

Overview of the Most Important Changes in the Revised ICC Arbitration Rules

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1. Introduction

As of 1 January 2012, the 1998 ICC Rules of Arbitration (“1998 ICC Rules”) in their revised form¹ will enter into force. This means that as of such date, the revised ICC Rules will apply in every arbitration in which the Request for Arbitration is received by the Secretariat of the ICC (Article 6(1)).²

The aim of the present article is to give regular ICC arbitration users, who are familiar with the 1998 ICC Rules, a concise overview of the most important substantive amendments introduced by the 2012 ICC Rules. Changes of minor importance and/or changes which clarify provisions in the 1998 ICC Rules and thus improving the transparency of the ICC Rules as a whole are, therefore, not particularly mentioned in this contribution. Based on the assumption that the reader of this paper is familiar with the 1998 ICC Rules, a reference list is added as an Annex indicating where the 1998 provisions can be found, in whole or in part, in the new provisions.

After a brief discussion of the process and main goals of the revision (section 2), the structure of this article follows the order of the 2012 ICC Rules rather than grouping the various issues on which the revision focused (sections 3 to 9). An exception is made for the emergency arbitrator proceedings, the basic principles of which are dealt with separately (section 10). Lastly, this contribution ends with some concluding remarks on the revised rules and the revision process (section 11).

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¹ In the present contribution, the new ICC Rules of 2012 will be referred to as “amended”, “revised” or “new” ICC Rules, “2012 ICC Rules” or simply as “ICC Rules”. References to Articles without any specification refer to Articles in the revised 2012 ICC Rules. Capitalized terms not defined in this publication derive from the wording of the 2012 ICC Rules. Finally, the use of the term “arbitral tribunal” includes sole arbitrators.

² The parties can, however, agree to the application of the 1998 ICC Rules if they wish that the revised ICC Rules shall not apply. However, the parties cannot “opt-in” to the new ICC Rules before their entry into force on 1 January 2012.

2. Procedure and main goals of the revision of the 1998 ICC Rules

2.1 Initiation of the revision process and bodies established for the revision

Ten years after the entry into force of the 1998 ICC Rules, there was a feeling among members of the ICC arbitration community that the rules needed to be revised. In April 2008, on the occasion of the 10th anniversary of the enactment of the 1998 ICC Rules, a conference was organized in Paris where participants gathered in various working groups to collect ideas for a revision of the 1998 ICC Rules.

In the course of 2008, the National Committees were given the opportunity to submit comments and requests for revision in the form of answers to a questionnaire circulated by the ICC. During the same year the Task Force on the Revision of the ICC Rules of Arbitration (“Task Force”) was established. Membership in the Task Force was based on nominations made by National Committees. In order to allow for the widest possible input from various cultural and geographical backgrounds, no limitation was placed on the number of members which would comprise the Task Force. Thus, it was left to each of the National Committees to determine the number of delegates it would choose for the Task Force as well as the criteria it would apply for selecting such delegates. This resulted in a very large group of over 175 members and a broad diversity among members per National Committee.

In addition to the Task Force, other working bodies took part in the revision of the 1998 ICC Rules. These included the permanent ICC Commission on Arbitration (“Commission”) and the ICC governing bodies, who were empowered with the final authority to approve the revised rules. Finally, a small Drafting Sub-Committee was set up (“DSC”) which was composed of the Chair and two Co-Chairs of the Task Force³, the Secretary to the Commission⁴, the Chairman of the ICC International Court of Arbitration (“Court”) and the Vice Chairs of the Commission as *ex officio* members. In addition, two representatives of ICC users and six representatives of counsel and arbitrators were selected. The DSC’s task was to perform the actual revision of existing provisions and the drafting of new provisions for submission to the Task Force. For this purpose, the DSC met one or two days per month between March 2009 and March 2011. While all of the drafting

³ Peter M. Wolrich (Chair), Michael W. Bühler and W. Laurence Craig (Co-Chairs).

⁴ Francesca Mazza.

proposals formally came from the DSC, in practice – and especially for certain complex issues – smaller and less formal working groups were formed within the DSC. During its meetings the DSC would then extensively discuss and revise any drafts for new articles prepared by such working groups.

Given the complexity of the issues at stake, the number of participants involved and the diversity of interests represented, the revision process required a total of five Task Force meetings. The Commission discussed the revised rules on four different occasions and in June 2011 the ICC governing bodies approved the revised text. The revised ICC Rules, in their final form, were officially made public on 12 September 2011.

2.2 Main purpose of the revision of the 1998 ICC Rules

It was apparent from the beginning of the process that the revision of the 1998 ICC Rules should be “gentle”. In other words, there was general consensus among the ICC as well as practitioners and users that the ICC Rules of Arbitration worked well in principle and needed to be updated only in areas which had either evolved or which over the course of the past decade had presented certain problems in practice. It was also understood that the key features of ICC arbitration distinguishing it from other institutional arbitration should in any event be maintained.

On the more formal side, the plan was that the revision process should submit the ICC Rules to a **general “face-lift”**, including the substitution of “Chairman” with “President” of the Court and the introduction of modern, gender-neutral language. The revision should also account for the fact that the ICC Secretariat now holds offices in places in the world other than Paris. Another aim was to address changes in the ICC’s **general use of information technology**.⁵

One of the main purposes of the revision was to address the arbitration community’s concern that there was at times a disproportion between the issues at stake and the time and cost of the arbitration procedure. Thus, one of the main declared goals of the revision was to **reduce the time and cost of arbitration**. Another substantive goal, clear from the outset, was the

⁵ Due to software delivery problems caused by the ICC external software supplier, this is the only goal which did not materialize in the 2012 ICC Rules and thus no corresponding changes were made in the rules or any annexes thereto. This project is, however, still ongoing and future amendments reflecting the updated possibilities of the ICC’s information technology are to be expected (such amendments will likely take the form of an additional Appendix to the ICC Rules). As these changes will relate to developments in information technology they will not have to be laid before the Commission before submission to the Executive Board of the ICC for approval. The second half of Article 7 of Appendix I to the ICC Rules was put in place to address these expected modifications.

resolution of the problems encountered by the Secretariat in previous years regarding the growing number of **multi-party arbitrations**. In this area the existing practice of the Court is not reflected in the 1998 ICC Rules.

In the course of the revision, the “wish list” of the participants involved in the process grew longer and longer. However in most cases the drafters resisted the temptation to alter provisions which had not given rise to any problems in the past 10 years of practice. Changes were made only where they were felt to be necessary, with the idea that the 2012 ICC Rules should serve as a suitable basis for practice for the next decade.

With this in mind, two other primary areas were taken into account during the revision process. One was the ICC’s desire that the 2012 ICC Rules become more attractive for the **resolution of investment disputes**. This led to some particular changes.⁶ The other major area relates to the fact that several other institutions had recently introduced **emergency procedures** to allow for an expedited method of appointing an emergency arbitrator to decide on interim or conservatory relief. After long and intense discussions of this issue, ultimately the working bodies concluded that the ICC should also follow this trend. This led to the new Appendix V (“Emergency Arbitrator Rules”).

3. “Introductory Provisions” (Articles 1 – 3)

Article 1(1) of the 2012 ICC Rules was reduced from its original scope to a main statement describing the ICC International Court of Arbitration. The purpose of the amendment in Article 1(2) is to emphasize the Court’s role as the only body authorized to administer cases under the ICC Rules.⁷ Article 1(5) was modified to make the role of the Secretariat more transparent and declares that the Court is “assisted in its work by the Secretariat [...] under the direction of its Secretary General [...].”

Article 2 needed to be adapted in order to reflect the new provisions which now specifically provide for joinder of a new party (Article 7) or multiple parties and the possibility of different claims between them (Article

⁶ See Article 1(1) of the revised ICC Rules where the reference to “business” disputes was deleted. Further, see Article 13(4)(a) regarding the direct appointment of arbitrators by the Court and the changes made to Article 21(2) regarding the applicability of contractual provisions. Finally, the limitation of the application of the Emergency Arbitrator Provisions according to Article 29(5) leads to the exclusion of their application to investment arbitrations based on an investment treaty. In parallel to the ICC Rules revision, the ICC Commission on Arbitration also established an ICC Task Force on “Arbitration Involving States or State Entities”. This task force prepared a first report in autumn 2010 with recommendations for the revision of the ICC Rules ongoing at the time.

⁷ This is further supported by an undertaking of the parties in Article 6(2).

8). Also, Article 2 reflects the notion that a “party” can signify more than one claimant or respondent, respectively.

Another change in this introductory section in terms of the future practice of the ICC is the insertion of “email” as an authorized means of communication from the ICC Secretariat and the arbitral tribunal to the parties, and the deletion of facsimile transmission, telex and telegram from such list (Article 3(2)).

As in the 1998 ICC Rules, the revised ICC Rules do not specify the method of communication from the parties to the ICC Secretariat, and – in particular – to the arbitral tribunal. Thus, it cannot be assumed that email will be the standard method of communication between the arbitral tribunal and the parties. Rather, this issue will still need to be addressed in the specific procedural rules adopted in the arbitration.

Formal submissions to the ICC Secretariat, in particular the transmission of a Request for Arbitration, should still be made by courier in order to have clear evidence of receipt. With regard to other communication, given that the ICC Secretariat is now allowed to communicate by email, the same would also seem possible for the parties – something already regularly done in practice. Depending on the content of the communication, parties are advised to request a confirmation of receipt of their email in order to be able to provide evidence of receipt if called upon to do so in the future.

4. “Commencing the Arbitration” (Articles 4 – 6)

4.1 “Request for Arbitration” and “Answer to the Request; Counterclaims” (Articles 4 and 5)

With the creation of new offices of the ICC Secretariat in places other than Paris, a modification was made to the rules to allow Requests for Arbitration to be submitted at any of the ICC Secretariat’s locations.⁸

The structure of the Request for Arbitration followed by the Answer to the Request for Arbitration and the screening process by the Court has not been amended in principle. However, some important changes have been made.

Regarding the Request for Arbitration (Article 4) the following three points should be highlighted:

⁸ For the time being the Secretariat has an outside office only in Hong Kong.

First, the drafters felt that it would be helpful to the respondent if the claimant would be required to specify on what basis claims are made (Article 4(3)(c)). In theory, this added requirement should alleviate a situation in which a respondent faces a potentially high claim without knowing whether such claim is based in contract or, if so, which contract. Having more information in advance will place the respondent in a better position to assess the seriousness of the claims and prepare its defense. For this reason, this amendment was strongly supported by the users who generally wished to have access to as much information as possible early on in the proceedings.

Second, additional changes were made in the interest of being able to obtain more information at the beginning of the arbitration: The revision of Article 4(3)(g) and (h) to include a reference to “any observation and proposal” as well as the new second paragraph of Article 4(3) suggest that additional information shall be submitted with the Request for Arbitration under the revised rules. More importantly, the claimant is now required to state the “amounts of any quantified claims, and to the extent possible”, to estimate the monetary value of any other claims (Article 4(3)(d)). This amendment is also significant for the ICC Secretariat since it allows the institution to fix the amount of the advances on costs owed by the parties at an earlier stage on the basis of the amounts submitted by the parties themselves.⁹

Third, given the new possibility under certain conditions to decide in one arbitration claims arising out of more than one contract (Article 9), it is now also necessary that the claimant specify the arbitration agreement under which each of its claims is made, when claims are made under more than one arbitration agreement (Article 4(3)(f)).

The changes in Article 4 mentioned above are also reflected in Article 5 regarding the Answer to the Request for Arbitration and Counterclaims.

4.2 The *prima facie* test for jurisdiction (Article 6)

4.2.1 The referral of cases to the Court by the Secretary General (Article 6(3))

The revised Article 6 contains one of the most important changes to the 1998 ICC Rules. Under Article 6(2) of the 1998 ICC Rules, if the respondent did not file an Answer to the Request for Arbitration or if objections regarding “the existence, validity or scope of the arbitration agreement” were

⁹ It should be noted that this new rule is not as strict as many procedural rules before State courts, since it only requires the claimant to state an amount of quantified claims, not *quantifiable* claims. This gives the claimant the discretion to determine what is and what is not quantifiable.

raised by any party, the matter had to be referred to the Court for a *prima facie* decision on jurisdiction.

Statistics show, however, that only a very limited percentage (in fact less than 3%) of cases submitted to the Court under Article 6(2) of the 1998 ICC Rules fail to meet the *prima facie* test and thus are not ultimately transferred to the arbitral tribunal. For this reason, in the interest of efficiency and time, it was decided that the Secretary General will function as a “gatekeeper” and decide which cases should be submitted to the Court. Thus the presumption that the lack of an Answer to the Request for Arbitration, or the presence of objections to the jurisdiction of the arbitral tribunal, will lead to a decision by the Court is reversed under the revised rules. According to Article 6(3) of the 2012 ICC Rules, the general rule is that the arbitral tribunal itself will be the first body to decide on jurisdictional issues. The Court will decide jurisdictional issues only in the exceptional case that the Secretary General decides to submit such questions to the Court for a *prima facie* decision. If this exception occurs, the situation would be the same as under the 1998 ICC Rules. In particular, any positive findings of jurisdiction by the Court will not be binding on the arbitral tribunal, while negative decisions on jurisdiction will be binding. This is already expressed in Article 6(2) of the 1998 ICC Rules but is now more clearly stated in Article 6(5) of the 2012 ICC Rules. Also Articles 6(6) and 6(7) have further clarified that a negative *prima facie* decision by the Court does not hinder a party’s ability to seek a state court judgment on the issue of the binding nature of the arbitration agreement (Article 6(6)) or introduce the same claims again in a later arbitration (Article 6(7)).

The 2012 ICC Rules do not determine which test the Secretary General will have to apply for its decision on whether to refer a case to the Court. Therefore, the standard will be formed through the practice of the Secretary General. However, it is safe to assume that the Secretary General will refer a case to the Court for a *prima facie* determination when the situation is not apparent and/or when it is important to have a practice developed by the Court itself. This is likely to be the case for matters where the Court already currently applies different theories to allow arbitration to go forward even when one of the parties is not a signatory to the arbitration agreement that is the basis of the jurisdiction of the arbitral tribunal. Also, cases involving multiple parties or multiple arbitration agreements (for which the tests are specified in Article 6(4))¹⁰ are also likely to be referred to the Court by the Secretary General for determination. However, the fact that there is no “referral test” provided for in the modified ICC Rules allows the practice of the Secretary General to be

¹⁰ See subsection 4.2.2.

adapted according to future demands. For example, the test of “an arbitration agreement” under Article 6(4)(i) in multi-party arbitration is not necessarily a complex standard to verify if all of the parties in the arbitration have signed the same arbitration agreement. In such circumstance, it would appear that no referral to the Court would be necessary.

4.2.2 Specification of a *prima facie* test in cases involving multiple parties and/or multiple arbitration agreements

The other important change regarding the *prima facie* test concerns cases in which there are multiple parties and/or multiple arbitration agreements (Articles 7 and 9). While the 1998 ICC Rules do not contain any substantive rule regarding the *prima facie* test, Article 6(4) of the amended ICC Rules describes the tests that the Court will apply for these two particular situations. The purpose of this clarification is to provide transparency and to give users the comfort that although these new possibilities are now formally recognized in the 2012 ICC Rules, they will not lead to a diminishment of party autonomy and in particular to a dilution of privity of the arbitration agreement. Thus, parties can still rely on the fact that an arbitration agreement is binding upon the parties to that particular arbitration agreement *only* (Article 6(4)(i), unless the Court deems that the parties “may have agreed” to arbitrate their claims together in one arbitration (Article 6(4)(ii))).

In the following subsections, the two tests provided for in Article 6(4)(i) and (ii) shall be explained in more detail.

a. Prima facie test for multi-party arbitration under one arbitration agreement (Article 6(4)(i))

Regarding the test for multi-party arbitration, either from the start of the proceedings or due to the joinder of additional parties in accordance with Article 7, the Court must *prima facie* be satisfied that there is an arbitration agreement that binds all parties (Article 6(4)(i)). The possibility of a multi-party arbitration under Article 6(4)(i) means that all parties must have consented to the *same* arbitration agreement. This is clear from the wording of Article 6(4)(i) and from the fact that the case of more than one arbitration agreement is dealt with in Article 6(4)(ii). However, how such agreement took place is not determinative and the Court will apply all the theories that it applies to any so-called “third” non-signatory party to the arbitration agreement. This is a welcome change from the current practice of the Court, according to which the requirements for a respondent to join a third party are more restrictive than for the claimant to file claims against multiple parties.

***b. Prima facie test in cases of multiple arbitration agreements
(Article 6(4)(ii))***

Regarding multiple claims made under multiple arbitration agreements, the relevant test requires the Court to apply a double *prima facie* test (Article 6(4)(ii)).

First, the Court must be *prima facie* satisfied that the arbitration agreements under which the claims are made may be compatible.¹¹ According to the existing practice of the Court, this requires the same method of appointment of the arbitrator(s) as well as the same seat of the arbitration. However, if one arbitration agreement is simply silent on either or both of these issues, the compatibility will nevertheless be presumed. Also, differences regarding the applicable law and/or the language of the arbitration do not hinder the compatibility of the arbitration agreements.

Second, the Court must *prima facie* be satisfied that all parties to the arbitration agreement “may have agreed” to have their claims determined together in a single arbitration. As mentioned, this provision ensures that the Court will respect party autonomy and privity of the arbitration agreement. As a result of the phrase “may have agreed” in Article 6(4)(ii), no party will be forced to be a party in an arbitration where it cannot at least be presumed that such party would have agreed to the arbitration agreement had it been aware of the issue prior to the occurrence of the dispute. Whether or not such presumption is justified will have to be decided by the Court on a case-by-case basis. However, it can be expected that certain recurring factors indicating the connectivity between the various arbitration agreements will be relevant to such determination by the Court. One important factor, if not the most important, will be whether or not the parties to the multiple arbitration agreements are identical. A further important indicator of connectivity between the various arbitration agreements will be whether or not the same economic transaction is at stake.

By way of example, the Court is likely to presume that the parties may have agreed to a single arbitration in the case of multiple purchase agreements between the two parties concerning the same commodity. In such hypothetical situation, each purchase agreement contains the same arbitration agreement, but there is no explicit so-called “framework” arbitration agreement stipulating that disputes resulting from several of these purchase agreements shall be decided in a single arbitration. Thus, one could *prima*

¹¹ The fact that this is phrased as a *prima facie* test and not a final administrative decision indicates that an arbitral tribunal can, in theory, review the issue of compatibility of the arbitration agreements. Although not excluded, it is however rather unlikely in practice that an arbitral tribunal would come to another finding.

facie assume that, before the dispute broke out, parties would have agreed upon a single arbitration for all claims. In other words, if one party later refuses to consolidate the claims once the dispute arises, such party would be deemed as doing so in order to obstruct the smooth resolution of the dispute.

Multiple claims and multiple arbitration agreements can also be made in multiple party situations. A case which was repeatedly discussed during the drafting process, and where it was however unmistakable that the test of Article 6(4)(ii) would *not* be met, relates to disputes arising in the construction industry: an owner or employee files claims against the general or main contractor who in turn wishes to file claims against its subcontractor. In such circumstances, even if the arbitration agreements are compatible, it could not be assumed that the parties “may have agreed that those claims can be determined together in a single arbitration” (Article 6(4)(ii)). Thus, the basic principle remains that if multiple parties want to join claims under several contracts in one arbitration they must themselves contractually provide for this possibility.

5. “Multiple Parties, Multiple Contracts and Consolidation” (Articles 7 - 10)

As already mentioned, one of the declared goals sought by the revision of the ICC Rules was to address questions of multiple parties, joinder, multiple claims and multiple contracts, since the Secretariat and the Court have increasingly been confronted with such issues in the past.¹² It was important for transparency reasons to clearly define the ICC’s policy in this complex area and to have the applicable principles spelled out in the ICC Rules. This being said, the new rules mostly reflect the current practice of the Secretariat and the Court, although the revision also introduces some changes.

It should be mentioned at the outset that Articles 7 to 10 do not themselves address the issue of jurisdiction but merely set forth the procedural framework for dealing with multiple parties, multiple contracts and consolidation issues. If referred to by the Secretary General, the jurisdictional issue shall be decided by the Court on a *prima facie* basis in accordance with Article 6(4) of the revised ICC Rules and, if no negative decision is rendered, by the arbitral tribunal called upon to decide the dispute (see Article 6(5)).

¹² According to the available statistics, roughly a third of all ICC arbitrations are multi-party arbitrations (see ICC 2009 Statistical Report (2010), p. 11).

5.1 “Joinder of Additional Parties” (Article 7)

Article 7 deals with the joinder of a third party after the filing of a Request for Arbitration commencing the arbitration. Typically, joinder under Article 7 will be used by the respondent since the claimant will if necessary file its claims directly against multiple respondents at the time the proceedings are commenced, *i.e.* with its Request for Arbitration. But, it is not excluded that the claimant may also file a Request for Joinder in accordance with Article 7. What is excluded under Article 7 is the possibility for a *third* party to request to be joined to the proceedings (commonly referred to as “intervention”).

Article 7 deals mainly with the procedural issues of joinder such as the requirement of a Request for Joinder (Article 7(2)) and its necessary content (see reference to Articles 4(4) and 4(5) in Article 7(3)). According to the requirements for a Request for Joinder, the party to the arbitration which seeks to join an additional party must make a claim against such third party. This requirement therefore excludes the joinder of an additional party for the sole purpose of assistance in the arbitration procedure.

The additional party must file an Answer similar to the one the respondent is required to file (Article 7(4)). The new provision on joinder treats a third, so-called “additional party” as a party from the very moment a Request for Joinder is filed, as is equally the case for a respondent when the Request for Arbitration is filed. This constitutes a change to the current practice of the Court, according to which a third party becomes a party only once the Court has accepted the joinder.

To address concerns raised during the drafting of the new joinder provision that a repetitive joinder could block the proceedings and cause substantial delays, a safe-guard provision was introduced to allow the Secretariat to fix the time limit for the submission of a Request for Joinder (Article 7(1) last sentence).

The substantive test for admitting the joinder of an additional party is not provided for in Article 7 but in Article 6(4).¹³ This is stated in Article 7(1) with the reference to Articles 6(3) to 6(7). The additional reference to Article 9 in Article 7(1) clarifies that joinder can arise under two basic scenarios. First, where the additional party is a party to the same arbitration agreement which is already the basis for the arbitration between the original parties, and, second, where the additional party and the original party wishing to join the additional party are bound by another arbitration agreement. In the

¹³ See above section 4.2.2.

first case, the applicable test employed by the Court in deciding whether to admit the joinder of such additional party will be the test set under Article 6(4)(i), while in the second case it will be the test under Article 6(4)(ii). There might be cases where both situations occur due to the joinder of an additional party or parties. In this situation, both tests set under Article 6(4) will be applied by the Court. However, as there is some overlap between the two tests it can be expected that the Court will undertake a global assessment of the situation of the parties rather than apply the two tests separately.

There is one important specification found in Article 7(1) which addresses more than procedural formalities for joinder. According to the second to last sentence of such provision, no joinder is possible after the confirmation or appointment of any arbitrator by the Court without the agreement of all parties involved. Extensive discussions took place in the course of the drafting process regarding this particular problem. A proposal was made to apply a flexible rule allowing the constituted arbitral tribunal to take a decision with regard to this issue based on its own discretion and the circumstances of the particular case. This is based on the view that in certain – albeit very limited – cases, joinder of a third party *after* the confirmation or appointment of an arbitrator might be the only way to restore procedural fairness in an arbitration.¹⁴ However, in the end more emphasis was placed on the unhindered progression of the arbitration before the arbitral tribunal as the delayed but necessary *prima facie* test under Article 6(4) would disrupt the ongoing arbitration procedure. An advantage, however, of the provision which was finally adopted is that it allows for greater certainty as to who is a party in the arbitration from the point in time when the arbitral tribunal is constituted. Because of the substantive rule found in Article 7(1), a constituted ICC arbitral tribunal will not be allowed to join a third party unless all parties agree.

5.2 “Claims Between Multiples Parties” (Article 8)

Another area where the revision attempted to codify the Court’s current practice is found in Article 8 which addresses claims between multiple parties. While Article 7 of the revised rules allows for the joinder of an additional party after the Request for Arbitration has been filed but before confirmation or appointment of any arbitrator, Article 8 permits the making of additional claims even at a later stage. This is possible provided, however, that the Terms of Reference are not yet signed by the parties, since upon

¹⁴ See Nathalie Voser/Andrea Meier, “*Joinder of Parties or the Need to (Sometimes) Be Inefficient*”, Austrian Arbitration Yearbook 2008, Wien 2008, 115 – 123, p. 181 et seq.

signature of the Terms of Reference the general rule for new claims under Article 23(4) will apply. This is explicitly stated in Article 8(1).

In an arbitration with multiple parties, claims may be made by any party against any other party (*i.e.*, this provision reinforces the Court's practice to allow claims, counter-claims and cross-claims among parties in a multi-party arbitration). In order to ensure that the same level of information is received by a party who is to respond to a particular claim, Article 8(2) invokes the provisions of Article 4 for any party making a claim pursuant to Article 8(1). Also, the subsequent procedure is similar to the Answer to the Request for Arbitration (see references to Article 5 in Article 8(3)). However, once the file has been transmitted to the arbitral tribunal, the arbitral tribunal itself determines the procedure for making a claim under Article 8.

Similar to Article 7 of the 2012 ICC Rules, Article 8 primarily provides procedural guidance on the complex issue of claims in a multi-party arbitration. The substantive test for the admission of such claims can only be found in Article 6(4). Claims between multiple parties do not necessarily have to be made under different arbitration agreements, and if claims between the multiple parties are made under the same arbitration agreement the *prima facie* test of Article 6(4)(i) shall apply. If, however, claims in a multi-party arbitration are made under different arbitration agreements, then the test of Article 6(4)(ii) will apply. Finally, claims between multiple parties may be made under a single arbitration agreement entered into between all of the parties to the multi-party arbitration, as well as under a different arbitration agreement entered into between only some of the parties to the multi-party arbitration. This scenario would lead to the application of both Article 6(4)(i) and Article 6(4)(ii). However, as already mentioned in the context of Article 7, due to the overlap between the two tests, it can be expected that the Court will make a global assessment of the situation rather than evaluating the two tests independently.

5.3 “Multiple Contracts” (Article 9)

As opposed to Articles 7 and 8, Article 9 of the 2012 ICC Rules does not particularly address arbitrations between multiple parties since the issue of multiple contracts can arise in the context of an arbitration between two parties as well as in an arbitration involving multiple parties.

Parties who have entered into multiple contracts may have provided for a framework arbitration agreement to govern all disputes arising out of the multiple contracts entered into between the parties. However, framework arbitration agreements are rather infrequent in practice. Thus the multiple

contracts provision in Article 9 of the revised rules – albeit mentioning both alternatives – deals primarily with a situation in which there are multiple arbitration agreements under the ICC Rules.

Early drafts of the new rules provided for the relevant test for the admission of such situations in the sections pertaining to multi-party arbitrations, although it was ultimately decided that it would be more logical to have only one provision dealing with the *prima facie* tests. Thus the relevant test for claims made under more than one arbitration agreement is in the final version of the revised rules set forth in Article 6. Article 9 is thus in essence limited to referring to Articles 6 and 23(4).

5.4 “Consolidation of Arbitrations” (Article 10)

Article 10 of the revised rules is the last provision in the section on multiple parties, multiple contracts and consolidation. Article 10 concerns consolidation and replaces Article 4(6) of the 1998 ICC Rules. This Article has undergone substantial changes since, in the course of the Court’s practice in recent years, Article 4(6) of the 1998 ICC Rules proved to be too narrow. What remains unchanged, however, is that it is still the Court which decides issues of consolidation. Also, as opposed to an Article 6(3) decision, the Court’s decision under Article 10 of the revised rules is not a *prima facie* decision but a *final* procedural decision of the Court. Finally, as in the 1998 ICC Rules, consolidation will be made only at the request of a party. In other words, no consolidation will be made upon the Court’s own motion.

Article 10 outlines three basic scenarios in which the consolidation of arbitration proceedings would be possible.

First, consolidation will be made if all parties agree to it (Article 10(a)).

Second, consolidation is possible if all claims made in the arbitrations fall under the same arbitration agreement (Article 10(b)). In this situation, it is irrelevant whether the arbitrations to be consolidated are between the same parties or involve other parties. This new rule is broader than Article 4(6) of the 1998 ICC Rules where consolidation is only deemed possible in arbitrations between the same parties. The reason for this amendment is that any party to the same arbitration agreement has accepted to be a party in a single arbitration concerning claims made under such arbitration agreement. Any refusal to be a party to such single arbitration would be at odds with such party’s initial consent to the arbitration agreement.

Third, consolidation is also possible when the claims in the arbitration are made under different arbitration agreements. However, this is possible if

three conditions are fulfilled (Article 10(c)): (1) Similar to Article 4(6) of the 1998 ICC Rules, consolidation is possible only if the consolidation involves arbitrations between the same parties. (2) The disputes in the arbitrations must concern the same legal relationship. This requirement is already in Article 4(6) of the 1998 ICC Rules and it was considered useful to maintain the same criterion which has worked in practice. The factors which the ICC will apply will be akin to the connectivity test applied under Article 6(4)(ii)¹⁵ since both cases involve multiple arbitration agreements. (3) Finally, the various arbitration agreements must be compatible.¹⁶

The Court is not required to order consolidation each time the above conditions are met. Rather, as stated in the second paragraph of Article 10 of the revised rules, the Court will take into account all relevant circumstances when deciding whether to order consolidation. In particular, the Court will consider whether any arbitrators have already been confirmed or appointed and, if so, whether the same persons shall act as arbitrators in the consolidated arbitration. It should be noted, however, that this rather broad provision no longer contains a limitation as to timing. In particular, while under the 1998 ICC Rules no consolidation is possible once the Terms of Reference are signed, Article 10 of the 2012 ICC Rules contains no such limitation. As a result, consolidation may still be possible even if the proceedings of the arbitration which had commenced first are already in an advanced stage, although in practice the advanced progress of the first arbitration will work against consolidation with a second arbitration about to commence.

6. “The Arbitral Tribunal” (Articles 11 - 15)

6.1 General comment

The “Arbitral Tribunal” section in the ICC Rules deals with the confirmation of arbitrators nominated by the parties, the appointment of arbitrators by the Court, the number of arbitrators, and challenges of arbitrators. As a whole, this part of the ICC Rules has not undergone many important changes. In particular, the basic principle has been maintained that if the parties have agreed on a panel of three arbitrators, unless the parties provide otherwise, the president of the arbitral tribunal will be appointed by the Court and not by the party-nominated arbitrators. In discussions during the revision, it had been put forward that although this provision could be a surprise to some

¹⁵ See above section 4.2.2.b.

¹⁶ Regarding the practice of the Court regarding compatibility, see above section 4.2.2.b.

parties, it constituted a characteristic feature of ICC arbitration. Thus, parties who wish that in a three member panel the president be nominated by the party-appointed arbitrators, such parties must continue to provide for this type of nomination procedure, either in their original arbitration agreement or, at the latest, after the filing of the Request for Arbitration.

According to a new rule in Article 12(5), if the parties have provided for a procedure for the appointment of the president other than appointment by the Court,¹⁷ such nomination must be made within 30 days of the confirmation or appointment of the co-arbitrators (or any other time limit agreed by the parties or fixed by the Court). This added specification was introduced to make sure that the constitution process remains time-efficient even when parties deviate from the default mechanism for appointment provided for in the ICC Rules.

Other changes in the “Arbitral Tribunal” section concern clarification and improvements of the structure of Articles 8 to 10 of the 1998 ICC Rules, now in Article 12 of the revised rules under the heading “Constitution of the Arbitral Tribunal”. This provision also needed to be adapted in order to account for the possibility of joinder and its impact on the nomination of the party-appointed arbitrator (see Article 12(7)). Finally, the revised Article 15(1) requires that the Court must accept a joint request by both parties to replace an arbitrator. This amendment was introduced in order for the Court to be able to ascertain whether or not such an agreement between the parties effectively exists and in order to be able to fix the time as of when the replacement jointly agreed upon by the parties becomes effective.

In addition to the above changes, which generally are of lesser importance, there have been two significant amendments to the portion of the ICC Rules concerning the “Arbitral Tribunal” which are addressed in the following sections.

6.2 Revised standard for conflicts of interest and disclosure

In Article 7 of the 1998 ICC Rules, the threshold standard for conflicts of interest for arbitrators acting in an ICC arbitration is only independence; after considerable discussion and debate throughout the entire revision process, it was finally concluded that the new standard shall be independence *and* impartiality (Article 11(1) of the revised rules). The same standard also

¹⁷ Often the nomination of the president of the arbitral tribunal will be made by the party-appointed arbitrators but it can also be made by the parties directly.

applies, as a consequence, for the challenge of an arbitrator (Article 14(1) of the revised rules).

Those who purported to favor an “independence only” limitation preferred a more pragmatic approach, in particular acknowledging that in practice the party-appointed arbitrator generally has a closer relationship to the party that appointed him or her which might influence their impartiality. The new wording in Articles 11(1) and 14(1) makes it apparent that the ICC strives for a high standard when addressing conflicts of interests, and that no distinction shall be made between the standard owed by a president of the arbitral tribunal and the standard owed by a party-appointed arbitrator. However, it should be noted that in practice the Court has always applied a strict standard and no changes in principle are to be expected from this amendment. Nevertheless, with this amendment the revised rule sends a signal that ICC arbitrations are to be conducted under the highest standard with regard to conflicts of interest applicable to all arbitrators.

With the addition of “impartiality” in Articles 11(1) and 14(1), the ICC Rules are in line with the UNCITRAL Arbitration Rules and with many other institutional rules. Corresponding to the UNCITRAL Model Law on International Commercial Arbitration, this change also reflects a trend in revised arbitration laws.¹⁸

The question as to whether the disclosure requirement in Article 11(2) should be changed to reflect the new standard for conflicts of interest was also highly debated. Ultimately, the majority of those involved in the process purported that a parallelism exists between the standard for conflicts of interests and the test for challenging an arbitrator, on the one hand, and an arbitrator’s disclosure obligation, on the other hand. This led to an adaptation of the wording in Article 11(2). The new language that was introduced in connection with the arbitrator’s impartiality (“... as well as any circumstances that could give rise to reasonable doubts as to the arbitrator’s impartiality”) is close to the wording of Article 11 UNCITRAL Arbitration Rules. While “independence in the eyes of the parties” is a subjective criterion based on the specific parties of the arbitration, the circumstances that must be disclosed regarding impartiality are measured based on an objective criterion (“reasonable doubts”).

¹⁸ The Swiss Federal Tribunal recently addressed this issue and adhered to this principle of requiring independence and impartiality, albeit the express standard in the *lex arbitri* only requires “independence”; see decision dated 29 October 2010; DFT 136 III 605.

6.3 Possibility of direct appointments by the Court

The second important change in the section on the “Arbitral Tribunal” refers to the method of appointment of arbitrators by the Court. Under the 1998 ICC Rules, any appointment has to be based on a proposal of a National Committee. This applies even if the Court does not accept the proposal made, or if the National Committee failed to submit the proposal within the time limit fixed by the Court. In these cases, the only option that the Court has is to request a proposal from another National Committee (Article 9(3) of the 1998 ICC Rules).

This restrictive rule has become somewhat difficult for the Court. This is due to the fact that in certain jurisdictions the National Committees are structurally not in a position to put forward acceptable proposals for arbitrators, whether because of how the selection process is made, which criteria for nomination are applied (like, in certain very exceptional cases, the requirement of “remunerations” from the arbitrators for their appointment), or because of the lack of available qualified arbitrators.

For these reasons, the ICC strives to allow for direct appointment by the Court in certain circumstances. In the finally accepted provision of Article 13, the Court’s ability to make a direct appointment is limited to four specific situations:

- (1) In the event that the Court requests a National Committee to make a proposal and such National Committee either does not make a proposal that is deemed acceptable by the Court or fails to make its proposal within the time fixed, the Court can, as an alternative to requesting a proposal from another National Committee, appoint directly any person it regards as suitable (Article 13(3)).
- (2) If at least one of the parties to the arbitration is either a state or claims to be a state entity, the Court may appoint directly to act as arbitrator any person whom it regards as suitable (Article 13(4)(a)). This exception was considered justified in order to promote state investment arbitration under the ICC Rules, since states had expressed concerns regarding the nomination process through National Committees. According to the recommendations issued by the ICC Task Force on “Arbitration Involving States or State Entities”¹⁹, the reason for such concerns was that states sometimes perceived the National Committees as lacking

¹⁹ See above footnote 6.

neutrality since their membership is composed of leading companies and business associations in their respective countries.

- (3) The Court can make a direct appointment when it considers it would be appropriate to appoint an arbitrator from a jurisdiction where there is no National Committee or Group (Article 13(4)(b)).²⁰
- (4) Lastly, the Court can make a direct appointment if the President of the Court certifies to the Court that “circumstances exist which, in the President’s opinion, make a direct appointment necessary and appropriate” (Article 13(4)(c)). The President will do so particularly when it is notorious that the National Committee is not in a position to make acceptable proposals. In such “dysfunctional” cases, the Court is no longer required to undergo the futile and time-consuming exercise of requesting a National Committee’s proposal but will make the appointment directly. This is an important amendment which will improve the quality of the arbitrators appointed by the Court and thus enhance the confidence of users of ICC arbitration. At the same time, it will motivate National Committees to put themselves in a position to be able to provide proposals of highly qualified candidates within very short time limits and thus avoid becoming candidates for a “certification” under Article 13(4)(c).

7. “The Arbitral Proceedings” (Articles 16 - 29) and “Case Management Techniques” (Appendix IV)

The provisions of the 1998 ICC Rules concerning the arbitral proceedings have been amended in various ways although not all of such amendments are of equal importance. Section 7.1 below briefly explains these various amendments.

The other subsections separately address those issues which are of greater importance: Section 7.2 deals with an amendment to the 1998 ICC Rules concerning confidentiality of the arbitration process. Section 7.3 addresses Article 22, regarding the conduct of the arbitration, and Article 24, regarding the new provision on case management conference and the

²⁰ The new notion of “Group” was introduced in the 2012 ICC Rules (see Article 13(3), 13(4) and 40, as well as Appendix I and II) to take into account the special situation of jurisdictions where no National Committee is or could be established. This for example is the case in Hong Kong as it is a Special Administrative Region of the People’s Republic of China no National Committee has ever been officially recognized as such, thus it operates as a “Group”.

procedural timetable. Both Articles 22 and 24 have at their core the aim to enhance the efficiency and cost-effectiveness of the arbitration. For this purpose, Article 24 refers to a new Appendix IV concerning “Case Management Techniques” which is discussed in section 7.4 below. Also, the amended provision on the closing of the proceedings is dealt with separately in section 7.5. The new Article 29 on emergency arbitrator proceedings will not be discussed in this section but in a separate subheading together with the new Appendix V (“Emergency Arbitrator Rules”) (see below section 10).

7.1 Various amendments

Some party representatives automatically submit a power of attorney to the ICC and/or the arbitral tribunal. But other representatives, depending on their legal background, do not. So far, the ICC Secretariat had no explicit basis to request **proof of authority to act** from a party representative if no such authorization was provided for voluntarily. In the course of the re-drafting it was felt that it would be helpful to give the Secretariat and also the arbitral tribunal the explicit power to request from any party representative evidence of his or her authority to act on behalf of the concerned party. It should not be expected that such proof will as of 2012 be requested as a matter of course, but rather solicited only if there are indications that the authorization is doubtful and particularly if doubts are raised by the other party. This amendment is found in Article 17 of the revised rules.

Another minor amendment was deemed necessary in Article 21 which is the provision addressing the **applicable rules of law**. Article 17(2) of the 1998 ICC Rules presupposes the existence of a contract between the parties as well as the existence of relevant trade usages. However, in view of (investment) treaty based arbitrations where the claims may not necessarily be based in contract, Article 21(2) of the revised rules now clarifies that the arbitral tribunal shall apply the provisions of the contract and trade usages if they actually exist.

The changes in Article 23(1) regarding the content of the **Terms of Reference** reflect the changes made in Articles 4 and 5. Finally, the deletion of the term “counterclaim” in Article 23(4) (Article 19 of the 1998 ICC Rules) reflects the new, broad definition of “claims” (see Article 2(iv)).

7.2 Confidentiality (Article 22(3))

Article 22 regarding the conduct of the arbitration shall be discussed separately in section 7.3 below. There is, however, one amendment in Article

22(3) which requires individual attention and concerns not only the conduct of the arbitration but the issue of **confidentiality of the arbitration**.

The 1998 ICC Rules do not provide for a provision which declares that the arbitration is confidential as is the case in other arbitration rules.²¹ In other words, and depending on what substantive rules of law apply to the arbitration agreement, it is not forbidden for the arbitrators or the parties to disclose the arbitration to third parties. This might come as a surprise to some users, who think of arbitration as essentially a confidential process.

It was intensively debated during the revision process whether the ICC Rules should indeed provide for a specific rule whereby the arbitrator and the parties agree to keep the arbitration confidential. Ultimately, no such provision was introduced. The main reason was that it was thought that the issue of confidentiality is an issue which is best left to the parties who might have diverging interests as to whether an arbitration should be kept confidential. Also, from the side of the states there appeared to be an interest in greater transparency, in particular in the area of treaty based arbitration.²² However it was felt useful to at least clarify that the arbitral tribunal is competent to issue orders concerning confidentiality. Therefore, Article 22(3) of the revised rules concerning the competence of the arbitral tribunal to issue orders was amended and an additional competence was added which is the arbitral tribunal's ability to make orders "concerning the confidentiality of the arbitration proceedings".

Because it is not entirely apparent from the mere reading of Article 22(3), it is important to emphasize that based on the above explanation this provision must not be understood to mean that there is now actually a duty of confidentiality provided for in the ICC Rules. Rather, any party who requests the arbitral tribunal to issue such an order must be able to show to the arbitral tribunal an autonomous legal basis for confidentiality. Such basis will, as a rule, be a confidentiality agreement between the parties that includes the arbitration process. Alternatively, another basis may be where the law applicable to the arbitration agreement and/or the *lex arbitri* contains a pertinent provision.

²¹ See for example Article 43 Swiss Rules.

²² The DSC, as a sort of compromise, proposed to include a duty of confidentiality in the statement that each arbitrator will be required to sign in accordance with Article 11. This proposal was also rejected by the Commission.

7.3 “Conduct of the Arbitration” and “Case Management Conference and Procedural Timetable” (Articles 22 and 24)

7.3.1 General obligation to conduct the arbitration in an “expeditious and cost-effective manner”

As mentioned in section 2.2 above, reducing the time and cost of arbitration was one of the main goals of the revision which was strongly supported by the users of ICC arbitration. The main amendments designed to implement such goals are reflected in the new Articles 22 and 24.

Article 22(1) imposes on the arbitrators and the parties the duty “to conduct the arbitration in an expeditious and cost-effective manner having regard to the complexity and value of the dispute.”

During the drafting process it was discussed intensively whether the ICC Rules should provide a special procedure for small claims.²³ However, in the end it was felt that in ICC arbitration it is not possible to determine what constitutes a “small claim” since its scope has to cover parties from every part of the world. It should also be said that the administrative challenges of such a separate “small claims procedure” would have been very hard for the ICC to overcome.

Article 22(1) together with Article 22(2) gives the arbitral tribunal strong footing to deny any unnecessary procedural motion by the parties and to endorse specific procedural measures, in order to keep the balance between the time and costs, on the one side, and the value of the dispute, on the other side. The only express limitation to such orders is that they should not be contrary to any agreement of the parties. In addition, arbitrators of course have to always respect each party’s right to be heard, which is at times difficult to balance against the efficiency of the procedure.

The parties are specifically ordered to comply with any order made by the arbitral tribunal (Article 22 (2) and (5)).

7.3.2 Case management conference

With the new Article 24(1), the amended ICC Rules introduce the mandatory obligation of the arbitral tribunal to conduct a case management conference, because it is considered an effective means towards promoting time and cost efficient proceedings as undertaken by the parties under Article 22(1).

²³ Such procedure is known from the Swiss Rules where it is applied to claims where the amount in dispute does not exceed 1 million Swiss francs (Article 42 Swiss Rules).

It is often the case under the 1998 ICC Rules that an in-person meeting would take place between members of the arbitral tribunal and the parties in order to finalize and sign the Terms of Reference as well as discuss the procedural timetable. The case management conference required under the revised rules will therefore most likely be held at the same occasion. It is also possible, however, that the case management conference could be conducted “as soon as possible” after the drawing up of the Terms of Reference (Article 24(1)). A case management conference does not require a meeting in person. In order not to unnecessarily raise costs, the ICC Rules provide that modern means of communication can be used to conduct the case management conference (Article 24(4)).

The main purpose of the mandatory case management conference is to discuss procedural measures available to the parties which will help control time and costs of the proceedings. To assist the arbitral tribunal and the parties, the drafters have identified in a new Appendix IV (to which Article 24(1) refers) the most frequently used case management techniques (see below section 7.4).

There is also a provision whereby the arbitral tribunal can request the attendance of the “parties in person or through an internal representative” at any case management conference (Article 24(4)). This provision permits the arbitrators to request to speak directly to the parties, when they feel that this would be beneficial to reduce the time and cost of the arbitral procedure. Although it is generally assumed that party involvement does enhance time and cost efficiency, if the arbitrators were to invoke this competence, it may, on the one hand, convey a certain mistrust by the arbitrators towards counsel. A request for the presence of the parties may imply that the representatives of the parties are not acting in the best interest of their clients. On the other hand, one has to keep in mind that although the parties and the arbitrators have the duty to conduct the arbitration in a timely and cost-efficient manner, party autonomy will always prevail in procedural issues.²⁴ Thus, the presence of a party representative may assist in finding mutually agreed procedural means which reflect time and cost efficiency but entail certain procedural risks (such as the decision to have very limited document disclosure and production). In any event, these positions show that the arbitrators will have to consider carefully the impact their request for the presence of the parties will have in each case.

²⁴ See Article 19(1) of the 2012 ICC Rules which corresponds (unchanged) to Article 15(1) of the 1998 ICC Rules.

The new duty of the arbitrators to effectively manage the case is an ongoing task which continues throughout the entire proceedings. This is indicated in Article 24(3) whereby the arbitral tribunal can order further measures or modify the timetable in the course of the arbitral procedure.

It should be noted that the duty to conduct a case management conference at the beginning of the procedure and the continuing obligation to effectively manage the case has the desired side-effect of the arbitrators becoming familiar with the facts and issues of the case from the very start of the proceedings and continuing on an ongoing basis. Otherwise the arbitral tribunal will not be in a position to adopt appropriate procedural measures to effectively manage the case, as required under Article 22(2).

7.3.3 Procedural timetable

The duty to conduct a case management conference does not affect the arbitral tribunal's obligation to establish a procedural timetable. Rather, the rules as they relate to the procedural timetable have remained the same. However, while Article 24(2) is similar to Article 18(4) of the 1998 ICC Rules, the substitution of the word "provisional" with "procedural" makes it clear that such timetable is binding upon the arbitral tribunal and the parties and in this sense not "provisional".

7.4 Appendix IV: "Case Management Techniques"

As already mentioned, imposing a general duty on the arbitral tribunal and the parties to control time and costs of the proceedings prevailed over a solution providing for special procedural rules for small claims. This drafting background, however, becomes apparent in the preamble of the new Appendix IV, which emphasizes that in cases of low complexity and low value, in particular, time and cost must be "proportionate to what is at stake in the dispute".

In addition to this general rule, Appendix IV lists a number of procedural techniques (see Appendix IV a) to g)) which are already used in practice to conduct a timely and cost-efficient procedure. The list includes bifurcation of the procedure, identification of issues which can be decided on the basis of documents only, certain basic rules regarding the production of documentary evidence, and indication of issues on which the parties shall focus during the hearing. In the last sentence of Appendix IV, reference is made to the ICC publication "Techniques for Controlling Time and Costs in Arbitration" which was issued by the ICC in 2007 and contains further procedural techniques for effective case management.

Appendix IV also has a provision on settlement and explicitly provides that the arbitral tribunal may take steps to facilitate the settlement of the dispute. Such steps might include the frequently used method of arbitral tribunals to give their preliminary views of the case prior to rendering an award. This has proven to be an effective way to prompt the parties to settle their dispute. However, the relevant provision of Appendix IV(h)(ii) requires that any steps taken by the arbitral tribunal must be in accordance with the general provision of Article 41 to render an enforceable award. Regarding the possibility to give a preliminary view, this means that in practice the parties must agree to this and, in addition, must – preferably expressly – waive any challenges of potential conflicts of interests resulting from the arbitral tribunal assisting in the settlement of the dispute.²⁵

7.5 “Closing of the Proceedings and Date for Submission of Draft Awards” (Article 27)

The provision regarding the closing of the proceedings underwent some substantial changes in the interest of speeding up the procedure for rendering an award and in particular reducing the time between the last authorized submission and/or the hearing and the rendering of the award. According to the Article 27 of the 2012 ICC Rules, as soon as possible after the last authorized submission or the hearing (whichever is later), the arbitral tribunal will be obliged to perform two actions. First, the arbitral tribunal must declare the proceedings closed with regard to issues to be decided in the upcoming award. Second, the arbitral tribunal must inform the Secretariat and the parties when it expects to submit the draft award to the Secretariat.

Thus the main changes as compared to the Article 22 of the 1998 ICC Rules are as follows:

- Under the revised ICC Rules the proceedings must be declared closed as soon as possible after the last authorized submission or the hearing, whichever is later, whereas under the 1998 ICC Rules the arbitral tribunal is required to close the proceedings only after it is satisfied that the parties each had a reasonable opportunity to present their case. With the revised rule, it will no longer be possible for an arbitral tribunal to wait to close the proceedings until the award is drafted and is about to be sent to the Secretariat for scrutiny.

²⁵ See IBA Guidelines on Conflicts of Interest in International Arbitration (2004), General Standard 4(d).

- At the same point in time, the arbitral tribunal must inform the Secretariat and the parties of the date it expects to submit the draft award, whereas under the 1998 ICC Rules such information is required to be sent only to the Secretariat.

Based on the procedural timetable and the above new obligations of the arbitral tribunal, the Secretariat will be in a better position to monitor the procedure between the last submission and/or the hearing up to the submission of the draft award.²⁶ It can be expected that the Secretariat will send an enquiry notice to the arbitral tribunal rather promptly if it does not hear from the arbitral tribunal shortly after the last submission and/or the hearing. By providing information to the parties of the date by which it intends to submit its draft award to the Secretariat, the arbitral tribunal will create a feeling of commitment towards the parties, which is likely to prompt the arbitral tribunal to organize its deliberations and drafting of the award at an earlier stage than what is often the case today.

The closing of the proceedings means that no further arguments can be made, or evidence submitted by the parties, unless authorized by the arbitral tribunal. Under the 1998 ICC Rules the arbitral tribunal would typically close the proceedings only once it was fully satisfied that it was in possession of all necessary information and submissions of the parties. It would therefore rarely occur that the arbitral tribunal would require further submissions after the closing of the procedure. Given the new rules, however, this can be expected to occur more often in the future. It cannot be excluded that an arbitral tribunal may realize only in the course of its intensive deliberations, or during the process of drafting of an award, that an important piece of information or evidence is lacking. In addition, some jurisdictions with a very strict principle of contradictory proceedings (such as France with its “*principe du contradictoire*”) require that any legal authority the arbitral tribunal wishes to use as a basis for its award which had not been put forward and commented upon by the parties in their submissions or oral argument, will need to be submitted to the parties for comment.

8. “Awards” and costs (Articles 30 to 37)

The portion of the ICC Rules on awards has not undergone many substantive changes and thus the comments provided in this article are brief. The relevant substantive changes are described in the following subsections

²⁶ According to Article 2(2) Appendix III (“Arbitration Costs and Fees”), in setting the arbitrator’s fees the Court shall take into account – among other factors – “the rapidity of the proceedings”. This includes the time spent for drafting and submitting the award after the closing of the proceedings.

(sections 8.1 and 8.2). Section 8.3 addresses the changes made to the ICC Rules concerning the advances on costs and the decision as to the costs.

8.1 Time limit for rendering the award (Article 30)

In the course of the revision, it was decided to keep the deadline within which the arbitral tribunal must render its award to six months after the last signature of the Terms of Reference, albeit compliance with such deadline in practice is hardly ever achieved. However, by adding a new sentence at the end of Article 30, depending upon the specific procedural timetable, the Court is now expressly allowed to fix a time limit, which is different from the six-month period generally applicable. It is to be expected that under the revised ICC Rules, this will be the general rule employed by the Court when fixing the deadline for issuing the award. This will render it unnecessary for the Court to undertake the bureaucratic work of extending the deadline by – so far – the usual three months, which proves to be rather confusing for the parties.

8.2 Remission of awards (Article 35(4))

There are instances in which a state court will decide to remit an arbitral award to the arbitral tribunal which has rendered such award. This is particularly the case when an award has been set aside by a state court. As a rule this occurs not too long after the award has been rendered, since the setting aside proceedings must – in most cases – be initiated within a certain time limit after the award has been issued and notified. However, in some cases, such remission can occur much later. This is the situation if the relevant jurisdiction recognizes the possibility to re-open a case in particular circumstances. The most common example is when one party can establish that the award had been obtained fraudulently.²⁷

The 1998 ICC Rules have no explicit provision allowing the ICC to handle cases of remission, in particular in terms of fixing an advance to cover the additional costs. Also, no provision of the 1998 ICC Rules can be used as a basis for the procedural rules to be applied in such circumstances. With the revision, however, this situation has been remedied with the new Article 35(4) which states that the relevant procedural rules are applicable *mutatis mutandis* and which allows the Court to fix an advance to cover additional fees and expenses.

²⁷ In Switzerland this is called “revision”; see DFT118 II 199; DFT 134 III 286; Decisions of the Swiss Federal Tribunal of 29 August 2006 (4P.102/2006) and of 6 October 2009 (4A_596/2008).

It should be noted that Article 35(4) of the 2012 ICC Rules presupposes that the remitting state court will order the award to be remitted to “the” arbitral tribunal, meaning the same arbitral tribunal which rendered the award. The amended ICC Rules do not address the difficult question of whether the original arbitrators must accept the handling of the remitted case or not. In particular, the ICC Rules as amended do not specifically provide a solution to the situation in which a state court has remitted an award while the arbitral tribunal’s mandate has in the meantime ended, because the remission occurs long after the award has been rendered.

8.3 Costs of the arbitration (Articles 36 and 37)

8.3.1 Advances on costs (Article 36)

The issue of the fixing of advances on costs was discussed during several DSC meetings and at two Task Force Meetings. A change from the current principle of a “global” amount of costs for *all* claims, to a principle of “isolated” advances for each claim was intensively discussed. However, in the end, a dual system was introduced in the revised ICC Rules.

According to this dual system, the principle of the “global” advance on costs, which is payable in equal shares by each party, was maintained as the basic principle (Article 36(2)) for the normal “bi-polar” cases with one or more initial claimants and/or respondents at the outset. As in the 1998 ICC Rules, under the 2012 ICC Rules the Court is allowed to fix separate advances on costs when counterclaims are submitted. Since this would result in higher costs, the Court will only do so upon a request by one of the parties. This corresponds to the existing practice of the Court.

The other advances on costs principle is contained in the new Article 36(4). With this Article, the Court has been given the competence to set the advances differently in cases that fall under Article 7 (joinder) and Article 8 (claims in multi-party arbitrations). In these cases, the Court has very broad discretion when fixing the advances on costs. The Court can apply a global advance and fix only one advance (which will be the case particularly if the multiple parties and/or claims do not change the fact that it is a bi-polar dispute). In the alternative, the Court can fix several separate advances on costs. As a new competence, the Court is not limited to fixing only one or separate advances on costs but can in the event of a global advance also decide which share shall be paid by each party instead of requiring the parties to pay equal shares. This broad discretion will allow the Court to fix advances which best fit each individual case of joinder and/or multi-party arbitrations. The disadvantage to this flexible approach, however, is that

advances on costs for cases falling under Articles 7 or 8 cannot be predicted by the parties based on the provisions of the ICC Rules themselves.

8.3.2 “Decision as to the Costs of the Arbitration” (Article 37)

With regard to decisions as to the costs of the arbitration, three amendments are noteworthy:

First, Article 37(3) makes explicit that the arbitral tribunal has the competence to make decisions on costs at any time during the arbitral procedure. Although the same rule applies already under the 1998 ICC Rules (Article 31(2) of the 1998 ICC Rules, last sentence), it is not sufficiently known by arbitral tribunals and thus only rarely used. This provision does not change the principle that the costs fixed by the Court (the arbitrators’ fees and the administrative costs) are only fixed at the end of any arbitral procedure, which explains why these costs are explicitly exempted from this competence.

Second, a new provision was added that allows the arbitral tribunal to take into account any circumstances it considers relevant when fixing the costs (Article 37(5)). The purpose of this provision is to make the arbitral tribunal aware that it is allowed to take into account factors other than who succeeded with their claims (which is the most frequently applied allocation rule under the ICC Rules). In particular, the arbitral tribunal can consider to which extent “each party has conducted the arbitration in an expeditious and cost-effective manner”. This competence is not new but again is rarely used by arbitral tribunals. It is now explicitly tied to the duties of the parties to conduct the arbitration in an expeditious and cost effective manner (Article 22(1)) and gives the arbitral tribunal an effective tool to sanction any contrary behavior.

Third, is the addition of a new provision which addresses what effect the withdrawal of claims will have on the issue of costs (Article 37(6)). This provision codifies the current practice of the Court. Primarily, the provision is based on the principle that the parties have agreed on the effect of the withdrawal. This will often be the case since the withdrawal occurs mostly as a consequence of settlement. If the parties have not decided on the allocation of the costs, the issue must be decided by the arbitral tribunal. For that purpose, the arbitral tribunal will render an award on costs. Since a decision on cost is a decision to which a party is entitled to as part of the proper resolution of the dispute in arbitration, in case no arbitral tribunal has been constituted, each party can require that an arbitral tribunal be constituted for the purpose of rendering an award on costs.

9. “Miscellaneous” and Limitation of Liability (Articles 38 - 41)

Except for the provision on the liability, the final provisions of the ICC Rules have not changed considerably.

Regarding the liability provision (Article 40), it is now called “limitation of liability” under the 2012 ICC Rules instead of “exclusion of liability”. The background behind such modification is that according to a decision of a French court, which expressed doubts as to the validity of the total exclusion of liability, it was thought safer to only reduce the liability to the extent such limitation is not prohibited by the applicable law. Although this could be viewed as a declaratory change only, it is important should Article 40 become relevant in a jurisdiction which provides that a provision deemed invalid is inapplicable as a whole and not only reduced to the still valid part. In the first situation, due to the wording in the 1998 ICC Rules, the entire provision would be invalidated and there would be no limitation of liability.

The other change to the provision on the limitation of liability is the extension of such limitation of liability to persons appointed by the arbitral tribunal (most often these will be party-appointed experts), emergency arbitrators and Groups²⁸, as well as employees and representatives of National Committees and Groups.

10. Emergency arbitrator proceedings (Article 29 and Appendix V: “Emergency Arbitrator Rules”)

It would go beyond the purpose and scope of the present article to comment extensively and in individual detail on Article 29 as well as each of the eight articles of the “Emergency Arbitrator Rules” of Appendix V (in the following, the “EAR”). Therefore below, only the main principles characterizing the new emergency arbitrator proceedings shall be explained.²⁹

10.1.1 Structure of Article 29 and Appendix V and definitions

The new Article 29 is the core provision that sets the framework for the new regime for urgent interim or conservatory measures which cannot await the constitution of an arbitral tribunal under the ICC Rules (defined as “Emergency Measures” in Article 29(1)).

²⁸ See comment above in section 6.3.

²⁹ In the following it will be assumed that there is one applicant and one respondent only but the intended meaning is to include also situations with more than one applicant and respondent.

Article 29(1) and (2) contain the main principles of the new regime. Article 29(3) and (4) determine the relationship between the emergency arbitrator proceedings and the arbitral tribunal's jurisdiction. Article 29(5) defines Articles 29(1) – 29(4) together with the EAR set forth in Appendix V collectively as the “Emergency Arbitrator Provisions”. Article 29(5) and (6) determine the procedural requirements for the applicability of the Emergency Arbitrator Provisions and, finally, Article 29(7) determines the relationship between the emergency arbitrator proceedings and the availability of recourse to state courts.

The detailed procedure rules for the emergency arbitrator proceedings are determined in Appendix V, *i.e.* in the EAR.

10.2 Automatic application of the Emergency Arbitrator Provisions (“opt-out” principle)

A party to an arbitration agreement under the ICC Rules has the right to file an application for interim or conservatory measures to be decided by an emergency arbitrator, even if the parties have not expressly provided for the applicability of the emergency arbitrator proceedings in their agreement (Article 29(1)). Such automatic application, or opt-out principle, was the result of long and intensive discussions in the DSC, the Task Force and the Commission. As a result, the emergency arbitrator proceedings are available any time parties agree to ICC arbitration. If parties do not wish to be bound by such rules, they must explicitly exclude them. However, while the 2012 ICC Rules will be applied in general to all arbitrations *commenced* after 1 January 2012, the Emergency Arbitrator Provisions are *only* applicable to arbitration agreements which have been *agreed upon* after the date of the entry into force of the 2012 ICC Rules, *i.e.* 1 January 2012 (Article 29(6)(a)).

In order to avoid a possible “surprise effect” of parties finding themselves in emergency arbitrator proceedings without having been aware of their existence, the revised ICC Rules provide for an additional standard arbitration clause which explicitly excludes the applicability of the Emergency Arbitrator Provisions. Also, Article 29(6)(b) emphasizes that the Emergency Arbitrator Provisions will not be applicable if the parties opt out of such procedure.

10.3 Emergency Arbitrator Provisions as an additional avenue for interim relief open to parties in an ICC arbitration

The main purpose for introducing Emergency Arbitrator Provisions was to fill the potential vacuum that exists in arbitral proceedings due to the

lack of available relief from an arbitral tribunal until the constitution of the arbitral tribunal. During such time, which can last up to several months, if one of the parties needs urgent interim relief under the 1998 ICC Rules, it must address a state court unless another set of rules is agreed upon (such as the ICC Pre-Arbitral-Referee Rules). While in many cases submission to state courts is an efficient and appropriate course of action, there are situations in which such action is not possible, for instance when the only court competent to hear such submission cannot be relied upon.

In order to make it abundantly clear that the Emergency Arbitrator Provisions shall be an additional option and not curtail a party's ability to go to a state court, Article 29(7) makes it plain that from the viewpoint of the ICC Rules any party can address any competent judicial authority notwithstanding the existence of the Emergency Arbitrator Provisions. This specification addresses the concerns voiced by members of the Commission that the existence of emergency arbitrator provisions alone could lead to the adverse consequence of some state courts deciding to deny their own jurisdiction to issue interim or conservative measures.

Even once an application for Emergency Measures has been submitted, parties can "in appropriate circumstances" still seek urgent interim or conservatory relief from any competent judicial authority (Article 29(7)). What constitutes "in appropriate circumstances" will have to be determined by the judicial authority to which the application is made on a case-by-case basis.

There is one exception to the principle that the Emergency Arbitrator Provisions constitute an additional possibility to obtain relief for parties to an ICC arbitration clause. The representatives of users of the FIDIC contracts were concerned that these new provisions could undermine the possibilities for interim and conservatory relief provided for in the FIDIC contracts in cases of ICC arbitration. Therefore, Article 29(6)(c) provides that any time the "parties have agreed to another pre-arbitral procedure that provides for the granting of conservatory, interim and similar measures", the Emergency Arbitrator Provisions shall not apply. Although the concerns expressed by users of the FIDIC contracts are to an extent understandable, this rather atypical provision unfortunately will apply not only to FIDIC contracts but will also extend to other agreements which make "pre-arbitral procedure" possible. This may cause difficulties in the application of the Emergency Arbitrator Provisions since, under Article 1(5) EAR, the President of the Court will be required to evaluate whether the requirement of Article 29(6)(c) is fulfilled for each specific contract and it might not always be clear whether or not the parties have agreed to a pre-arbitral procedure that provides for the granting of "conservatory, interim or similar measures". Also, it is open

whether Article 29(6)(c) applies when the measures ordered, which are based on the other agreed pre-arbitral procedure are of contractual nature and thus cannot be recognized and enforced as a judicial decision rendered by an arbitral tribunal (see also comments below section 10.7).

10.4 Emergency arbitrator proceedings are available only in truly urgent situations (Article 29(1))

One of the original ideas suggested by the DSC was to have the ICC Pre-Arbitral Referee Rules used as an opt-out solution for parties seeking urgent interim or conservatory measures. However, one problem with the use of the ICC Pre-Arbitral Referee Rules in such context is that the nature of the order issued by the ICC Pre-Arbitral Referee has been understood by French courts to be contractual in nature. In other words, it is not a judicial decision such as interim or conservatory measures rendered by arbitral tribunals. Furthermore, although it appears that the ICC Pre-Arbitral Referee Rules were drafted to remedy urgent situations, it is purported in the literature that urgency is not a mandatory requirement for the application of such rules.³⁰ As a consequence, according to these views these rules can be used as an adjudication-like process.

Although there is much to say in favor of adjudication as a fast and highly cost-efficient means of dispute resolution, the Task Force decided that such process should not be imposed on the parties. To use the ICC Pre-Arbitral Referee Rules in combination with an automatic application would therefore be inappropriate. But since according to the view of many experienced practitioners, an opt-in solution would not change the current situation in which the ICC Pre-Arbitral Referee Rules are very rarely used, an important goal was to introduce an opt-out solution that could ensure effective remedies for every concerned party during the period before the constitution of the arbitral tribunal. At the same time, the risk of surprising the parties with a process they have not agreed upon should be minimized. In this situation, the only viable solution was to limit the scope of application of the emergency arbitrator proceedings to truly urgent situations “that cannot await the constitution of an arbitral tribunal”. This is now provided for in Article 29(1).

Whether or not such urgency is present in a given case is a substantive condition for the issuance of an order by the emergency arbitrator and thus neither for the Secretary General nor for the President of the Court to decide.

³⁰ Emmanuel Gaillard/Philippe Pinsolle, “*The ICC Pre-Arbitral Referee: First Practical Experiences*”, 20(1) *Arb. Intl* 13, 14 - 15 (2004).

Rather, as provided for in Article 6(2) EAR, the emergency arbitrator shall determine in his or her order whether the requirement for admissibility according to Article 29(1) is met, which means that urgency as defined in Article 29(1) is present in the given case.

The fact that the emergency arbitrator proceedings deal exclusively with urgent situations is also reflected by the requirement that the emergency arbitrator render his or her order within 15 days following the date on which the file was transmitted to him or her (Article 6(4) EAR).

10.5 Emergency Arbitrator Provisions only applicable to “signatories” or “successors to such signatories” (Article 29(5))

Application of the Emergency Arbitrator Provisions is not only limited to truly urgent situations. In addition, only certain parties can take part in emergency arbitrator proceedings. According to Article 29(5) of the revised rules, such proceedings can only occur between “parties which are either signatories of the arbitration agreement under the Rules that is relied upon for the application, or successors to such signatories.” The purpose behind the incorporation of this provision is threefold.

First, no party will be drawn into an emergency arbitrator proceeding as a respondent without having clearly agreed to arbitrate under the ICC Rules. While this requirement excludes the so-called “extension-theories”, a practice will have to be established to determine the scope and meaning of the term “signatories”. Similarly, a practice will need to develop as to the application of the “successor rule” contained in the last part of Article 29(5). Based on the signatory requirement, it will most likely be possible to rely on the “successor rule” only if there is unambiguous documentary evidence of a successor-relationship to one of the signatory parties to the arbitration agreement.

Second, another important purpose of Article 29(5) is that it acts as a substitute for the protection generally afforded to respondents in Article 6(3) and (4) of the 2012 ICC Rules with regard to the existence of an arbitration agreement. The Emergency Arbitrator Provisions needed to ensure that a respondent to an application for Emergency Measures would be afforded, at minimum, the same protection as any other respondent in ICC arbitration. Since, however, the application of Article 6(3) and (4) would require too much time and would necessitate input from the respondent it was not seen as a viable solution. Rather, drafters wanted to propose a simple and clear-cut test which ensures that only respondents who have agreed to an arbitration clause under the 2012 ICC Rules with the applicant, can be involved in an

emergency arbitrator proceeding. The goal was to create a test which would enable the President of the Court, or its Vice Presidents, to verify compliance easily within a very short time period. The requirement of Article 29(5) fulfills these conditions.

Third, and finally, the limitation provided for in Article 29(5) will lead to the exclusion of the emergency arbitrator proceedings to treaty-based arbitrations, and in particular treaty-based *investment* arbitrations, since they are not based on a signed individual arbitration agreements. This is a welcomed corollary effect since it was the view of at least the majority of the DSC members that the Emergency Arbitrator Provisions should not automatically apply to treaty-based investment arbitrations involving states and/or state entities.

The requirement that the Emergency Arbitrator Provisions “shall apply only to parties that are either signatories of the arbitration agreement under the Rules that is relied upon for the application, or successors of such signatories”, is but one procedural safeguard put in place to protect future respondents to an application for Emergency Measures. Other safeguards that are available are explained in greater detail in the following section.

10.6 Various other safeguards for a respondent to an application for Emergency Measures

A characteristic feature of the Emergency Arbitrator Provisions is that they contain built-in safeguards to prevent the new remedy from being used by one party as a strategic means to obtain leverage early on the arbitration. This was requested particularly by the users who find themselves often in both situations, *i.e.*, as claimant or respondent. Indeed, in international dispute resolution before state courts, it is quite often the case that an application for provisional measures is used as a tool to obstruct the proceedings. For instance, one party may try to preliminarily seize assets of its counterparty in order to obtain some meaningful advantage.

The first and probably most important means to restrict such possible procedural tactics and abuse is to limit the application of the Emergency Arbitrator Provisions to “truly” urgent situations (as detailed above in section 10.4). Another requirement which adopted in order to prevent future abuse is the requirement that Emergency Arbitrator Provisions only apply to parties that are signatories or successors of signatories (as also addressed above in section 10.5). Other provisions which offer further protection to a respondent to an application for Emergency Measures can be found in the EAR and include the following:

- According to the EAR, there is no short deadline for a respondent to submit its reaction to the application for Emergency Measures. Rather, the timing and form of a reaction by the respondent is determined in the procedural timetable drawn up by the emergency arbitrator normally within two days from the transmission of the file (Article 5(1) EAR). This leaves the respondent with some time to organize itself before having to file a submission.
- The applicant for Emergency Measures is required to pay, immediately, a fee of USD 40'000 to cover the costs of the emergency arbitrator proceedings (Article 7(1) EAR).
- The applicant must file a Request for Arbitration within 10 days of the receipt of the application for Emergency Measures (Article 1(6) EAR). It goes without saying that the Request for Application must concern the same dispute as that which gave rise to the application for Emergency Measures. With this additional requirement, applicants are made aware of the fact that they cannot simply file an application for Emergency Measure in order to put pressure on the other side to settle the case in the event of a positive order. Rather, applicants must be prepared to take all of the steps which are required to go through with the arbitration (including payment of advances on costs in the arbitration).

10.7 The form of a decision made by an emergency arbitrator: Order (Article 29(2))

According to Article 29(2) of the revised rules, the decision by the emergency arbitrator shall be rendered in the form of an order. This notion is repeated in Article 6(1) EAR. The main purpose of this denomination is to distinguish the decision of the emergency arbitrator from an award issued by an arbitral tribunal. It also erases any possible doubts regarding the need for scrutiny by the Court of any decision rendered by an emergency arbitrator.

It should be noted, however, that such denomination does not have any impact on whether orders issued by ICC emergency arbitrators can be recognized and enforced in any jurisdiction. Such decision is for the recognizing and enforcing jurisdiction to take. In particular jurisdictions which have adopted or will adopt the revised UNCITRAL Model Law, including the Articles 17H and 17I, are likely to recognize and enforce orders issued by an ICC emergency arbitrator. Also, in some jurisdictions, the *lex*

arbitri provides for means to recognize and enforce interim measures rendered by arbitral tribunals.³¹

11. Concluding remarks

The goal of the revision was not to amend the key principles of ICC arbitration but rather, to a great extent, to reflect and make transparent the current practice of the Court. This was necessary in order to ensure that the ICC Rules can also be understood and applied by users who are not necessarily “insiders” of ICC arbitration.

Nevertheless, the amended ICC Rules contain some important changes to the existing procedural principles that go beyond merely codifying current practice. The most important changes to the existing procedure which concern the administration within the ICC itself are:

- New and leaner screening process for the *prima facie* test on jurisdiction, with the Secretary General as a “gatekeeper”;
- Discretion of the Court, in certain limited cases, not to use National Committees for the appointment of arbitrators; and
- Broader provision on consolidation which, in limited cases, allows consolidation even if the parties to the arbitrations are not identical.

The 2012 ICC Rules do, however, also contain new rules. The background behind the addition of such new provisions can be seen as (1) regulating general issues which have proven to be important in the interest of international arbitration as a preferred means of dispute resolution, (2) addressing procedural problem areas which have occurred in the practice of the ICC when administrating cases in the course of the past 10 years and to a great extent to reflect existing Court practice, or (3) constituting best practice in institutional arbitration. This resulted in three areas which are genuinely new in the revised ICC Rules:

- New provisions on joinder of additional parties, claims between multiple parties, and multiple contracts;
- New provisions and a new Appendix on conducting the arbitration in an expeditious and cost-efficient manner, including the obligation to hold at least one case management conference; and
- New provisions and a new Appendix on emergency arbitrator proceedings.

³¹ This is, for example, the case in Switzerland based on Article 183(2) of the Swiss International Arbitration Law.

Although, as can be seen from the above lists, the changes to the 1998 ICC Rules are substantial, it can nevertheless be said that the typical features of ICC arbitration have been maintained.

It is not the main purpose of this paper to comment on the quality of the reform or on whether certain amendments are more welcomed than others in the view of the present author. However, what can be said is that the described procedure of the revision, as cumbersome and as time consuming as it was, led to a very careful revision. Each and every proposed amendment and addition had to undergo intense scrutiny before it was ultimately adopted. Also, each and every comment raised by the members of the large Task Force was taken into account. As a consequence, some changes were revised many times until the final result was reached and sometimes entire provisions which had been prepared by the DSC were redrafted or did not even make it to the Task Force or the Commission for comment. Throughout the process, it was always kept in mind that amendments should only be made if they were truly necessary.

In the view of the present author, this rather confining framework led to a well-balanced and positive overall result which should prove to be not only acceptable but welcomed by the arbitration community. Despite the meticulous manner in which the revision was conducted it nevertheless fostered the development of innovative solutions for highly complex issues such as, in particular, arbitrations involving multiple parties and multiple claims, which was one of the main goals of the revision. Here the 2012 ICC Rules set a new standard of modern institutional arbitration rules.
