between those cases where the parties have agreed to have recourse to the ICC Mediation Rules (Article 2) and those where there is no such agreement (Article 3). In both instances, however, the proceedings commence with the filing of a request for mediation with the ICC International Centre for ADR (the 'Centre').

In those cases where an agreement to use ICC mediation already exists, any party or parties may file a request for mediation, in which they are required to state their own addresses and those of their representatives, provide a description of the dispute and, if possible, an assessment of its value, indicate any agreement to use a settlement procedure other than mediation or, in the absence thereof, any proposal for such other settlement procedure, mention any agreement as to the time limit, the language of the location for conducting the mediation or, in the absence thereof, any proposal thereto, and jointly nominate a mediator or indicate the qualifications a mediator should have if appointed by the ICC. The request should be accompanied by a copy of the written agreement under which it is made and a non-refundable registration fee of US$ 2 000 (Article 1 of the Appendix to the Rules).

If the request is not filed jointly by all of the parties, although there is an agreement to submit disputes to ICC mediation, the party or parties filing the request must simultaneously send the request to the other party or parties (Article 2(3)).

If the parties have not previously agreed to refer their dispute to ICC mediation, the Centre sends the request to the other party or parties, asking them to advise it within 15 days or within an additional time limit determined by the Centre whether they agree or decline to participate in the mediation proceedings. If they refuse to participate or if they fail to respond, the request will be considered to have been declined and consequently the mediation proceedings will not commence (Article 3). If they agree to take part in the mediation proceedings, they may propose one or more mediators to be designated by all the parties or make any proposal regarding the qualifications of a mediator to be appointed by ICC (Article 5).

4. Mediator

The parties are free to select between themselves the mediator who will conduct the mediation proceedings (Article 5(1)). However, if they cannot agree upon the person to act in this capacity, the Centre shall, after consulting the parties, either appoint a mediator or propose a list of mediators to the parties (article 5(2)). In practice, the second option is generally used. The parties can select from such list their preferred candidate for appointment by the Centre or, as it is done quite often, they may specify the qualifications that the Centre should take into account before making a proposal or the appointment.

Like arbitrators, every prospective mediator should complete a curriculum vitae form and a statement of acceptance, availability, impartiality and independence. If there are facts or circumstances that could call into question the prospective mediator's independence in the eyes of the parties as well as any circumstances that could give rise to reasonable doubts as to the mediator's impartiality, these should be disclosed with the statement of acceptance, availability, impartiality and independence (Article 5(3)).

If the Centre appoints the mediator, the parties have 15 days from the time they are notified of the appointment in which to file objections against the person appointed. The objections must be sent to the Centre and to the other party or parties. Thereupon, the Centre is required to appoint another mediator (Article 5(5)).

The parties can agree to have more than one mediator conduct the proceedings (Article 5(6)). The appointment of two or more mediators may be appropriate in certain circumstances, for instance when the parties wish to have mediators with different qualifications or professional backgrounds or when the complexity or the number of parties involved warrant a co-mediation.

5. Conduct of Mediation Proceedings

The Rules allow the parties and, in the event they are unable to agree, the mediator, considerable freedom to conduct the mediation proceedings as they think fit (Article 7(1)). The mediation can be adapted to the needs of the parties, including their cultural and legal backgrounds, and any elements of the dispute other than a legal component. The parties can also agree on specific modalities of the mediation proceedings, such as whether submissions are to be filed, or whether there is to be a site visit, although mediation can and should not mimic legal proceedings. After having discussed this with the parties, the mediator shall provide a written note informing the parties of the manner in which the mediation shall be conducted (Article 7(2)). Informal by nature, such a note should simply clarify which technique(s) the mediator shall use throughout mediation.

By agreeing to refer a dispute to the ICC Mediation Rules, each party takes the commitment to participate in the proceedings at least until the receipt of the written note from the mediator with which the mediator sets out how the mediation shall be conducted (Article 7(2)).This provision is inspired by the 2001 ICC ADR Rules (Article 5(1) thereof) which stipulated that the parties could not withdraw from the ADR proceedings prior to the first meeting with the neutral.

During mediation sessions, the mediator may meet with all parties together in a joint meeting or have separate meetings with each of the parties or certain party representatives. Because mediation essentially is a third party assisted negotiation process in which legal aspects are normally only part of many other relevant factors such as underlying party interests, the procedural concept of 'due process' is not directly applicable to mediation, irrespective of the fact that mediation will only properly function, if it is being perceived by all stakeholders as fair and reasonable. The Mediation Rules merely state that in all cases the mediator shall be guided by the principles of fairness and impartiality and by the wishes of the parties (Article 7(3)). If one or both of the parties wish(es) to provide the mediator with documents or other information that should not be communicated to the other party, these will be kept confidential by the mediator ('Mediation Guidance Notes', ICC Publication No. 870, Paris, 2013, p. 6). This reflects the fact that ICC mediation provides essentially for third-party-assisted negotiations, with the parties remaining in ultimate control. They should therefore not be considered as subject to the same principles as judicial proceedings. Accordingly, the ICC 'Mediation Guidance Notes' (ICC Publication No. 870, Paris, 2013, p. 6) also underscore that aspects of due process are not being applied in mediation to the same extent as in arbitration and court proceedings.

During all meetings (both joint and private) the mediator will seek to create an environment conducive to constructive negotiations; some meetings may be used by the parties and/or their lawyers to make presentation to each other; others may be used for the mediator to explore the background and unrevealed elements of the dispute, especially identify the interests and needs of each of the parties (as opposed to pure elements of facts and law) for their mutual benefit and consider any alternative options for settlement instead of focusing on adversary debates ('Mediation Guidance Notes', ICC Publication No. 870, Paris, 2013, p. 7).

The mediator determines the language or languages of the proceedings (Article 4(2)) and the place where meetings will be held, if the parties have not already agreed on them (Article 4(1)). Although it is generally useful for the parties and the mediator to meet, conversations can also take place by telephone conference, videoconference or any other suitable means.

As regards the participation of the parties in mediation proceedings, the rules require each party to cooperate in good faith with the mediator (Article 7(4)). It is important that there be at least a discussion between the parties and the mediator, regardless of whether or not it leads to a settlement, mediation being an important and useful channel of communication between parties in dispute.

6. Termination of Mediation Proceedings

The rules describe a number of situations in which the mediation proceedings end (Article 8). Clearly, the best possible situation is when both parties reach a settlement agreement that terminates their dispute (Article 8(1)(a)). The parties will normally confirm their agreement in writing. The rules do not state whether the mediator should be involved in the drafting of the settlement agreement or should sign it. This will be a matter to be discussed and decided with the parties, when the situation arises. There may be times, albeit unusual, when parties reach a settlement agreement among themselves, the full details of which are unknown to the mediator. The mere indication by the parties to the mediator that the dispute has been settled should suffice to put an end to the proceedings. In some instances, it is worth considering the possibility to incorporate the settlement agreement in an award by consent within the meaning of Article 32 of the ICC Rules of Arbitration (see comments on Article 32 of the ICC Rules of Arbitration above) in order to facilitate the international enforcement of the settlement agreement (e.g. pursuant to the 1958 New York Convention on the recognition and enforcement of foreign arbitral awards).

Mediation proceedings can also terminate without a settlement being reached. This can occur when one of the parties informs the mediator in writing that it no longer wishes to pursue the mediation proceedings, after it has received the mediator's note referred to in Article 7(2)) (Article 8(1)(b)), or when the mediator informs the parties that, in his or her opinion, the mediation will not resolve the dispute between the parties (Article 8(1)(d)). The mediation proceedings will also terminate, without a settlement, when the mediator informs the parties in writing that the mediation has been completed (Article 8(1)(c)). Similarly, when the mediator informs the parties that a time limit set for the mediation proceedings has expired and has not been extended by all the parties (Article 8(1)(e)), the mediation proceedings will come to an unsuccessful end.

There are also situations in which mediation proceedings terminate at a very early stage, even before they have really commenced. This can happen, for instance, when the Centre considers that there has been a failure to nominate a mediator or that it has not been reasonably possible to appoint a mediator (Article 8(1)(g)). Early termination will also occur when the ICC notifies the parties and the mediator that a due payment has not been made at least seven days after payment should have been made (Article 8(1)(f)).

7. Confidentiality

ICC Mediation proceedings are confidential. The Mediation Rules put in place maximum safeguards to that effect in order to ensure efficiency in the process. Article 4 of Appendix I – Statutes of the Standing Committee confirms the principle of the confidential nature of the work of the Standing Committee and of the Centre.

Article 9(1) of the Rules states that, unless agreed otherwise by the parties or unless prohibited by applicable law, the mediation proceedings, but not the fact that

they are taking place, have taken place or will take place, are private and confidential (Article 9(1)(a)). If a settlement agreement is reached, this must likewise be kept confidential, unless a party is required by law to disclose its contents, or this is necessary for its implementation or enforcement (Article 9(1)(b)). As a result, parties may not produce any information in proceedings before a court or arbitral tribunal that was submitted by the other party or by the mediator in the mediation proceedings, unless such information can be obtained independently (Article 9(2)(a)). Nor may a party disclose any views expressed or suggestions put forward by any party or by the mediator (Article 9(2)(b)), or any admissions made by the other party during the mediation proceedings (Article 9(2)(c)).

If the parties have not agreed in their contract on the application of the Mediation Rules and if one party requests the commencement of Mediation proceedings and the other party rejects this request, there will have been no agreement on the application of the Mediation Rules, including its confidentiality provisions. In such a situation, there is no guarantee that the unilateral request for mediation will be kept confidential.

Unless the parties agree otherwise, the mediator may not act as a judge, arbitrator, expert or representative of a party in any judicial, arbitration or similar proceedings relating to the dispute that is the subject of the mediation proceedings (Article 10(3)). Unless required by applicable law or unless the parties agree otherwise, the mediator shall not give testimony in any judicial, arbitration or similar proceedings relating to the dispute that is the subject of the mediation proceedings (Article 10(3)).

8. Limitation of Liability

Like the Arbitration Rules, the Mediation Rules contain a provision excluding the liability of the expert or neutral, the Centre, ICC and its employees, and the ICC national committees and groups and their employees and representatives, for any act or omission in connection with the mediation proceedings, except to the extent that such limitation of liability is prohibited by law (Article 10(5)).

9. Costs

The Centre will process a request for mediation only if it is accompanied by payment of the required registration fee (Article 2(2)). As indicated in the Appendix to the Rules, this registration fee currently amounts to US$ 2 000. This is not refundable, even if the mediation proceedings are not set in motion (Appendix, Fees and Costs, Article 1).

Upon receipt of a request for mediation, in the absence of an agreement by the parties to refer their dispute to mediation under the Rules, the Centre may request the party filing the request for mediation to pay a deposit to cover the administrative expenses of the Centre (Article 6(2)). Following the commencement of the mediation proceedings, the Centre shall request the parties to pay a deposit to cover the expected administrative expenses of the ICC and fees and expenses of the mediator (Article 6(3)). The Centre may stay or terminate the mediation proceedings if this amount is not paid (Article 6(4)). The parties are required to pay the deposit in equal shares, unless they have agreed otherwise in writing. If one of the parties fails to pay its share, the other party will be invited to substitute for the defaulting party (Article 6(6)). A party's other expenditure shall remain the responsibility of that party, unless otherwise agreed by the parties (Article 6(7)).

Upon termination of the proceedings, the Centre shall fix the total costs of the mediation proceedings and shall, as the case may be, reimburse the parties for any

excess payment or bill the parties for any remaining balance required pursuant to the Rules (Article 6(5)).

The ICC's administrative expenses for mediation are fixed at its discretion, depending on the tasks it carries out, and taking into account the amount in dispute. However, they may not exceed a maximum amount of US$ 30 000 (Appendix, Fees and Costs, Article 2(1)). Where the amount in dispute is not stated, the administrative expenses may be fixed by the Centre at its discretion, taking into account all the circumstances of the case, including indications regarding the value of the dispute, but they shall normally not exceed US$ 20 000 (Appendix, Fees and Costs, Article 2(2)). In exceptional circumstances, the Centre may fix the administrative expenses at a higher figure than that which would result from the scale, without however exceeding the maximum amount for administrative expenses foreseen in the scale (Appendix, Fees and Costs, Article 2(3)). If the parties or one of them with the acquiescence of the other requests to hold the mediation proceedings in abeyance, the Centre may request the payment of an abeyance fee which shall normally not exceed US$ 1 000 per party per year (Appendix, Fees and Costs, Article 2(4)).

Unlike the ICC Rules of Arbitration, the mediator's fees are not fixed on the basis of a scale. The mediator is remunerated on the basis of an hourly rate fixed by the Centre in consultation with the mediator and the parties (Appendix, Fees and Costs, Article 3(1)). It is stated in the Appendix that this hourly rate must be reasonable in amount and shall be determined in light of the complexity of the dispute, and any other relevant circumstances. In practice, the prospective mediator is invited to provide the Centre and the parties with his or her hourly rate for approval. However, if agreed by the parties and the mediator, the Centre may fix the mediator's fees on the basis of a single fixed fee for the whole proceedings rather than on the basis of an hourly rate (Appendix, Fees and Costs, Article 3(2)). It is stated in the Appendix that this single fee must be reasonable in amount and shall be determined in the light of the complexity of the dispute, the amount of work that the parties and the mediator anticipate will be required of the mediator, and any other relevant circumstances. In addition, the mediator is reimbursed for reasonable expenses fixed by the Centre (Appendix, Fees and Costs, Article 3(3)).

10. Prior ICC Arbitration

Parties are free to agree upon mediation even after a request for arbitration is filed. When the Secretariat of the ICC International Court of Arbitration notifies a request for arbitration to the respondent(s), the Secretariat also points out that the parties are free to settle their dispute amicably at any time during an arbitration and that the parties may wish to consider conducting an amicable dispute resolution procedure pursuant to the ICC Mediation Rules (see comments on Article 4(5) of the ICC Rules of Arbitration above).

When the parties in an arbitration agree to conduct a mediation pursuant to the ICC Mediation Rules, the filing fee paid for the arbitration proceedings shall be credited to the administrative expenses of the mediation, if the total administrative expenses paid with respect to the arbitration exceed US$ 7 500 (Appendix, Fees and Costs, Article 4).

The parties may agree that the arbitrator (sole arbitrator) or a member of the arbitral tribunal (usually the president) or all arbitrators assist the parties in negotiating a settlement of their dispute by acting as mediator. The parties may also agree that if the mediation does not lead to a settlement of all the issues in dispute in the arbitration,

then the mediator may return to the role of arbitrator and proceed to make or participate in the making of an award in the arbitration. This practice should be handled with care, so that it may not jeopardize the arbitral process and the enforceability of the arbitral award rendered by an arbitrator who has acted before as mediator in the same dispute. The key concerns are that during mediation information is being elicited from the parties which would normally not be part of the factual assertions of any of the parties and that such information could lead to 'extra-legal' psychological influences during the decision-making process. This problem is aggravated when information is provided during a private meeting (caucus)of a party with the mediator(s). Because of the potential risks to the integrity of the arbitral proceedings in some jurisdictions, Article 10(3) allows a mediator to act as arbitrator in the same dispute only when all the parties have consented thereto in writing ('Mediation Guidance Notes', ICC Publication No. 870, Paris, 2013, p. 15). In practice it is highly recommendable that the arbitral tribunal informs the parties of what such a change of procedure and the role from arbitrator to mediator implies and seek informed acceptance thereof from all parties before engaging in the mediated settlement efforts. Such acceptance should normally be made in writing and include an explicit waiver of future challenges of the proceedings for the sole reason that the arbitrator(s) acted as mediator(s) during an aborted settlement attempt. Notwithstanding, such change between the role of mediator and the role of arbitrator may nevertheless be appropriate when the parties, once a written settlement has been reached, wish to have it incorporated in an arbitral award by consent (see comments above) so as to ensure the enforcement of the settlement agreement.

In certain jurisdictions arbitrators frequently engage during a hearing in discussions aiming at facilitating settlement. In such cases the arbitral tribunal in most instances will share its provisional view of the strengths and weaknesses of the parties' respective positions in a hearing and engage in a 'learned' discussion with the party representatives. This resembles more to what is known as claims based early neutral evaluation and less to interest driven mediation, especially, because the tribunal only works with the information the parties have already submitted and does not purposefully elicit additional information. Furthermore, caucusing is normally not part of this approach. In our view the procedural rules of due process and fair and equal treatment of the parties remain applicable during such discussions. Therefore, and because the approach remains claims based this form of settlement facilitation is not to be confounded with mediation. It is argued that during such discussions the arbitral tribunal prematurely makes up its mind and prejudges the case before hearing all arguments and evaluating all evidence. How serious this argument is being taken appears to be a cultural issue. However, the described concerns should not be bluntly dismissed as irrelevant, wherefore also in such cases it is highly recommendable in international arbitration to first seek the parties' informed consent before embarking in this kind of evaluative settlement facilitation.

11. Value Added Tax (VAT)

Article 5(2) of the Appendix, Fees and Costs, states that amounts paid to the mediator do not include value-added tax or any other taxes, charges and imposts that may be applicable to the mediator's fees. It goes on to say that the parties have a duty to pay such taxes and charges. Their recovery is a matter for the mediator and the parties alone and does not involve ICC. Although not specifically mentioned, it may be understood that income tax is not covered by this provision.

Article 5(3) of the Appendix, Fees and Costs, sets out that any ICC administrative expenses may be subject to value added tax or charges of similar nature at the prevailing rate.

12. ICC as Appointing Authority

The International Chamber of Commerce is sometimes called upon to appoint a mediator in proceedings that are not conducted under the ICC Mediation Rules. In such case, the request to appoint a mediator will be treated in accordance with the ICC Rules for the Appointment of Experts and Neutrals (see Chapter 6 and Appendix 25 below) and shall only be processed if accompanied by a filing fee of US$ 3 000 per mediator (ICC Rules for the Appointment of Experts and Neutrals, Appendix II – Costs, Article 1). This filing fee is not refundable. For additional services, the ICC may at its discretion decide to fix ICC administrative expenses, which shall be commensurate with the services provided and which shall normally not exceed the maximum amount of US$ 10 000 (ICC Rules for the Appointment of Experts and Neutrals, Appendix II – Costs, Article 5).

D. ICC EXPERT RULES

The ICC Expert Rules offer users a broad range of options. Experts may be required in a number of different settings. An expert opinion may be required to settle a technical issue, such as the compliance of natural or manufactured products with contractual specifications, trade customs or other standards, as well as legal or financial and accounting issues. The circumstances in which expert opinions are needed also vary greatly. For instance, there may be times when parties agree to have an issue determined urgently during the performance of a contract. It may happen that a party needs an expert opinion to prepare litigation but has difficulty finding an appropriately qualified person or wishes to increase the expert's credibility by having him or her selected by an independent institution. In other cases, parties may need a neutral expert opinion during post-contractual amicable settlement negotiations, when they agree on the broad framework but not on the particular issue that they decide to submit to the expert.

Independent expert proceedings normally are used without relation to arbitration at an earlier stage of the parties' relationship. In certain areas, expert determination outside of a DRB (Dispute Resolution Board; see ICC Rules for Dispute Boards hereafter) is quite often used. One example among others are post Merger & Acquisition price adjustments.

Expertise also plays an important role in international arbitration procedures. Disputes referred to arbitration often involve technical issues. Arbitrators, who are usually lawyers, may find it necessary to seek an opinion from an expert with specialized technical or other knowledge (e.g. accounting, damage assessment, etc.). The ICC Rules of Arbitration explicitly allow arbitral tribunals to have recourse to experts in the course of arbitration proceedings (Article 25(4) of the ICC Rules of Arbitration).

The functions experts fulfill may vary depending on the legal system under which the parties have chosen to have their dispute settled. In the context of arbitration and litigation, experts are generally called upon to provide neutral opinions in civil law countries, whereas in common law countries parties often expect experts to act as witnesses and use experts' opinions to assert their respective cases. A slightly different,

An expert proposed under the Rules may be a physical person or a legal person, such as a company or a partnership (Article 4(1) of the Rules).

If the Centre is not able to identify an expert or neutral having all the attributes set out by the requesting party, the Centre may ask the requesting party whether it wishes the Centre to propose more than one expert or more than one neutral who between them have the requested attributes, or whether the attributes set out in the request for a proposal may be modified (Article 2(2) of the Rules).

The requesting party is free to decide whether or not to make use of the proposed expert's services. The Centre will not notify any other person of the request for a proposal, unless the requesting party specifically requests it to do so (Article 1(3) of the Rules).

Where, prior to the date of entry into force of the 2015 Rules, the parties have agreed to request the proposal of an expert or of a neutral pursuant to the earlier Rules for Expertise of the ICC, they shall be deemed to have agreed to make their request pursuant to the 2015 ICC Rules for the Proposal of Experts and Neutrals, unless any of the parties objects thereto, in which case the earlier Rules for Expertise of the ICC shall apply (Article 4(2) of the Rules).

Like the Arbitration and the Mediation Rules, the Rules for the Proposal of Experts and Neutrals contain a provision excluding the liability of the expert or neutral, the Centre, ICC and its employees, and the ICC national committees and groups and their employees and representatives, for any act or omission in connection with the proposal of an expert or neutral, except to the extent that such limitation of liability is prohibited by law (Article 4(3)). Article 4 of Appendix I – Statutes of the Standing Committee confirms the principle of the confidential nature of the work of the Standing Committee and of the Centre.

2. Appointment of Experts

Requests for the appointment of an expert or neutral by the ICC International Centre for ADR can be accepted only if the parties have previously agreed to have recourse to the Centre for this purpose or if the Centre is otherwise satisfied that there is a sufficient basis for appointing an expert or neutral (Article 1(1) of the ICC Rules for the Appointment of Experts and Neutrals). The request should therefore contain not only the same information as a request for proposal but also a copy of the parties' agreement for the appointment of an expert or neutral by the Centre and/or any other elements constituting the basis for the request (Article 1(2)). It must also be accompanied by a non-refundable payment of US$ 3 000 to cover administrative expenses, without which the request will not be processed (Article 4(1) of the Rules; Appendix II – Costs, Article 1).

If the parties do not act together by jointly requesting the appointment of an expert, or if they fail to agree on the expert's mission, the Centre will notify the request to the other party or parties and give it or them a time limit within which to submit any comments (Article 1(4) of the Rules). It is possible for parties to jointly propose a particular expert for confirmation by the President of the Standing Committee of the Centre (Article 3(2)). Every expert or neutral must be and remain impartial and independent of the parties involved in the proceedings, if any, unless otherwise agreed in writing by the parties (Article 3(3)). As with proposals, prospective experts and neutrals will first be asked to sign a statement of acceptance, availability, impartiality and independence, and to reveal to the Centre any facts or circumstances that could cause the parties to doubt their independence. The Centre in turn notifies the

parties of any such facts or circumstances and gives them a time limit within which to submit comments (Article 3(4)). The Centre checks the prospective expert's or the neutral's nationality, residence, training and experience, and the prospective expert's or neutral's availability and ability to conduct the work to be carried out (Article 3(2). If the Centre is not able to identify an expert or neutral having all the attributes set out by the requesting party, the Centre may ask the parties whether they wish the Centre to appoint more than one expert or neutral who between them have the requested attributes, or whether the attributes agreed upon by the parties may be modified (Article 3(2) of the Rules).

An expert appointed under the Rules may be a physical or a legal person, such as a company or a partnership (Article 5(1) of the Rules).

Any appointment of an expert or neutral by the Centre shall be made by the Centre either through an ICC national committee or group, or otherwise (Article 3(1)). The ICC International Centre for ADR is well equipped to respond quickly with an appointment. All appointments of experts and neutrals are made by the President of the Standing Committee of the ICC International Centre for ADR, after consultation with the members of the Committee (Appendix I – Statutes of the Standing Committee, Article 3(3)). The Centre may replace an expert if a party objects that the expert in question does not have the necessary attributes or is not fulfilling his or her functions or is not independent or impartial. Before making its decision, the Centre will consider the observations of the expert and the other party or parties (Article 3(5)).

Where, prior to the date of entry into force of the 2015 Rules, the parties have agreed to request the appointment of an expert or of a neutral pursuant to the earlier Rules for Expertise of the ICC, they shall be deemed to have agreed to make their request pursuant to the 2015 ICC Rules for the Appointment of Experts and Neutrals, unless any of the parties objects thereto, in which case the earlier Rules for Expertise of the ICC shall apply (Article 5(2) of the Rules).

Like the Arbitration and the Mediation Rules, the Rules for the Appointment of Experts and Neutrals contain a provision excluding the liability of the expert or neutral, the Centre, ICC and its employees, and the ICC national committees and groups and their employees and representatives, for any act or omission in connection with the appointment of an expert or neutral, except to the extent that such limitation of liability is prohibited by law (Article 5(3)). Article 4 of Appendix I – Statutes of the Standing Committee confirms the principle of the confidential nature of the work of the Standing Committee and of the Centre.

3. Administration of Expert Proceedings

The ICC International Centre for ADR is also available to administer expert proceedings, if the parties so wish. In this case, there must be an agreement between the parties to have recourse to the Centre for this purpose. The agreement may have been made in the parties' underlying contract or at a later stage, after a dispute has arisen. There may be times when a neutral opinion from an expert is required before the parties sign their contract. In most cases, however, parties will call upon an expert after a conflict has arisen, regardless of whether or not they have made an agreement to this effect.

The ICC Rules for the Administration of Expert Proceedings contain basic provisions applicable at different stages of the procedure, from the filing of a request for the administration of expert proceedings to the notification of the expert's report. The first step is therefore to file a request, which can only be accepted if there is an

agreement between the parties to have recourse to the Centre for the administration of expert proceedings, or the Centre is otherwise satisfied that a sufficient basis for administering expert proceedings exists (Article 1(1) of the Rules for the Administration of Expert Proceedings). For this reason, the request should contain not only the same information as a request for the proposal or for the appointment of an expert, but also a copy of the parties' agreement for the administration of expert proceedings by the Centre and/or any other elements upon which the request is based (Article 1(2)). The request must be accompanied by a payment of US$ 3 000 to cover administrative expenses, which is non-refundable and will be credited to the requesting party's or parties' portion of the deposit subsequently requested (Article 1(3) and Article 12(1) of the Rules; Appendix II – Costs, Article 1).

As soon as the Centre has received the initial payment and the required number of copies of the request, it informs the other party or parties of the request (Article 1(5)). At the outset of the proceedings, it will fix an advance on costs sufficient to cover the expert's fees and expenses and the Centre's administrative costs (Article 12(2) of the Rules; Appendix II – Costs, Article 2). The Centre may stay the proceedings until the advance on costs has been paid (Article 12(2)). The fees of the expert shall be calculated on the basis of the time reasonably spent by the expert in the administered expert proceedings, taking into account the diligence and efficiency of the expert and other relevant circumstances. These fees shall be based on an hourly rate fixed by the Centre when appointing or confirming the expert and after having consulted the expert and the parties. The hourly rate shall be reasonable in amount and shall be determined in light of the complexity of the work to be performed by the expert (Appendix II – Costs, Article 3(1)). The amount of reasonable expenses of the expert shall be fixed by the Centre (Appendix II – Costs, Article 3(2)). The Centre fixes the total cost of the proceedings once they have been completed (Article 12(4) of the Rules).

The first stage in the proceedings will be the appointment of an expert by the Centre (Article 3(2)). Alternatively, the parties may jointly nominate an expert for confirmation by the Centre (Article 3(1)). An expert must remain independent of the parties to the proceedings, unless they agree otherwise (Article 4(1)).

As with proposals and appointments, prospective experts will first be asked to sign a statement of acceptance, availability, impartiality and independence, and to reveal to the Centre any facts or circumstances that could cause the parties to doubt their independence. The Centre in turn notifies the parties of such facts or circumstances and gives them a time limit within which to submit comments (Article 3(3)). In confirming or appointing an expert, the Centre shall consider the prospective expert's nationality, residence, training and experience, and the prospective expert's availability and ability to conduct the expert proceedings in accordance with the Rules (Article 3(4)).

An expert appointed under the Rules may be a physical person or a legal person, such as a company or a partnership (Article 14(1) of the Rules).

The ICC International Centre for ADR is well equipped to respond quickly with an appointment or confirmation of an expert. All confirmations or appointments of experts are made by the President of the Standing Committee of the ICC International Centre for ADR, after consultation with the members of the Committee (Appendix I – Statutes of the Standing Committee, Article 3(2)).

Any appointment or confirmation of an expert or neutral of the Centre shall be made by the Centre either on the basis of proposal by an ICC national committee or group, or otherwise (Article 3(5) of the Rules). If the Centre is not able to identify an expert or neutral having all the attributes set out by the requesting party, the Centre

may ask the parties whether they wish the Centre to appoint more than one expert who between them have the requested attributes, or whether the attributes agreed upon by the parties may be modified (Article 3(5) of the Rules).

The Rules provide that experts will be replaced in the event of death, resignation or if they are unable to carry out their functions (Article 4(3)). An expert confirmed or appointed by the Centre shall be replaced upon acceptance by the Centre of a written request of all the parties (Article 4(4)). Also, the Centre may replace an expert if a party objects that the expert in question does not have the necessary qualifications or is not fulfilling his or her functions in accordance with the Rules or within any prescribed time limits. Before making its decision, the Centre will consider the observations of the expert and the other party or parties (Article 4(5)).

As soon as the expert has received the file from the Centre, and after having consulted the parties, the expert shall set out his or her mission in a written document (Article 6(2)). The document must include the following: (i) the names and addresses of the parties, (ii) the name(s) and address(es) of the expert or experts, (iii) a list of issues on which the expert shall make findings in the expert's report, (iv) the procedure to be followed by the expert, (v) the place where the expertise will be conducted, and (vi) the language in which the proceedings will be conducted (Article 6(2)). If the parties disagree on the expert's mission, the expert will have the final say (Article 6(4)). Once the document defining the expert's mission has been drawn up, the expert will prepare a procedural timetable for the conduct of the proceedings (Article 7).

The expert's role is to make findings within any time limits laid down in the document defining his or her mission, and after giving the parties an opportunity to make submissions (Article 8(1) of the Rules). Those findings will not be binding on the parties, unless they have agreed in writing that such findings shall be contractually binding upon them (Article 8(2)). The parties will find below some contract clauses recommended by the ICC, with which they can indicate whether or not they wish the expert's findings to be binding and whether they wish to foresee possible arbitration proceedings after the termination of the administered expert proceedings, in case the expert's findings have not resolved the dispute. Even if a party fails to participate in the proceedings, an expert can still make findings, provided that the party concerned has been given the opportunity to participate (Article 11(1)).

The administered expert proceedings are terminated with a written report of the expert, which the Centre notifies to the parties (Article 10). Before being signed, the expert's report is submitted in draft form to the Centre for approval, unless the parties have waived this requirement and the Centre considers such waiver to be appropriate (Article 9(2)). When scrutinizing the expert's report, the Centre may lay down modifications as to the form of the report and, without affecting the expert's liberty of decision, may also draw the expert's attention to points of substance (Article 9(1)). The rules allow the expert's report to be produced in judicial or arbitral proceedings in which all of the parties were also parties to the administered expert proceedings, unless the parties agree otherwise (Article 8(3)).

Where, prior to the date of entry into force of the 2015 Rules, the parties have agreed to refer their dispute to the administration of expertise proceedings pursuant to the earlier Rules for Expertise of the ICC, they shall be deemed to have agreed to make their request pursuant to the 2015 ICC Rules for the Administration of Expert Proceedings, unless any of the parties objects thereto, in which case the earlier Rules for Expertise of the ICC shall apply (Article 14(2) of the Rules).

3. History of the emergency arbitrator proceedings

☐ A. Summary of all procedural steps to date (e.g. Application, appointment of the emergency arbitrator, transmission of the file to the emergency arbitrator, timetable for the emergency arbitrator proceedings).

☐ B. Place of the emergency arbitrator proceedings (decision of the President if applicable).

☐ C. Indication of means used by the emergency arbitrator for notification of the Order (Article 6(5) Appendix V) and clarification that the Order was made by the emergency arbitrator in due time (Article 6(4) Appendix V).

☐ D. Time extension for rendering the Order.

4. Admissibility/jurisdiction

☐ A. Indication of the President's decisions regarding Article 1(5) of the Appendix V.

☐ B. Admissibility pursuant to Article 29(1): Emergency Measures are so urgent that they cannot await the constitution of the arbitral tribunal.

☐ C. Compliance of the Application with Articles 29(5) and 29(6):

- ☐ i. parties are signatories/successors to such signatories;
- ☐ ii. arbitration agreement(s) concluded after 1 January 2012;
- ☐ iii. no agreement to opt out;
- ☐ iv. no agreement to resort to other pre-arbitral procedure for urgent conservatory or interim measures.

☐ D. Any other issue regarding admissibility/jurisdiction.

5. Cost of the emergency arbitrator proceedings (Articles 7(3) and 7(4), Appendix V)

☐ i. US$ 40 000 or any amount as increased pursuant to Article 7(2), Appendix V.

☐ ii. Parties' legal costs.

☐ iii. Allocation of the costs of the emergency arbitrator proceedings.

6. Dispositive section, place of the emergency arbitrator proceedings, date, signature

☐ A. Order contains a dispositive section mentioning all decisions made (including the decision on admissibility and jurisdiction) and nothing more.

☐ B. Order deals with all Emergency Measures sought by the applicant (which should be stated clearly).

☐ C. State in the dispositive section of the Order that all other requests are rejected.

☐ D. Indication of any conditions for the Order, including appropriate security, if any (Article 6(7), Appendix V).

☐ E. After the dispositive section, add the date on which the Order is made and the signature in the following manner:

Place of the emergency arbitrator proceedings: City (Country)

Date: _____ Signature: _____

APPENDIX 9

SECRETARIAT'S NOTE TO THE ARBITRAL TRIBUNAL ON THE CONDUCT OF THE ARBITRATION (2012 RULES)

This Note is intended to provide the arbitral tribunal with information concerning the conduct of arbitration under the 2012 ICC Rules of Arbitration ("Rules"). It incorporates notes previously published separately on (i) personal and arbitral tribunal expenses, (ii) VAT, taxes, charges and imposts applicable to arbitrators' fees, and (iii) appointment, duties and remuneration of administrative secretaries. For previous versions of the Rules, contact the Secretariat of the International Court of Arbitration of the International Chamber of Commerce ("Secretariat").

Time limits under the Rules

1. Rapid resolution of arbitrations is a priority of the International Court of Arbitration of the International Chamber of Commerce ("Court"). Arbitrators should devote the time and effort necessary to conduct the arbitration within the requirements of the Rules. The Rules contain strict time limits, in particular:

- Terms of Reference: must be established within two months from the transmission of the file to the arbitral tribunal (Article 23(2)).
- Case management conference: must be convened with the parties when drawing up the Terms of Reference or as soon as possible thereafter (Article 24(1)).
- Procedural timetable: must be established during or immediately following the case management conference and transmitted to the Court and the parties (Article 24(2)).
- Closing of the proceedings: must be done as soon as possible after the last hearing concerning matters to be decided in an award, or the filing of the last authorised submissions concerning such matters (Article 27).
- Date for submission of draft awards: must be indicated to the Secretariat and the parties when the arbitral tribunal closes the proceedings in relation to the award (Article 27).
- Final award: must be rendered within the time limit fixed by the Court based upon the procedural timetable or, if the Court does not fix such time limit, within six months from the date of the last signature or notification of the approval of the Terms of Reference. (Article 30(1)). The Court expects sole arbitrators to

submit draft awards within two months and three-member arbitral tribunals to submit draft awards within three months of the last hearing concerning matters to be decided in such award or the filing of the last authorised submission concerning such matters, whichever is later (Article 27).

Conduct of the arbitration and techniques for controlling time and costs

2. The Rules require the arbitral tribunal and the parties to make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute (Article 22(1)).

3. In order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties (Article 22(2)). The arbitral tribunal should consider the case management techniques referred to in Appendix IV to the Rules and the report of the ICC Commission on Arbitration and ADR entitled *Controlling Time and Costs in Arbitration*, available on the ICC website.

4. Although extensions of the time limits indicated above may be granted by the Court, in setting an arbitrator's fees, the Court considers the diligence and efficiency of the arbitrator, the time spent, the rapidity of the proceedings, the complexity of the dispute and the timeliness of the submission of the draft award when fixing arbitrators' fees (Article 2(2) of Appendix III).

5. The Court can replace an arbitrator when it decides that such arbitrator is not fulfilling his or her functions within the prescribed time limits (Article 15(2)).

ICC International Centre for ADR ("Centre")

6. Parties are free to settle their dispute amicably prior to or at any time during an arbitration. Where appropriate, arbitrators may wish to remind the parties about the Mediation Rules of the International Chamber of Commerce, which, in addition to mediation, also allow for the use of other amicable settlement procedures. The Centre can also assist the parties in finding a suitable mediator.

7. If the assistance of an expert is required, the Centre can, upon request, propose experts from a wide range of specializations. This service is provided free of charge to arbitrators.

8. Further information is available from the Centre at +33 1 49 53 30 53 or adr@iccwbo.org or www.iccadr.org.

Replacement of arbitrators

9. When an arbitrator is replaced, the reconstituted arbitral tribunal shall invite the parties to comment and then determine if and to what extent prior proceedings shall be repeated (Article 15(4)).

10. When fixing the arbitral tribunal's fees, the Court generally deducts the fees of the previous arbitrator from the fees of the replacement arbitrator.

11. Subsequent to the closing of the proceeding, taking into account the views of the remaining arbitrators and the parties, instead of replacing an arbitrator who has died or been removed by the Court pursuant to Article 15(1) or 15(2), the Court may

decide, when it considers it appropriate, that the remaining arbitrator shall continue the arbitration (Article 15(5)).

ICC Award Checklist ("Checklist")

12. The Checklist is intended to provide arbitrators with guidance when drafting awards and is not an exhaustive, mandatory or otherwise binding document. It should not be thought to reflect the opinion of the members of the Court or its Secretariat, but is intended to facilitate the arbitrators' mission. It may not be published or used for any purpose other than the conduct of ICC arbitrations. The Checklist is not exhaustive of issues that may be raised by the Court under Article 33 of the Rules.

Originals of Terms of Reference and Awards

13. An original of the Terms of Reference signed by the parties and the arbitral tribunal must be provided to each party, each member of the arbitral tribunal and the Secretariat. The arbitral tribunal must verify with the parties the number of originals they need. When the Terms of Reference are submitted to the Court for approval (Article 23(3)), the necessary number of originals must be prepared.

14. Similarly, each party, each arbitrator and the Secretariat receive an original of the awards signed by the arbitrators after approval of the drafts by the Court. The arbitral tribunal must thus provide the Secretariat with the required number of originals (unbound) to be notified to the parties.

Advance on costs

15. The advance on costs is intended to cover the arbitral tribunal's fees and arbitration related expenses, as well as the ICC administrative expenses (Article 36 and Article 1(4) of Appendix III).

16. The advance on costs may be readjusted by the Court if the development of the arbitration so requires (Article 36). The arbitral tribunal should inform the Secretariat of any developments in the value and complexity of the arbitration or any other issues it considers relevant.

17. The arbitral tribunal should clarify with the parties whether they will be directly responsible for the costs of any hearing or whether such costs should be included in the arbitration-related expenses. If hearing costs will be included in the arbitration-related expenses, the arbitral tribunal should provide the Secretariat with an estimate of such costs. Thereafter, the Secretariat will examine whether it is appropriate to invite the Court to reconsider the advance on costs.

The arbitral tribunal's fees

18. The arbitral tribunal is encouraged to consult the Cost Calculator on the ICC website (www.iccarbitration.org). Fees are fixed exclusively by the Court. Separate fee arrangements between the parties and arbitrators are not permitted.

19. The Court fixes arbitrators' fees at the end of the arbitration, although advances on fees may be granted upon completion of concrete steps in the arbitration.

20. In setting an arbitrator's fees, the Court considers the diligence and efficiency of the arbitrator, the time spent, the rapidity of the proceedings, the complexity of the dispute

and the timeliness of the submission of draft award, so as to arrive at a figure within the time limits specified or, in exceptional circumstances (Article 37(2)), at a figure higher or lower than those limits (Article 2(2) of Appendix III to the Rules). The Court does not consider the arbitrator's usual hourly rates or remuneration.

21. When there is a three-member arbitral tribunal, arbitrators should consider the time spent and the work done by each arbitrator and inform the Secretariat of their opinion of a fair and appropriate allocation of the fees for each arbitrator. Unless the Secretariat is advised in writing that the arbitral tribunal has agreed to a different allocation, the Court normally fixes the arbitrators' fees so that the president receives 40% of the total fees and each co-arbitrator receives 30%. The Court may decide upon a different allocation based on the circumstances. Unless otherwise agreed, the same allocation will apply to any advances on fees granted by the Court.

22. Under French tax laws, the ICC is required to declare the amount of fees, including advances on fees, paid to any arbitrator during each calendar year, as well as any expenses reimbursed during the same period.

Personal and arbitral tribunal expenses (as of 1 September 2013)

How to submit a request for expenses

23. The Secretariat will reimburse expenses and pay *per diem* allowances only upon receipt of a request in a readily comprehensible form including a cover page listing each payment claimed and the reason for it. Expense reimbursement claims must be supported by original receipts. This is necessary so that the Secretariat can carry out its accounting responsibilities and, from time to time, provide the parties with comprehensive statements of expenses incurred by arbitrators.

When to submit a request for expenses

24. Arbitrators should submit their requests for the reimbursement of expenses and/or the payment of *per diem* allowances, together with any required supporting documentation as specified below, as soon as possible after expenses are incurred. This will help ensure that the advance on costs paid by the parties is adequate to cover the costs of the arbitration.

25. All requests for the reimbursement of expenses and/or the payment of *per diem* allowances relating to any period prior to the submission of the draft final award must be provided at the latest when the draft final award is submitted to the Secretariat. Three-member arbitral tribunals should co-ordinate their submission of requests for reimbursement of expenses and/or payment of *per diem* allowances in order to ensure that they reach the Secretariat no later than the draft final award. Requests for the reimbursement of expenses and/or the payment of *per diem* allowances submitted after the Court has approved the final award will not be taken into account by the Court when fixing the costs of the arbitration and will not be paid save in exceptional circumstances as decided by the Secretary General.

26. In the event of the withdrawal of all claims or the termination of the arbitration before the rendering of a final award, all requests for the reimbursement of expenses and/or the payment of *per diem* allowances must be submitted within the time limit granted by the Secretariat. Requests for the reimbursement of expenses and/or the

payment of *per diem* allowances submitted after the date the Court fixes the costs of arbitration will not be taken into account by the Court and will not be paid.

Travel expenses

27. If required to travel for the purpose of an ICC arbitration, an arbitrator will be reimbursed for the actual travel expenses he or she incurs travelling from and returning to his or her usual place of business as indicated on the *curriculum vitae* filed for the relevant ICC arbitration. Travel expenses will be reimbursed in accordance with paragraphs 28 to 30.

28. A request for reimbursement of travel expenses must be accompanied by the originals of all receipts claimed or other proper substantiation if receipts are unavailable. Travel expenses that are not fully and comprehensively justified will not be reimbursed.

29. The reimbursement of travel expenses is subject to the following strict limits:
   (a) Air travel: an airfare equivalent to the applicable standard business class airfare.
   (b) Rail travel: the applicable first class train fare.
   (c) Transport to and from airport(s) and/or train station(s): the applicable standard taxi fare.
   (d) Travel by private car: a flat rate for every kilometre driven, plus all necessary actual parking and toll charges incurred. The flat rate is US$ 0.80 per kilometre.

30. Except for expenses claimed pursuant to paragraph 29(d) above, travel expenses will, where possible, be reimbursed in the same currency in which they were incurred. An arbitrator may alternatively request reimbursement in US dollars provided that the request is accompanied by a statement of the US dollar amount and evidence of the exchange rate (for example, a print out from www.oanda.com). The date for the currency conversion should be the date the expense was incurred.

Per diem allowance

31. In addition to travel expenses, an arbitrator will be paid a flat-rate *per diem* allowance in accordance with paragraphs 32 to 35 for every day of an ICC arbitration that he or she is required to spend outside his or her usual place of business as indicated on the *curriculum vitae* filed for the relevant ICC arbitration. The arbitrator is not required to submit receipts in order to claim the *per diem* allowance, but simply evidence of the travel for purposes of the arbitration.

32. If the arbitrator is not required to use overnight hotel accommodation, the flat-rate *per diem* allowance is US$ 400.

33. If the arbitrator is required to use overnight hotel accommodation, the flat-rate *per diem* allowance is US$ 1,200.

34. The applicable *per diem* allowance is deemed to cover fully all personal living expenses of whatever nature and of whatever actual value (other than travel expenses) incurred by an arbitrator. In particular, the applicable *per diem* allowance is deemed to cover, among other expenses, the total cost of:
   - Accommodation (except where paragraph 32 above applies)
   - Meals
   - Laundry/ironing/dry cleaning and other housekeeping or similar services

- Inner-city transport
- Telephone calls, faxes, emails and other means of communication
- Gratuities

35. For the avoidance of doubt, no *per diem* allowance will be paid in respect of time spent by an arbitrator travelling to or from the relevant destination.

36. Since the *per diem* allowance is deemed to cover all personal living expenses incurred by an arbitrator while outside his or her usual place of business on ICC arbitration business, the Secretariat will not reimburse expenses over and above the applicable *per diem* allowance under any circumstances.

General office expenses and courier charges

37. General office expenses and overheads incurred in the ordinary course of business by an arbitrator or an arbitral tribunal in connection with an ICC arbitration will not be reimbursed. However, an arbitrator or an arbitral tribunal may request to be reimbursed at cost for any courier, photocopying, facsimile or telephone charges incurred for the purposes of an ICC arbitration, provided such request is accompanied by detailed receipts.

Advance payments on expenses

38. An arbitrator may request an advance payment of travel expenses and/or the applicable *per diem* allowance in accordance with paragraphs 27 to 36 above. If an advance is granted, the arbitrator must subsequently submit the relevant supporting documentation to the Secretariat, including all receipts and a statement of working days and nights spent outside of his or her usual place of business on ICC arbitration business.

VAT, taxes, charges and imposts applicable to arbitrators' fees (as of 15 October 2010)

39. Amounts paid to an arbitrator do not include any possible value added taxes (VAT) or other taxes or charges and imposts applicable to the arbitrator's fees (Article 2(13) of Appendix III). Parties have a duty to pay any such taxes or charges; however, the recovery of any such charges or taxes is a matter solely between the arbitrator and the parties.

40. ICC nonetheless offers arbitrators subject to VAT and other taxes, charges and imposts (hereinafter "VAT"), who expressly request in writing, a service allowing them to have the funds corresponding to their estimate of the VAT due on their fees and expenses (hereinafter "fees") administered by ICC.

41. This service is totally separate from, and has no effect on, the procedure for paying advances as set out in the Rules. Should the parties fail to pay the VAT on the arbitrators' fees, this cannot be invoked by the arbitrators before the Court, for instance as a ground for suspending the arbitral proceedings.

42. Any arbitrator subject to VAT may take advantage of this service. ICC acts as the 'depositary' of the funds, receives funds from parties who have been instructed to this effect by an arbitrator, and makes the payments corresponding to the VAT at the arbitrator's request.

43. The initiative of requesting that a VAT account be opened, of calling advances for the payment of VAT on fees ("VAT advance") and paying arbitrators on the basis of the amounts deposited lies solely with the arbitrators.

44. This service is available to arbitrators from any country.

45. The VAT advance is only administered in US dollars and does not yield interest for the parties or the arbitrators.

46. It is the arbitrators' sole responsibility to ensure that the procedure described below complies with the tax law provisions applicable to the exercise of their profession as arbitrators, including the payment of their fees. Arbitrators are encouraged to check the basis on which they should calculate the amount of VAT due.

47. The ICC acts exclusively as depositary and is not in a position to advise the arbitrators on any tax law.

48. *Procedure*

Step 1: Request for VAT account
Any arbitrator wishing to use this service shall inform the Secretariat in writing and request ICC to act as depositary for the sums paid by the parties as an advance on the VAT due on the arbitrators' fees.

Step 2: Estimation of amounts
The arbitrator determines the amount of VAT on his or her fees in light of the rules that apply at the place where he or she is taxable.

Arbitrators may use the Cost Calculator on the ICC website (www.iccarbitration.org) to estimate the amount of the fees that may be payable. They are however reminded that the proportions in which the total amount of the fees is divided between the members of the arbitral tribunal (40% for the President, 30% for each co-arbitrator) are given merely as a guide and may be changed by the Court.

If, in the course of an arbitration, the amount of the advance is increased pursuant to a decision of the Court, this step may be repeated.

Step 3: Disclosure of the estimated amounts of VAT
The arbitrator fixes a time limit in this respect and requests the parties:

- to pay the VAT advance in US dollars
- bear any banking charges associated with the payment
- use the following banking instructions:

Beneficiary (*Account holder*):	International Chamber of Commerce 33–43 avenue du Président Wilson 75116 Paris, France
Bank of Beneficiary:	UBS AG Bahnhofstrasse 45 8098 Zurich Switzerland
IBAN:	CH44 0024 0240 2245 3463 G
Code SWIFT/BIC:	UBSWCHZH80A
Reference of the case:	*****/***/VAT Arbitrators Claimant(s)/Respondent(s)

The payment must originate from a party to the case in which the payment has been requested.

The arbitrator must also inform the Secretariat of the substance of this request.

If the president calls for a VAT advance on behalf of the members of the arbitral tribunal subject to VAT, he or she shall inform the Secretariat of the breakdown of this advance arbitrator-by-arbitrator.

Step 4: Acknowledgement of payments and administration

The Secretariat confirms to the arbitrator and the parties the receipt of the amounts paid by the parties.

In the absence of communication to the arbitrator by the Secretariat of any receipt of payments on the advance on VAT made by the parties, it is up to the arbitrator to renew his or her request to the parties and to fix a time limit in this respect.

ICC administers the VAT advance on behalf of the arbitrator.

Step 5: Payments to the arbitrator

When drawing up his or her invoice, the arbitrator requests ICC to pay the amount corresponding to the VAT on the fees due by the parties. This applies at the time of the final award, but also in the event that the Court decides to pay an advance on fees to arbitrators who reside in countries where, under local tax law, VAT becomes payable to the tax authorities when fees are paid in advance.

Payments are made to the arbitrators by ICC on behalf of the parties and within the limits of the VAT advances already provided.

Step 6: Balance of account

At the end of the arbitration proceedings the Secretariat seeks instructions from the arbitrator for closing the VAT advance. On the basis of the information provided by the arbitrator and in accordance with his or her instructions, the Secretariat closes the VAT account and returns to the parties any amounts remaining from the VAT advance deposited with ICC.

After advising the arbitrator, ICC may close the account if no balance remains. The account will be closed even if the parties have not paid any additional VAT advance requested by the arbitrator.

Appointment, duties and remuneration of administrative secretaries (as of 1 August 2012)

49. The ICC Rules of Arbitration ("Rules") are silent as to the appointment, duties and remuneration of arbitral tribunal administrative secretaries or other assistants ("Administrative Secretaries"). This Note replaces the Secretariat's previous note on the same subject. It sets out the policy and practice of the ICC International Court of Arbitration ("Court") and its Secretariat regarding the engagement of Administrative Secretaries by arbitral tribunals. It applies with respect to any Administrative Secretary appointed on or after 1 August 2012. Any arbitral tribunal proposing to appoint an Administrative Secretary shall provide the parties with a copy of this Note.

Appointment

50. Administrative Secretaries can provide a useful service to the parties and arbitral tribunals in ICC arbitration. While principally engaged to assist three-member arbitral tribunals, an Administrative Secretary may also assist a sole arbitrator. Administrative Secretaries can be appointed at any time during an arbitration.

51. If an arbitral tribunal envisages the appointment of an Administrative Secretary, it shall consider carefully whether in the circumstances of that particular case such an appointment would be appropriate.

52. Administrative Secretaries must satisfy the same independence and impartiality requirements as those which apply to arbitrators under the Rules. ICC staff members are not permitted to serve as Administrative Secretaries.

53. There is no formal process for the appointment of an Administrative Secretary. However, before any steps are made to appoint an Administrative Secretary, the arbitral tribunal shall inform the parties of its proposal to do so. For this purpose, the arbitral tribunal shall submit to the parties the proposed Administrative Secretary's *curriculum vitae*, together with a declaration of independence and impartiality, an undertaking on the part of the Administrative Secretary to act in accordance with the present Note and an undertaking on the part of the arbitral tribunal to ensure that this obligation on the part of the Administrative Secretary shall be met.

54. The arbitral tribunal shall make clear to the parties that they may object to such proposal and an Administrative Secretary shall not be appointed if a party has raised an objection.

Duties

55. Administrative Secretaries act upon the arbitral tribunal's instructions and under its strict supervision. The arbitral tribunal shall, at all times, be responsible for the Administrative Secretary's conduct in relation to the arbitration.

56. An Administrative Secretary may perform organizational and administrative tasks such as:

- transmitting documents and communications on behalf of the arbitral tribunal;
- organizing and maintaining the arbitral tribunal's file and locating documents;
- organizing hearings and meetings;
- attending hearings, meetings and deliberations; taking notes or minutes or keeping time;
- conducting legal or similar research; and
- proof-reading and checking citations, dates and cross-references in procedural orders and awards as well as correcting typographical, grammatical or calculation errors.

57. Under no circumstances may the arbitral tribunal delegate decision-making functions to an Administrative Secretary. Nor should the arbitral tribunal rely on the Administrative Secretary to perform any essential duties of an arbitrator.

58. The Administrative Secretary may not act, or be required to act, in such a manner as to prevent or discourage direct communications among the arbitrators, between the arbitral tribunal and the parties, or between the arbitral tribunal and the Secretariat.

59. A request by an arbitral tribunal to an Administrative Secretary to prepare written notes or memoranda shall in no circumstances release the arbitral tribunal from its duty personally to review the file and/or to draft any decision of the arbitral tribunal.

60. When in doubt about which tasks may be performed by an Administrative Secretary, the arbitral tribunal or the Administrative Secretary should contact the Secretariat.

Remuneration

61. With the exception of the Administrative Secretary's reasonable personal disbursements as provided under point 64, the engagement of an Administrative Secretary should not pose any additional financial burden on the parties. Accordingly, the arbitral tribunal may not look to the parties for the reimbursement of any costs associated with an Administrative Secretary beyond the scope prescribed in this Note.

62. Any remuneration payable to the Administrative Secretary shall be paid by the arbitral tribunal out of the total funds available for the fees of all arbitrators, such that the fees of the Administrative Secretary will not increase the total costs of the arbitration.

63. In no circumstances should the arbitral tribunal seek from the parties any form of compensation for the Administrative Secretary's activity. Direct arrangements between the arbitral tribunal and the parties on the Administrative Secretary's fees are prohibited. Since the fees of the arbitral tribunal are established on an *ad valorem* basis, any compensation to be paid to the Administrative Secretary is deemed to be included in the arbitral tribunal's fees.

Disbursements

64. The arbitral tribunal may seek reimbursement from the parties of the Administrative Secretary's justified reasonable expenses for hearings and meetings.

APPENDIX 10

SECRETARIAT'S NOTE ON ADMINISTRATIVE ISSUES IN PROCEEDINGS UNDER THE 2012 ICC RULES OF ARBITRATION

Communications

1. Pursuant to Article 3(1) of the ICC Rules of Arbitration ("Rules"), parties and arbitrators must send copies of all written correspondence directly to all other parties, arbitrators and the Secretariat of the International Court of Arbitration of the International Chamber of Commerce ("Secretariat").

2. The Secretariat will generally send correspondence by email. As such, parties, their counsel and prospective arbitrators must provide the Secretariat with their email addresses.

3. Pursuant to the Rules, the Request for Arbitration (Article 4), the Answer and any counterclaims (Article 5), and any Request for Joinder (Article 7, 2012 Rules) must be sent to the Secretariat in hard copy as well as in electronic form. To the extent possible, the Secretariat should be provided with any other written documents in electronic form only, even in cases where the arbitral tribunal also requests hard copies.

Dispatch of materials to the ICC and customs fees

3. Materials sent to the ICC (correspondence, submissions, binders, tapes, CDs, etc.) must be sent exclusively as "Documentation". No other description should be indicated on the transportation slip or waybill. Generally, documentation is not subject to customs tax. Other material may be subject to tax, which varies according to the origin, content and weight of such material. Customs fees, if any, will increase the costs of arbitration.

Representation

4. If the parties foresee being represented by counsel, they must inform the Secretariat of the name and address of such counsel.

ICC International Centre for Expertise

5. If a party requires the assistance of an expert, the ICC International Centre for Expertise ("Centre") can, upon request, propose experts from a wide range of specializations.

The fee for this service is US$ 2 500. Further information is available from the Centre at +33 1 49 53 30 53 or expertise@iccwbo.org or www.iccexpertise.org.

ICC Hearing Centre

6. The ICC Hearing Centre in Paris (France) is an integral part of ICC Services, a wholly-owned affiliate of the ICC. The ICC Hearing Centre offers flexible packages and a range of specialized facilities and services for hearings and meetings. Further information is available on our website at www.icchearingcentre.org.

7. By reserving a room at the ICC Hearing Centre for an ICC arbitration, parties and arbitrators accept that their contact details be communicated by the Secretariat to the ICC Hearing Centre for the needs of this booking only.

Post-arbitration services

8. Disbursements in connection with services requested after this arbitration is closed may be charged to the requesting party.

APPENDIX 11

SECRETARIAT'S ICC AWARD CHECKLIST (1998 AND 2012 RULES)

Disclaimer: This Checklist is intended to provide arbitrators acting under the ICC Rules of Arbitration with guidance when drafting Awards. It does not constitute an exhaustive, mandatory or otherwise binding document. It should not be thought to reflect the opinion of the members of the International Court of Arbitration of the International Chamber of Commerce or of its Secretariat, but is simply intended to facilitate the arbitrators' mission. Moreover, this Checklist is not exhaustive of issues that may be raised by the ICC Court.

Case No.: _____

1. General

☐ A. ICC case reference number mentioned in full on front page.

☐ B. Award clearly identified in its title as interim, partial, final or award by consent.

☐ C. Paragraphs numbered.

☐ D. Pages numbered.

☐ E. Table of contents included (unless award is short and does not need one).

☐ F. Abbreviations defined and used consistently.

☐ G. Translations of quotations in languages other than the language(s) of the arbitration.

☐ H. Indication of the applicable version of the ICC Rules of Arbitration (e.g. 1998 / 2012).

2. Identification of the parties, their representatives and the arbitrator(s)

☐ A. Parties' complete addresses and correct names. Clarify the identity of any parties to the arbitration that are different from the parties to the contract(s).

☐ B. Addresses of parties' representatives.

☐ C. Arbitrators' addresses.

3. Arbitration and choice-of-law agreements

☐ A. Quotation of entire arbitration agreement(s).

☐ B. Record of any agreed amendments to the arbitration agreement(s).

☐ C. Precise indication of the parties to and/or signatories of the arbitration agreement(s).

☐ D. Quotation of relevant choice-of-law clause.

4. History of the arbitral proceedings

☐ A. Summary of all procedural steps to date (e.g. Request for Arbitration, Answer, Terms of Reference, date of the case management conference (Article 24, 2012 Rules), procedural timetable, parties' submissions, hearing).

☐ B. Indication of the ICC Court's decisions regarding (if applicable):

- ☐ i. Article 6(2) (1998 Rules) / 6(4) (2012 Rules);
- ☐ ii. Place of arbitration;
- ☐ iii. Number of arbitrators.

☐ C. Description of the constitution of the arbitral tribunal (including confirmation or appointment decisions).

☐ D. If applicable, reference to the parties' agreement on an alternative method of nominating or appointing the president of the Arbitral Tribunal.

☐ E. Date of closing of the proceedings under Article 22(1) (1998 Rules) / 27 (2012 Rules) (for every award).

☐ F. Indication of the time limit for rendering the final award, including any extensions granted by the Court under Article 24(2) (1998 Rules) / 30(2) (2012 Rules) and the date on which it was granted.

It is recommended that all extensions granted by the Court and the date(s) on which they were granted be specified, especially when Paris is the place of arbitration.

☐ G. If there has been a prior Award, no need to repeat the procedural history set out in the prior Award, but simply:

- ☐ i. restate the information mentioned in sections 1, 2 and 3 above;
- ☐ ii. refer to the previous Award, the date on which it was notified to the parties by the Secretariat, the issues it decided, and the fact that its procedural background is incorporated by reference into the present Award;
- ☐ iii. describe the procedure subsequent to that set out in the previous Award.

5. Jurisdiction

☐ Wherever jurisdiction has been contested, or there is a non-participating party, or the ICC Court has made an Article 6(2) (1998 Rules) / 6(4) (2012 Rules) decision, the award should ordinarily include the Arbitral Tribunal's decision on jurisdiction or state why it is not necessary.

6. Costs of the Arbitration (Final Awards only)

☐ A. Costs of arbitration fixed by the ICC Court and each party's legal costs dealt with separately in both the body of the Award and in the dispositive section.

☐ B. Reference to Article 37 (1998 Rules) / 37(2012 Rules) and to the discretion to allocate costs of arbitration (Article 37(5), 2012 Rules) fixed by the Court and parties' legal costs, and fix the amount to be borne by each party.

7. Dispositive section, place of arbitration, date, signature

☐ A. Award contains a dispositive section mentioning all orders (including the decision on jurisdiction, if applicable) and nothing more.

☐ B. Award deals with all of the issues and parties' claims (which should be stated clearly and precisely somewhere in the Award and compared to the Terms of Reference), including the parties' most recent requests for relief, and decides nothing more than those issues and claims (state clearly if certain claims are reserved for one or more future Awards).

☐ C. State in the dispositive section of Final Awards that all other requests and claims are rejected (unless the nature of the Award makes this unnecessary).

☐ D. After the dispositive section, add the date on which the Award is made and the signatures in the following manner:

Place of arbitration: City (Country)

Date: __/__/____ _____*[date must be later than the Court session at which the Award was approved and not earlier than when the last arbitrator signs]*

Signature(s):_____

Article 35 of the 2012 ICC Rules of Arbitration provides:

1. On its own initiative, the arbitral tribunal may correct a clerical, computational or typographical error, or any errors of similar nature contained in an award, provided such correction is submitted for approval to the Court within 30 days of the date of such award.

2. Any application of a party for the correction of an error of the kind referred to in Article 35(1), or for the interpretation of an award, must be made to the Secretariat within 30 days of the receipt of the award by such party, in a number of copies as stated in Article 3(1). After transmittal of the application to the arbitral tribunal, the latter shall grant the other party a short time limit, normally not exceeding 30 days, from the receipt of the application by that party, to submit any comments thereon. The arbitral tribunal shall submit its decision on the application in draft form to the Court not later than 30 days following the expiration of the time limit for the receipt of any comments from the other party or within such other period as the Court may decide.

3. A decision to correct or to interpret the award shall take the form of an addendum and shall constitute part of the award. The provisions of Articles 31, 33 and 34 shall apply *mutatis mutandis*.

Furthermore Article 2(10) of Appendix III provides:

In the case of an application under Article 35(2) of the Rules [...], the Court may fix an advance to cover additional fees and expenses of the arbitral tribunal and additional ICC administrative expenses and may make the transmission of such application to the arbitral tribunal subject to the prior cash payment in full to the ICC of such advance. The Court shall fix at its discretion the costs of the procedure following an application [...], which shall include any possible fees of the arbitrator and ICC administrative expenses, when approving the decision of the arbitral tribunal.

Article 29(1) (1998 Rules) / 35(1) (2012 Rules)

If the arbitral tribunal decides to correct the award on its own initiative, it should inform the parties and the Secretariat of its intention to do so and grant the parties a short time limit to comment. The arbitral tribunal should submit the draft Addendum to the Court for scrutiny within 30 days of the date of the award.

Article 29(2) (1998 Rules) / 35(2) (2012 Rules)

Upon receipt of an Article 29(2) (1998 Rules) / 35(2) (2012 Rules) application, the Secretariat may submit the matter to the Court for it to consider whether, in view of the circumstances of the case, an advance to cover additional fees and expenses of the arbitral tribunal and additional ICC administrative expenses (Article 2(10), Appendix III, 2012 Rules) is warranted. Should the Court fix an additional advance, such advance must be paid before the Secretariat will transmit the application to the arbitral tribunal. Otherwise, the Secretariat will transmit the application directly to the arbitral tribunal. As such, the arbitral tribunal should not address an application until the Secretariat transmits it to them.

If the Court did not ask for an advance on costs at the time when the application was submitted to the Secretariat, it can, in exceptional circumstances, take a decision on costs at the time of the scrutiny and make the notification of the Addendum or the

Decision contingent upon the payment by one or both parties of the costs fixed by the Court.

Upon receipt of the application from the Secretariat the arbitral tribunal should grant the other parties a short time limit, normally not exceeding 30 days, for comments.

The arbitral tribunal should then submit its draft decision to the Court for scrutiny not later than 30 days following the expiration of the time limit granted for comments. Should the arbitral tribunal require an extension of such time limit, it should inform the Secretariat.

Depending upon the arbitral tribunal's decision, such decision can take one of four forms:

1. *Addendum*: if the arbitral tribunal decides to correct or interpret the award, as this shall constitute part of the award.
2. Decision: if the arbitral tribunal decides that the award does not need to be corrected or interpreted and does not take a decision on costs.
3. *Addendum* and Decision: if there are two or more applications and the arbitral tribunal decides to correct or interpret the award on the basis of one or more, but not all applications.
4. Decision and *Addendum* on Costs: if the arbitral tribunal decides that the award does not need to be corrected or interpreted but takes a decision on costs related to the application.

General considerations

All decisions should contain the reasons upon which they are based (Article 25(2) (1998 Rules) / 31(2) (2012 Rules)). They should also include operative conclusions ("*dispositif*") or a finding that the application is rejected. For further guidance about what should be included in the draft decision, see the ICC Checklist on Correction and Interpretation of Arbitral Awards. The Court will scrutinise the draft decision (Article 27 (1998 Rules) / 33 (2012 Rules)), and upon approval thereof it should be signed by the arbitral tribunal (Article 25(1) and (3) (1998 Rules) / 31(1) and (3) (2012 Rules)) and sent to the Secretariat for notification to the parties (Article 28 (1998 Rules) / 34 (2012 Rules).

In all cases the arbitral tribunal must first ensure that mandatory rules of law at the place of arbitration do not exclude the correction or interpretation of an award by the tribunal.

Where the relevant national law or court practice provide specific circumstances in which an arbitral tribunal may render certain decisions other than corrections or interpretation regarding an award which had been approved and notified, such situations shall be treated in the spirit of this Note.

or two years but an arbitration to determine responsibility for delays and defects can take as long as three to four years. In light of the concerns of users, the ICC decided to address time- and cost-efficiency in arbitration head-on.

As a first step, in 2007, the ICC Commission on Arbitration (as it was then known) published its report on controlling time and costs in arbitration. Prior research covering a wide range of ICC cases had showed that on average:

- 82% of the costs of an arbitration were party costs, including lawyers' fees and expenses, expenses related to witness and expert evidence, and other costs incurred by the parties for the arbitration;
- 16% of the costs covered arbitrators' fees and expenses; and
- 2% of the costs covered ICC administrative expenses.

It followed that, to minimize costs, special emphasis needed to be placed on reducing the costs connected with the parties' presentation of their cases. The report developed a series of suggested concrete measures for each phase of the arbitration that can be used to reduce time and cost.

Then, in 2009, the Commission began its revision of the ICC Rules of Arbitration. The revised Rules came into force on 1 January 2012. One of the guiding principles for the revision was to improve the time- and cost-efficiency of arbitration. Among the provisions directed to that end is the requirement of an early case management conference during which the parties and the tribunal can establish an appropriate, time- and cost-effective procedure for the arbitration. The suggestions in the 2007 report, many of which are now included as an appendix to the Rules, may be used for that purpose.

The present guide is a continuation of that effort and is designed to help party representatives implement the new provisions and make appropriate decisions for effective case management. The guide will also assist outside counsel in working with party representatives to ensure well-planned and well-managed proceedings.

As noted above, arbitration rules permit flexibility and do not specify precisely how an arbitration is to be conducted. For example, there is nothing in the ICC Rules of Arbitration about the number of rounds of briefs, document production, the examination of witnesses, oral argument, post-hearing memoranda or bifurcation. The open-ended nature of the Rules enables the parties and the arbitral tribunal to tailor-make an effective procedure that suits the needs and particularities of each case. However, when studying the matter, the Commission came to the conclusion that too often the parties and tribunals do not tailor-make the procedure at an early stage, but rather apply boilerplate solutions or simply decide procedural matters piecemeal as the case progresses. This was found to increase time and cost in many arbitrations. Under the new case management provisions in Articles 22-24 of the Rules, which are specifically designed to address that problem, the process of tailor-making the procedure has now become a formal requirement.

Tailor-making the procedure so that the arbitration will be faster and cheaper is not inherently difficult to accomplish. The parties can agree upon faster and cheaper procedures and, failing their agreement, the arbitral tribunal has the power to determine such procedures after consultation with the parties. This will normally be done at the first case management conference. What is more challenging is determining the appropriate level of process and resources to match the value and complexity of the case. It is faster and cheaper to have one round of briefs rather than three, or to hold a three-day rather than a three-week hearing, but an extended opportunity to be heard will necessarily be given up. It is less expensive and less burdensome to present a witness by videoconference, but perhaps also less persuasive. The goal of each party

is to present its case in a manner that is most likely to persuade the arbitral tribunal to find in its favour. The time and cost that a party should be willing to devote to that end will vary according to the importance, complexity and value of the dispute. For each phase of the arbitration, cost/risk/benefit decisions have to be made.

Appropriate time and cost decisions can be made when party representatives have a collaborative relationship with outside counsel and actively participate in the making of those decisions. Each party best knows its own internal processes, the value of the underlying transaction and what is ultimately at stake. It is the party's case, the party's risk and the party's money, so the party itself is in the best position to decide what level of risk to accept and what strategic decisions to make. Outside counsel can assist in reaching such decisions on the basis of an informed evaluation of the pros and cons of the available alternatives. In addition, arbitral tribunals play an important role by bringing their experience to bear in devising cost-effective procedures and encouraging all of the parties to assist in conducting the arbitration in an expeditious and cost-effective manner, as contemplated by Article 22(1) of the Rules.

Case management considerations

As a general matter, party representatives should consider the following when managing an arbitration:

- **Early case assessment**. Much time and cost can be saved by not litigating matters with low chances of success, or that are not worth the cost/time/distraction to its personnel. This should be analysed before an arbitration has begun; however, case assessment should also continue during the arbitration.
- **Maintaining realistic schedules**. Setting up of a realistic schedule for the entire arbitration as early as possible and sticking to that schedule, unless there are serious reasons for not doing so, are essential to controlled and predictable proceedings. Parties will be able more accurately to foresee the date of the award and make appropriate financial plans. The arbitral tribunal also has an important role in establishing and maintaining a realistic schedule.
- **Establishing a tailor-made and cost-effective procedure**. Using this guide, party representatives along with outside counsel can determine optimum procedures from the party's perspective. The question then is how to implement those procedures. First, one party may consult with the other party with a view to reaching agreement on the applicable procedures. Any such agreement must be applied pursuant to Article 19 of the Rules. If the parties cannot agree on one or more of the procedures, each can present its position to the arbitral tribunal prior to or during the case management conference. The arbitral tribunal will decide after hearing the parties.
- **Awareness of settlement procedures**. Settlement procedures such as mediation, neutral evaluation and direct settlement discussions can occur at any time before or during an arbitration. As an arbitration progresses, views on the case and parties' needs may change, affecting the desirability and nature of a potential settlement. New facts may come to light, a partial award may be rendered, management changes may occur, and new perspectives in relations between the parties may emerge. The parties should continually reassess their case and determine whether, at any given point in time, there is an opportunity for a meaningful settlement.

Structure of the guide

This guide is composed of three main parts, each of which is designed to assist in making effective time and cost decisions for an arbitration: first, a discussion of settlement considerations; second, a discussion of the case management conference; and third, a series of eleven topic sheets

Each topic sheet deals independently with a specific step in the arbitration process where cost/risk/benefit decisions need to be made. The topic sheets are not intended to cover every aspect of an arbitration; rather, they are designed to provide a methodology for decision-making. They may also serve as a tool to assist in making appropriate decisions on each topic. The following topics are covered:

- Request for arbitration
- Answer and counterclaims
- Multiparty arbitration
- Early determination of issues
- Rounds of written submissions
- Document production
- Need for fact witnesses
- Fact witness statements
- Expert witnesses
- Hearing on the merits
- Post-hearing briefs

Each topic sheet is designed to serve as an executive summary and follows a standard format consisting of a series of separate sections. The first section presents the topic and identifies the issue(s); the second section sets out the options available to the parties for that topic; the third section discusses the pros and cons of the different options; the fourth section analyses the different choices from a cost/risk/benefit perspective; and the fifth section lists useful questions that will help to focus on the key decisions that need to be made. The list of questions could, for example, serve as a basis for discussion between party representatives and outside counsel regarding the choices that need to be made for that particular phase of the arbitration. Where useful, a final section contains other general points to consider.

The topic sheets are not prescriptive and do not provide any definitive answers but rather contain suggestions that can be used to stimulate discussion and decision-making. It is the hope of the Commission that these topic sheets will help in taking the appropriate cost/risk/benefit decisions that need to be made in order to conduct an expeditious and cost-effective arbitration, having regard to the complexity and value of the dispute.

SETTLEMENT CONSIDERATIONS

A negotiated settlement of the dispute can save a great deal of time and cost, and parties would be well advised to maintain focus on the availability of settlement opportunities before and throughout an arbitration. The case management techniques listed in Appendix IV (h) to the ICC Rules of Arbitration indicate that the arbitral tribunal may inform the parties that they are free to settle all or part of the dispute at any time and, where agreed with the parties, may take steps to facilitate a settlement, subject to enforceability considerations under applicable law.

Whether or not to settle

This is a complex question that will depend on each individual case. It is necessary to weigh the chances of success in an arbitration against a series of factors including the costs, burden and distraction caused by the proceedings and the time required to obtain the result. The choice may be affected by matters of principle or the need to eliminate financial or other uncertainties. Additional considerations include:

- **Preservation of relationships**. Parties to an arbitration may have an ongoing relationship which they wish to preserve. Settlement may support that relationship better than litigating the dispute.
- **Difficulties of enforcement**. If a claimant anticipates difficulties in enforcing an arbitral award against a particular respondent, it should factor that difficulty into its assessment of the strength of its case. When enforcement is uncertain, a settlement for a lower amount may be appropriate.
- **Reasons not to settle**. Various factors may militate against settlement. For example, a claimant may wish to obtain a precedent or guidance from a tribunal for use in future cases or may consider that a given settlement offer does not match the chances of success in an arbitration. A respondent may prefer not to settle in order to discourage other potential claimants from seeking a settlement or because it is concerned that a settlement may be interpreted as an admission of liability.
- **Importance of confidentiality**. A settlement may be preferable to an arbitration that is not confidential. ICC arbitration proceedings will not be confidential unless the parties have so agreed, the tribunal has so ordered or applicable law so requires.

Methods of settlement

If the parties have decided to explore settlement, various methods are available to them. They may seek a settlement on their own, with the assistance of counsel or with the assistance of a mediator pursuant to the ICC Mediation Rules. Recourse to the Mediation Rules may be based on an agreement between the parties or a unilateral request by one party subsequently accepted by the other. While providing for mediation, the ICC Mediation Rules also allow the parties to choose any other settlement method that may be better suited to their dispute. Settlement methods that can be used under the ICC Mediation Rules include:

- **Mediation**. The neutral acts as a facilitator to help the parties arrive at a negotiated settlement of their dispute. The neutral is not requested to provide any opinion on the merits of the dispute.
- **Neutral evaluation**. The neutral provides a non-binding opinion or evaluation on any of a wide variety of matters including issues of fact or law, technical questions or the interpretation of a contract.
- **Mini-trial**. A panel consisting of the neutral and an authorized executive of each party hears presentations by the parties, after which either the panel or the neutral can mediate the dispute or express an opinion on the merits.
- **A combination of methods**, such as mediation with a neutral evaluation on a particular issue.

The report of an expert, selected pursuant to the ICC Rules for the Administration of Expert Proceedings to make findings on a disputed matter, may help to facilitate settlement. However, unlike a neutral evaluation and unless the parties agree otherwise,

the expert's report will be admissible in judicial or arbitral proceedings if no settlement is reached.

Case management techniques

The parties and their counsel should keep in mind that even where settlement is not feasible before or at the outset of an arbitration, the arbitration can be managed in such a way as to facilitate settlement throughout the proceedings. Appendix IV to the ICC Rules of Arbitration highlights several case management techniques that can be used to that end:

- **Bifurcation**. In appropriate cases, a partial award on jurisdiction or liability may facilitate settlement. For example, if the arbitral tribunal decides that it has jurisdiction, the parties will know that the arbitration will go forward. This could prompt them to discuss settlement. Similarly, if the tribunal finds a party to be liable, the parties may prefer to settle the issue of damages rather than incur the time and expense of completing the arbitration.
- **Early consideration of controlling issues**. In some cases there are issues of law, fact or a mixture of fact and law, which necessarily affect the determination of the claims in the arbitration, yet can be resolved independently at relatively little expense. Examples include the determination of the applicable law, statute of limitations, the interpretation of a particular contractual provision, the determination of a key fact or technical issue or the measure of damages. The parties may find it easier to arrive at a settlement after such issues have been resolved by the tribunal.
- **Engagement of the arbitral tribunal**. Where the parties agree and the applicable law permits, the arbitral tribunal can actively facilitate settlement either by encouraging the parties to pursue one of the settlement methods described above, or through discussions with the parties.

Creativity and open-mindedness

Arbitrations often take on a life of their own once the parties have developed their positions and incurred costs. Parties and their counsel should keep in mind that a settlement can occur at any time during an arbitration and that the ICC Rules of Arbitration encourage the parties to explore this possibility. When exercising their will and their creativity in seeking a settlement, parties often arrive at solutions that are unavailable through arbitration.

CASE MANAGEMENT CONFERENCE

The case management conference provides the mechanism for determining the manner in which the arbitration will be conducted. If it is not possible to determine the entire procedure at the first case management conference, the remaining issues may be decided at a subsequent conference. The decisions made at the case management conference can be modified during the course of the arbitration by agreement of all of the parties or, failing such agreement, by a decision of the arbitral tribunal.

Article 24(1) of the ICC Rules of Arbitration requires the arbitral tribunal to convene an early case management conference to consult the parties on the conduct of the arbitration. Thereafter, pursuant to Article 22(2) of the Rules, the arbitral tribunal may adopt procedural measures for the conduct of the arbitration, provided that they are not contrary to any agreement of the parties. Article 22(1) requires the arbitral tribunal

and the parties to make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute.

Issues to be decided include: the number of rounds of briefs; the extent of document production, if any; the early determination of issues; fact and expert witnesses; and the conduct of the hearing, if any. The topic sheets contained in this guide are designed to assist the parties, along with their counsel and the arbitral tribunal, in making appropriate choices for the conduct of the arbitration.

In practice, after receiving the case file, the arbitral tribunal may invite the parties to make case management proposals. If it does not do so, the parties can seek to agree between themselves upon the conduct of the proceedings. If they arrive at an agreement, it must be followed, subject to any proposals of the arbitral tribunal that are accepted by all of the parties. If the parties do not reach an agreement, the arbitral tribunal, after listening to the parties, will adopt procedural measures that it deems to be appropriate for the case at hand.

While Article 22(1) of the Rules refers to expeditious and cost-effective proceedings, it also makes clear that speed and low cost are not ends in themselves. The complexity and value of the dispute must be taken into account. A cost-effective and expeditious arbitration will be one in which the time and cost devoted to resolving the dispute is appropriate in light of what is at stake. In each case, it is necessary to make a cost/benefit analysis in order to see whether a particular procedural measure is cost-justified.

The objectives of the parties will play a crucial role in making such choices. Some examples of how parties' goals may translate into case management strategy are set forth below:

- When an important matter of principle is at stake, it may be worth the time and expense needed for a thorough examination of the facts and a full articulation of all legal arguments. A party with this objective may be willing to incur the expense of more extensive document production, multiple rounds of written submissions, a larger number of fact and expert witnesses, and the like.
- When neither an important principle nor great sums are at stake, parties may wish the arbitration to be as inexpensive and rapid as possible. Here, in contrast, parties may seek to limit document production, limit the number of witnesses, shorten hearings or minimize submissions.
- When parties wish to settle the case, for example in order to maintain their relationship or mitigate the risk of loss, they may use the case management conference to seek bifurcation of the proceedings or an early determination of controlling issues, the resolution of which might facilitate settlement. The parties may also agree to undertake settlement procedures either before or during the remaining phases of the arbitration.

TOPIC SHEET 1: REQUEST FOR ARBITRATION

Presentation

An ICC arbitration is commenced by the filing of a Request for Arbitration with the Secretariat of the ICC International Court of Arbitration (Article 4 of the ICC Rules of Arbitration). In all cases, the Request must contain the information required by Article 4(3) of the Rules. That provision is intended to elicit sufficient information to enable the respondent to respond to the claimant's claims, as required by Article 5(1) of the

Rules, and for the International Court of Arbitration to fulfil its functions under the Rules with respect to the constitution of the arbitral tribunal and the setting in motion of the arbitration.

Issue: Should the Request contain only the minimum requirements of the Rules or provide a more elaborate statement of the case?

Options

A. File a short Request that satisfies the Rules without providing any more content or evidence than is strictly required by the Rules.

B. File a comprehensive Request that constitutes a full statement of the case, including exhibits.

The above options represent two ends of a spectrum. However, there is also the option of filing a Request that provides a level of content and evidence anywhere between those two ends.

Pros and cons

A shorter and less comprehensive Request can be prepared more economically and more quickly than a more comprehensive document.

On the other hand, a more comprehensive Request may avoid the need for multiple rounds of subsequent submissions and thereby help to expedite the arbitration. In addition, providing more information may increase the impact of the Request on the respondent. Additional detail may also enable the parties and the arbitral tribunal to focus on the key issues in the case as early as possible and thereby facilitate the drawing up of the Terms of Reference and the conduct of the case management conference.

Cost/benefit analysis

In all circumstances, the claimant should seriously consider conducting an early assessment of the nature, strengths and weaknesses of its case before filing a Request. This will allow it to determine, in the first instance, whether the claims are sufficiently strong to warrant bringing the arbitration or whether it would be better to seek a settlement of the dispute. If it decides to proceed with the arbitration, the early case assessment will help to ensure that the Request does not contain errors and that the claimant's claims are correctly described and set forth in the most effective manner. While this assessment requires some time and expenditure, it typically results in a saving of both over the arbitration as a whole.

If the claimant decides to proceed with the arbitration, it must determine whether to file a shorter or longer Request. The decision on how comprehensive the Request should be will be heavily influenced by the circumstances of the case and strategic considerations. Some time and cost may be saved by drafting a shorter Request although this may be a temporary saving if the claimant is ultimately required to supplement such a Request with additional detailed information. When the Request and the Answer respectively constitute a full statement of the case and a full statement of defence, time and cost can be saved by avoiding one or more further rounds of submissions. However, in complex cases this may not be possible, and the Request and Answer may be ultimately superseded by subsequent written submissions.

If a primary purpose for filing a Request is to elicit settlement discussions, consideration should be given to whether this is best accomplished with a shorter or a longer

Request. A shorter Request may be preferable if the respondent is unlikely to discuss settlement unless an arbitration has been commenced and the substantive aspects of the claim would be best dealt with in the settlement discussions. A longer Request may be preferable if the goal is to show the respondent in writing the strengths of the claimant's case before commencing settlement discussions.

Questions to ask

1. What is the desired result of filing the Request (e.g. triggering settlement discussions or having the dispute resolved by arbitration)?

2. Are there any valid reasons for not conducting an early case assessment?

3. Are there any real cost savings in filing a shorter Request? Would they be outweighed by the benefits of filing a longer Request for any of the reasons described above?

4. Are there any other strategic or legal considerations that may affect the timing of the filing of the Request and consequently whether it should be shorter or longer?

Other points to consider

In certain cases, questions of timing may militate in favour of a shorter Request. For example, a Request may need to be filed quickly to avoid being barred by a statute of limitations. A Request may also have to be filed within ten days of receipt by the Secretariat of an application for emergency measures pursuant to Article 1 of the Emergency Arbitrator Rules (Appendix V to the Rules).

Pursuant to Article 23(4) of the Rules, after the Terms of Reference have been established, no new claims may be made without the authorization of the arbitral tribunal. It is therefore prudent for the claimant to make all of its claims prior to the signing of the Terms of Reference.

Article 5(6) of the Rules provides that the claimant shall submit a reply to any counterclaim raised by the respondent pursuant to Article 5(5) of the Rules. The topic sheet relating to the Answer and counterclaims offers guidance on this matter.

TOPIC SHEET 2: ANSWER AND COUNTERCLAIMS

Presentation

The respondent is required to file an Answer to the Request for Arbitration with the Secretariat (Article 5 of the ICC Rules of Arbitration). In all cases, the Answer must contain the information required by Article 5(1) of the Rules. The Answer may contain a counterclaim pursuant to Article 5(5) of the Rules.

Issue: How detailed or extensive should the Answer and any counterclaim be, above and beyond what is required by the Rules?

Options

A. File a short Answer that satisfies the Rules without providing any more content or evidence than is strictly required by the Rules.

B. File a comprehensive Answer that constitutes a full statement of defence, including evidentiary exhibits.