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THE 2012 INTERNATIONAL CHAMBER OF COMMERCE RULES OF ARBITRATION: MEETING THE NEEDS OF THE INTERNATIONAL ARBITRATION COMMUNITY IN THE 21ST CENTURY

Meeran Ahn*

I. INTRODUCTION

The International Court of Arbitration (ICA) of the International Chamber of Commerce (ICC) is among the world's major institutions for resolving international commercial and business disputes.¹ The ICC's Court of Arbitration was established in 1923² and has administered more than 17,000 cases.³ The reach and global prominence of the ICA is reflected in its 2010 statistics. In 2010, 793 cases were filed, 479 awards rendered, and involved 2,145 parties from 140 countries.⁴ ICC arbitration offers an attractive alternative to court litigation because it offers less costly and time-consuming advantages, in addition to confidentiality and freedom for the parties to choose the place of arbitration, applicable rules of law, language of the proceedings, and arbitrators.⁵ The formal procedures of ICC arbitration lead to a binding decision from an arbitral tribunal that is enforceable to both domestic arbitration laws and international treaties.⁶

The last revision to the ICC's Arbitration Rules was in 1998.⁷ Due to changing business needs and practices, the ICC decided to revise the 13-year-old framework and develop a modern set of arbitration rules.⁸ The revision process began in 2008 by a 20-member drafting committee, also supported by a task force composed of over 200 members from the ICC, Court members, the ICC Secretariat, and practitioners.⁹ The ICC World Council adopted the new Rules in Mexico City on June 11, 2011 and were issued on September 12, 2011, with the Rules enforceable on

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¹ International Chamber of Commerce, *Arbitration Today*, available at <http://www.iccwbo.org/court/arbitration/id4584/index.html> (last visited Oct. 3, 2011) [hereinafter *Arbitration Today*].

² International Chamber of Commerce, *International Court of Arbitration: Resolving Business Disputes Worldwide* (Feb. 2012), available at http://www.iccwbo.org/uploadedFiles/Court/Arbitration/810_Anglais_05.pdf. [hereinafter *Resolving Business Disputes Worldwide*].

³ *Arbitration Today*, *supra* note 1.

⁴ International Chamber of Commerce, *Facts and Figures on ICC Arbitration-2010 Statistical Report*, available at <http://www.iccwbo.org/court/arbitration/index.html?id=41190> (last visited Oct. 3, 2011) [hereinafter *Facts and Figures*].

⁵ *Resolving Business Disputes Worldwide*, *supra* note 2.

⁶ International Chamber of Commerce, *Arbitration and ADR Rules*, available at http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/2012_Arbitration%20and%20ADR%20Rules%20ENGLISH.pdf (last visited Oct. 5, 2011) [hereinafter *ICC RULES OF ARB.*].

⁷ International Chamber of Commerce, *Rules of Arbitration*, available at http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf (last visited Oct. 4, 2011) [hereinafter *ICC Rules of Arbitration 1998*].

⁸ Press Release, International Chamber of Commerce, *ICC Launches New Rules of Arbitration* (Sept. 12, 2011), available at <http://www.iccwbo.org/index.html?id=45658>.

⁹ *Id.*

January 1, 2012.¹⁰ The new Rules expand the 1998 Rules from being composed of 35 Articles and 3 Appendices to 41 Articles and 5 Appendices. The ICC Arbitration Rules are intended to be used globally in arbitrations conducted in any language and subject to any law.¹¹

The ICC explains in the introduction to the new Rules that the Rules “remain faithful to the ethos, and retain the essential features, of ICC arbitration, while adding new provisions . . .”¹² The ICC has three major aims for the revision. First, the revised Rules aim to better serve the businesses and governments engaged in international commerce and investment.¹³ Second, the revised Rules intend to update the Rules to the existing and future standards and practices in arbitration.¹⁴ The third aim is to reduce time and costs of ICC arbitration and ensure that the arbitral process is conducted expeditiously and in a cost-effective manner.¹⁵ John Beechey, Chairman of the ICC International Court of Arbitration, stated that one of the principal aims of the Court is to “ensure that its Rules promote efficiency in the arbitral process and that they reflect current business practice, consistent with the overriding objective of doing justice between the parties . . . while remaining faithful to the ethos, and retaining the essential features, of ICC Arbitration.”¹⁶

The revised Rules are more evolutionary rather than revolutionary because they do not make fundamental changes. The revisions update the ICC Rules to the standards and practices currently used in international arbitral proceedings. This article will look into the major changes and new provisions in the 2012 ICC Arbitration Rules.

II. INTRODUCTORY PROVISIONS

A. Article 1 International Court of Arbitration

The revised Rules define the role of the ICC’s International Court of Arbitration. Under Article 1 paragraph 2, the 2012 Rules declare that the ICC Court is the *only* body authorized to administer arbitrations in accordance with the ICC Rules of Arbitration.¹⁷ In addition, by agreeing to arbitrate under the ICC Rules, the parties accept that the arbitration is administered by the ICC Court.¹⁸ This provision is an expansion of Article 1 paragraph 2 of the 1998 Rules, which defines the function of the court to only be to ensure the application of the ICC Rules of Arbitration.¹⁹ The revised provisions tackle the problems occurring in ad hoc arbitration, when the parties agree to arbitrate under the ICC Rules, but are administered by another institution.²⁰ The new

¹⁰ *Id.*

¹¹ ICC RULES OF ARB. (2012).

¹² *Id.*

¹³ Release, International Chamber of Commerce, *supra* note 8.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ ICC RULES OF ARB. art. 1(2) (2012).

¹⁸ ICC RULES OF ARB. art. 6(2) (2012).

¹⁹ *ICC Rules of Arbitration 1998* at art. 1(2).

²⁰ Steven Finizio, Kirsten O’Connell & Charlie Caher, Revised ICC Rules of Arbitration, WilmerHale (Sept. 13, 2011) *available at* <http://www.wilmerhale.com/files/Publication/1c2433eb-91e4-462e-8801-83c6dc9757d7/Presentation/PublicationAttachment/428e3250-4b76-4312-8862-87dc1f95008d/International%20Arbitration%20Alert.pdf> [hereinafter Revised ICC Rules of Arbitration].

provisions establish the ICC Court as the sole body that is authorized to administer arbitrations governed by ICC Rules, making the ICC Rules ineffective in ad hoc arbitration. The Rules and the ICC Court are both strengthened in international arbitration by establishing a firm role for the Court and giving the Court exclusive control over arbitrations conducted under ICC Rules.

B. Article 3 Written Notifications or Communications; Time Limits

Article 3 illustrates the ICC's aim in updating the Rules to respond to current business practices and needs.²¹ Article 3 paragraph 2 permits the Secretariat and the arbitral tribunal to use email, already the norm, as a means of communication and leaves the option open for the use of other technology by allowing "any other means of telecommunication."²² This provision illustrates the aim of the revision to reflect modernization and the current methods of communication and practice.

III. COMMENCING THE ARBITRATION

A. Article 4 Request for Arbitration

The revised Article 4 includes new language regarding the request for arbitration.²³ Under Article 4 of the 1998 Rules, a request for arbitration requires only "a description of the nature and circumstances of the dispute giving rise to the claim(s)."²⁴ Now, under Article 4 paragraph 3, a basis for the claims must also be given in addition to the description.²⁵ This additional requirement is also found in Article 5 paragraph 5 of the revised Rules, which requires a "basis upon which the counterclaims are made."²⁶ The changes reflect the ICC's aim to revise the Rules to make them more conducive to efficient arbitration. By requiring a basis for claims and counterclaims, the arbitral tribunal and the parties benefit from having a firm foundation of the claims and enable the proceedings to be more focused and transparent.²⁷

Also in Article 4, the revised Rules add language concerning the relief sought.²⁸ When stating the relief sought, the revised provision requires a request to contain "the amounts of any quantified claims and, to the extent possible, an estimate of the monetary value of any other claims."²⁹ The revision expands the requirement in the 1998 Rules, which require only "an indication of any amount(s) claimed."³⁰ The new Rules discourage any tactics to intentionally conceal the true amount of damages or unintentionally neglect to calculate an accurate amount. An accurate figure of the amount in dispute will help construct efficient arbitral procedures and

²¹ ICC RULES OF ARB. art. 3 (2012).

²² ICC RULES OF ARB. art. 3(2) (2012).

²³ ICC RULES OF ARB. art. 4 (2012).

²⁴ *ICC Rules of Arbitration 1998* at art. 4(3)(b).

²⁵ ICC RULES OF ARB. art. 4(3)(c) (2012).

²⁶ ICC RULES OF ARB. art. 5(5)(a) (2012).

²⁷ Revised ICC Rules of Arbitration, *supra* note 20.

²⁸ ICC RULES OF ARB. art. 4(3)(d) (2012).

²⁹ *Id.*

³⁰ *ICC Rules of Arbitration 1998* at art. 4(3)(c).

may even lead to settlement.³¹ A similar provision also applies to counterclaims in the new Rules.³²

B. Article 6 Effect of the Arbitration Agreement

Article 6 paragraph 3 is an entirely new provision addressing challenges to jurisdiction.³³ Under the 1998 Rules, a prima facie finding on jurisdiction is resolved by the ICC Court.³⁴ Now, any jurisdictional challenges are referred directly to the arbitral tribunal rather than the ICC Court, unless the Secretary General of the Court refers it to the Court.³⁵ This new default rule requiring the arbitral tribunal to directly determine the prima facie decision on jurisdiction will expedite jurisdictional challenges by skipping the extra step of going to the ICC Court. The involvement of the arbitral tribunal at the early stage allows the arbitrators to have a better understanding of the case and accelerate the arbitral process.

IV. MULTIPLE PARTIES, MULTIPLE CONTRACTS, AND CONSOLIDATION

A key addition to the revised Rules is the section devoted to issues regarding multiple parties, multiple contracts, and consolidation.³⁶ Article 7 and Article 9 are two new provisions and Articles 8 and Article 10 revise articles of the 1998 Rules.³⁷ Under the 1998 Rules, only the parties to an arbitration agreement can participate in the proceedings under the agreement, and subsequently, the arbitration award will only bind those parties. However, the reality of many international commercial and business transactions involve more than one contract and/or multiple parties. Under the old Rules, many parallel proceedings led to wasteful cost and time because arbitral proceedings under the ICC Rules could not be consolidated. These Rules fostered inconsistent outcomes, defeating the aims of arbitral proceedings. Thus, the two revised and two new provisions in this section recognize the complexity of international arbitration and embody the objective to modernize the Rules to reflect current practices.

A. Article 7 Joinder of Additional Parties

Article 7 is a new provision addressing joinder of additional parties to an arbitral proceeding.³⁸ The new rule permits any party to join a third party to the arbitration by filing a Request for Joinder to the Secretariat, on the condition that an arbitrator has not been confirmed or appointed.³⁹ A request for joinder after an arbitrator has been appointed or confirmed requires

³¹ Revised ICC Rules of Arbitration, *supra* note 20.

³² ICC RULES OF ARB. art. 5(5)(b) (2012).

³³ ICC RULES OF ARB. art. 6(3) (2012).

³⁴ *ICC Rules of Arbitration 1998* at art. 6(2).

³⁵ ICC RULES OF ARB. art. 6(3) (2012).

³⁶ ICC RULES OF ARB. arts. 7-10 (2012).

³⁷ *Id.*

³⁸ ICC RULES OF ARB. art. 7 (2012).

³⁹ ICC RULES OF ARB. art. 7(1) (2012).

all parties to agree on the request, including the additional party.⁴⁰ Article 7 also allows the ICC Secretariat to fix a time limit for this submission.⁴¹

This new provision tackles a critique of arbitration, specifically the abuse of undue delay, and attempts to resolve the abuse of delay by preventing any joinder request from holding up the appointment of arbitrators. In relation to Article 7, the revised definitions of terms in the Rules are noteworthy. The Rules now define new words: “additional party” includes one or more additional parties; “party” or “parties” include claimants, respondents or additional parties; and “claim” or “claims” now include any claim by any party against any other party.⁴² The definitions clarify these formerly ambiguous terms and account for the complexity of current international arbitral proceedings.

B. Article 8 Claims Between Multiple Parties

Article 8 revises Article 10 of the 1998 Rules and focuses on issues of claims between multiple parties.⁴³ Article 10 of the 1998 Rules does not include an express provision on claims between multiple parties.⁴⁴ The old Article 10 addresses rules on nominating arbitrators to the tribunal by multiple parties.⁴⁵ Article 8 paragraph 1 permits any party in an arbitration with multiple parties to make claims (or counterclaims) against any other party to the arbitration, provided that the Terms of Reference have not been signed or approved by the Court.⁴⁶ Thereafter, such claims or counterclaims require the authorization of the arbitral tribunal.⁴⁷

C. Article 9 Multiple Contracts

Like Article 7, Article 9 is a new provision and deals with claims arising out of multiple contracts.⁴⁸ The Article permits these claims to be brought in a single proceeding, “irrespective of whether such claims are made under one or more than one arbitration agreement under the Rules.”⁴⁹ Article 9 is subject to Article 23(4), which hinders any party from making new claims once the Terms of Reference have been signed or approved by the Court, unless authorized by the arbitral tribunal.⁵⁰ Because of this limitation, parties may decide not to have claims arising from multiple contracts be heard in a single arbitration where they have not agreed to do so in their contracts. Parties may want to opt out of Article 9 when drafting their arbitration agreements to ensure that claims from different contracts cannot be brought together.⁵¹

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² ICC RULES OF ARB. art. 2 (2012).

⁴³ ICC RULES OF ARB. art. 8 (2012).

⁴⁴ *ICC Rules of Arbitration 1998* at art. 10.

⁴⁵ *Id.*

⁴⁶ ICC RULES OF ARB. art. 8(1) (2012).

⁴⁷ ICC RULES OF ARB. art. 8(3) (2012).

⁴⁸ ICC RULES OF ARB. art. 9 (2012).

⁴⁹ *Id.*

⁵⁰ ICC RULES OF ARB. art. 23(4) (2012).

⁵¹ Revised ICC Rules of Arbitration, *supra* note 20.

D. Article 10 Consolidation of Arbitrations

The last Article in this section, Article 10, expands the ICC Court's ability to consolidate arbitrations.⁵² Under the 1998 Rules, the ICC Court can only consolidate multiple claims arising out of a legal relationship between the same parties.⁵³ Article 10 of the revised Rules allows the ICC Court, at a party's request, to consolidate separate arbitrations under three circumstances: when all parties have agreed, when claims are made under the same arbitration agreement, or although made under different arbitration agreements, they are "compatible" arbitration agreements.⁵⁴ This provision attempts to address the issue of cost. Generally, multiple arbitrations involving different parties increase costs of the arbitral process. By broadening the scope of the Court's consolidation procedures, the revision attempts to keep arbitration costs down.

V. THE ARBITRAL TRIBUNAL

A. Article 11 General Provisions

Article 11 revamps the independence of arbitrators as expressed in Article 7 of the 1998 Rules.⁵⁵ While Article 7 of the 1998 Rules demands the arbitrator "be and remain independent of the parties involved in the arbitration,"⁵⁶ the revised Rules also explicitly require the arbitrator "be and remain impartial and independent."⁵⁷ The addition of impartiality is in accordance with other arbitration institutions, such as the UNCITRAL Arbitration Rules and the IBA Guidelines on Conflicts of Interest in International Arbitration, which require the arbitrator to be impartial.⁵⁸ The updated Rules continue to uphold the requirement that arbitrators remain professionally and personally separate from the parties, and although impartiality is assumed, the ICC Rules now explicitly require arbitrators to remain subjectively unbiased toward the parties.

In relation to the impartiality requirement, Article 11 paragraph 2 also mandates the arbitrator, before appointment or confirmation, to sign a statement of "acceptance, availability, impartiality and independence" to avoid any conflict of obligations.⁵⁹ This provision expands the "statement of impartiality" in Article 7 paragraph 2 of the 1998 Rules by including the arbitrator's availability.⁶⁰ This procedural change is an effort to promote efficiency of arbitral proceedings by ensuring that arbitrators have and will devote the time to conduct the arbitration. By including a statement of availability, the ICC aims to address the criticism that arbitrations are plagued by delays due to over-booked arbitrators.⁶¹ The revised provision also enhances the Court's ability to appoint accessible and competent arbitrators.

⁵² ICC RULES OF ARB. art. 10 (2012).

⁵³ *ICC Rules of Arbitration 1998* at art. 4(6).

⁵⁴ ICC RULES OF ARB. art. 10 (2012).

⁵⁵ ICC RULES OF ARB. art. 11 (2012).

⁵⁶ *ICC Rules of Arbitration 1998* at art. 7(1).

⁵⁷ ICC RULES OF ARB. art. 11(1) (2012).

⁵⁸ UNCITRAL ARB. RULES art. 6 ¶ 7 (2010); IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION pt. I(1) (2004).

⁵⁹ ICC RULES OF ARB. art. 11(2) (2012).

⁶⁰ *ICC Rules of Arbitration 1998* at art. 7(2).

⁶¹ Revised ICC Rules of Arbitration, *supra* note 20.

B. Article 13 Appointment and Confirmation of the Arbitrators

Article 13 revises Article 9 of the 1998 Rules regarding the appointment of arbitrators.⁶² Under the 1998 Rules, the Court can only appoint the arbitrator upon a proposal by an appropriate National Committee.⁶³ If the National Committee fails to make a proposal within the time frame or the Court does not accept the proposal made, the Court can request a second proposal or request one from another National Committee.⁶⁴ Under the old Rules, the Court relies on a National Committee for the appointment of sole arbitrators. The new Rules allow the ICC Court to directly appoint an arbitrator in limited circumstances, including when “the Court considers that it would be appropriate to appoint an arbitrator from a country . . . where there is no National Committee” or the President certifies that a direct appointment is “necessary and appropriate.”⁶⁵

Finally, as more arbitration involves states or state entities, the revised Rules permit the ICC Court to appoint an arbitrator when “one or more of the parties is a state or claims to be a state entity.”⁶⁶ The ICC modernized the Rules to reflect the rise in cases where at least one of the parties is a state. As reported in the ICC’s 2010 Statistical Report, in 10% of cases, at least one of the parties was a State or parastatal entity.⁶⁷

VI. THE ARBITRAL PROCEEDINGS

A. Article 22 Conduct of the Arbitration

One of the principle objectives of the revisions was to foster efficiency and limit the costs of arbitral proceedings.⁶⁸ Peter Wolrich, Chairman of the ICC Commission on Arbitration, commenting on the new Rules said, “The new Rules meet the growing complexity of today's business transactions, the needs surrounding disputes involving states, and the demand for greater speed and cost-efficiency.”⁶⁹ In contrast to the 1998 Rules, which do not provide an express requirement for expeditious and cost-effective arbitral proceedings, the revised Rules explicitly command that the arbitral tribunal and the parties “make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute.”⁷⁰ The new provision codifies the sentiment held by parties and arbitral tribunals to conduct arbitral proceedings without delay and without driving up costs, also acknowledging that every case is distinct and has different requirements. Article 22 paragraph 2 furthers this concept and empowers the arbitral tribunal to adopt procedural measures to ensure effective case management, which are further discussed in Article 24.⁷¹ This provision is broadly worded, giving the tribunal the ability to tailor these procedural measures to each arbitral proceeding,

⁶² ICC RULES OF ARB. art. 13(4) (2012).

⁶³ *ICC Rules of Arbitration 1998* at art. 9(3).

⁶⁴ *Id.*

⁶⁵ ICC RULES OF ARB. art. 13(4) (2012).

⁶⁶ *Id.*

⁶⁷ Facts and Figures, *supra* note 4.

⁶⁸ Release, International Chamber of Commerce, *supra* note 8.

⁶⁹ *Id.*

⁷⁰ ICC RULES OF ARB. art. 22(1) (2012).

⁷¹ ICC RULES OF ARB. art. 22(2) (2012).

which as expressed in Article 22 paragraph 1, is characterized by its own “complexity and value.”⁷²

Article 22 also includes a new provision on confidentiality.⁷³ Confidentiality is one of the advantages of arbitration and makes it attractive for settling disputes. Although a sense of duty to keep arbitral proceedings confidential is implied, the array of arbitration rules have taken different approaches to the issue of confidentiality. Some arbitration rules have included a confidentiality provision while many remain silent on the issue and leave the issue to the agreement of the parties to explicitly state a duty of confidentiality.⁷⁴ The 1998 Rules follow the latter view and do not provide an express provision on the confidentiality of proceedings, although Article 20 paragraph 7 of the 1998 Rules empower the tribunal to take measures to protect trade secrets and confidential information.⁷⁵ Now, the Rules expressly provide, under Article 22, that the arbitral tribunal may make confidentiality orders on a case-by-case basis.⁷⁶ According to the provision, the tribunal may continue to take measures to protect “trade secrets and confidential information,” but can now conceal the existence of the arbitration.⁷⁷

The new provision confers broad power to the tribunal to issue orders concerning confidentiality, but only upon the request of any party. The provision continues to uphold the freedom of contract idea and still leaves the issue of confidentiality up to the parties and the terms of the arbitration agreement. Therefore, parties to ICC arbitration may want to consider addressing the duty of confidentiality in their arbitration agreements. Although the revised Rules still do not impose a duty of confidentiality on the parties or establish a default confidentiality provision, the new rule allows flexibility to the parties and the tribunal in addressing the confidentiality issue and acknowledges that parties should not be restricted.⁷⁸ The inclusion of the confidentiality provision in the revised Rules is likely to be hailed as sufficiently serving the different commercial sectors that have an interest in protecting sensitive information.

Lastly, paragraphs 4 and 5 of Article 22 describe the required behavior of the arbitral tribunal and the parties during the conduct of the arbitration.⁷⁹ With no exceptions, the Rules mandate that the arbitral tribunal “act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.”⁸⁰ In exchange, the parties respect the tribunal and comply with orders given by the arbitral tribunal.⁸¹ The duty to comply with tribunal orders codifies the parties’ obligation to arbitrate in good faith.

B. Article 24 Case Management Conference and Procedural Timetable

Promoting expeditious and cost-effective arbitration, Article 24 of the new Rules focuses on case management and a procedural timetable. Under the 1998 Rules, the arbitral tribunal lacks any express powers to enforce case management. Article 24 now requires the arbitral tribunal to

⁷² ICC RULES OF ARB. art. 22(1) (2012).

⁷³ ICC RULES OF ARB. art. 22(3) (2012).

⁷⁴ Revised ICC Rules of Arbitration, *supra* note 20.

⁷⁵ *ICC Rules of Arbitration 1998* at art. 20(7).

⁷⁶ ICC RULES OF ARB. art. 22(3) (2012).

⁷⁷ *Id.*

⁷⁸ Revised ICC Rules of Arbitration, *supra* note 20.

⁷⁹ ICC RULES OF ARB. arts. 22(4)-(5) (2012).

⁸⁰ ICC RULES OF ARB. art. 22(4) (2012).

⁸¹ ICC RULES OF ARB. art. 22(5) (2012).

convene a case management conference with the parties when writing the Terms of Reference, or soon thereafter, to establish procedural measures that assist in a speedy and cost-effective arbitration.⁸² The provision refers to Appendix IV, which lists case management techniques that can be adopted to manage the case effectively.⁸³ The new Appendix to the Rules suggest techniques that include rendering one or more partial awards on key issues, identifying preliminary issues that can be resolved, conducting part or all of the arbitration on a documents only basis, and limiting the length and scope of written submissions to avoid repetition and maintain focus on key issues.⁸⁴ Appendix IV also suggests producing documents with submissions, avoiding excessive time and cost associated with document requests.⁸⁵ When documents are requested they should be relevant and be provided within a reasonable time.⁸⁶

Article 24 paragraph 2 also requires a procedural timetable to aid in conducting a speedy arbitral proceeding and to avoid delays.⁸⁷ In addition, the Rules allow the arbitral tribunal to adopt further procedural measures or modify the timetable as the arbitration proceeds, ensuring the exercise of effective case management throughout the whole proceeding.⁸⁸

C. Article 27 Closing of the Proceedings and Date for Submission of Draft Awards

Article 27 also addresses concerns about delays in ICC arbitration, specifically the delay of draft awards.⁸⁹ Article 27 defines the closing of a proceeding to be either after the last hearing or the filing of the last authorized submissions, whichever comes later.⁹⁰ The revised definition of a closed proceeding is less ambiguous than the definition under Article 22 of the 1998 Rules, which describe a proceeding to be closed once the parties have a “reasonable opportunity to present their case.”⁹¹ The loose definition of “closed proceeding” led to delays in the admission of the award because a draft award is issued after a proceeding is closed. The revised Article 27 instructs the arbitral tribunal to report to the Secretariat and the parties the date it expects to present its draft award for approval as soon as possible after the last hearing.⁹² Article 22 of the 1998 Rules is more lax requiring “an approximate date” once the proceedings close.⁹³ The new Article pressures the arbitral tribunal to deliver the draft award in accordance to the timetable or even sooner. This mechanism for transparency and monitoring the time it takes the arbitral tribunal to deliver the award illustrates the Rules’ effort to provide efficient arbitration and prohibit delays.

Closely related to the objective of the revisions to promote efficiency and limit the costs of arbitral proceedings is Article 37 paragraph 5.⁹⁴ Under this provision, the revised Rules

⁸² ICC RULES OF ARB. art. 24(1) (2012).

⁸³ ICC RULES OF ARB. app. IV (2012).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ ICC RULES OF ARB. art. 24(2) (2012).

⁸⁸ ICC RULES OF ARB. art. 24(3) (2012).

⁸⁹ ICC RULES OF ARB. art. 27 (2012).

⁹⁰ *Id.*

⁹¹ *ICC Rules of Arbitration 1998* at art. 22(1).

⁹² ICC RULES OF ARB. art. 27 (2012).

⁹³ *ICC Rules of Arbitration 1998* at art. 22(2).

⁹⁴ ICC RULES OF ARB. art. 37(5) (2012).

indicate cost consequences for parties that do not conduct the arbitration efficiently and in a cost-effective fashion.⁹⁵ The arbitral tribunal may take party action into account when making decisions as to the allocation of costs.⁹⁶ Although under Article 31 of the 1998 Rules the arbitral tribunal has cost shifting power,⁹⁷ the new provision gives the tribunal more power in allocating the costs of the proceedings to the parties and more power to judge the behavior of parties, ultimately rewarding good behavior. Thus, the new language urges parties to conduct the arbitral proceeding expeditiously and in good faith.

D. Article 29 Emergency Arbitrator and Appendix V

The most evolutionary change to the ICC Arbitration Rules is the introduction of the emergency arbitrator in Article 29 and Appendix V (the “Emergency Arbitrator Provisions”).⁹⁸ Although the concept of an emergency arbitrator is new to the ICC Rules, rules of other arbitral institutions, such as the AAA and SIAC, include the concept.⁹⁹ The 1998 Rules allow the arbitral tribunal to order interim or conservatory measures, but do not include provisions for urgent interim relief when a tribunal has not been formed.¹⁰⁰ Under the 1998 Rules, a party seeking interim or conservatory relief would need to seek judicial authority. Now, Article 29 and Appendix V allow a party to apply for an emergency arbitrator to review interim or conservatory measures that cannot wait until an arbitral tribunal is formed.¹⁰¹ In essence, an application for an emergency arbitrator can be submitted before the file is transmitted to the arbitral tribunal and even before the Request for Arbitration is submitted. The emergency arbitrator is appointed by the President of the ICC Court “within as short a time as possible, normally within two days from the receipt of the Application.”¹⁰²

Once appointed, the emergency arbitrator exercises broad power and can conduct the proceedings as the emergency arbitrator considers appropriate, with the requirement that the arbitrator acts “fairly and impartially.”¹⁰³ The emergency arbitrator issues an Order, not an award, which is binding on the parties,¹⁰⁴ but not on the ensuing arbitral tribunal.¹⁰⁵ The Order, made no later than fifteen days from the date when the emergency arbitrator receives the file, must determine whether the application for interim relief is admissible and whether the emergency arbitrator has jurisdiction.¹⁰⁶ Once the arbitral tribunal is constituted, it may modify, terminate, or annul the Order.¹⁰⁷ The Emergency Arbitrator Provisions apply only to parties that are signatories of the arbitration agreement and do not apply to arbitration agreements signed before the revised Rules enter into force on January 1, 2012, where the parties have opted out of it, or have agreed to

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *ICC Rules of Arbitration 1998* at art. 31.

⁹⁸ ICC RULES OF ARB. art. 29 (2012); app. V (2012).

⁹⁹ AAA COMMERCIAL ARBITRATION RULES O-1 (2010); SIAC Rule 26.2 (2010).

¹⁰⁰ *ICC Rules of Arbitration 1998* at art. 23.

¹⁰¹ ICC RULES OF ARB. art. 29(1) (2012).

¹⁰² ICC RULES OF ARB. app. V, art. 2(1) (2012).

¹⁰³ ICC RULES OF ARB. app. V, art. 5(2) (2012).

¹⁰⁴ ICC RULES OF ARB. art. 29(2) (2012); app. V, arts. 6(1), 6(6) (2012).

¹⁰⁵ ICC RULES OF ARB. art. 29(3) (2012).

¹⁰⁶ ICC RULES OF ARB. app. V, arts. 6(2), 6(4) (2012).

¹⁰⁷ ICC RULES OF ARB. art. 29(3) (2012).

another pre-arbitral interim measure procedure.¹⁰⁸ These restrictions assist in preventing abuse of the emergency arbitrator proceeding, with the opt-out provision ensuring that an emergency measure is truly urgent, and the limitation to signatories of the parties protecting, to some extent, the responding party.

Furthermore, emergency arbitrator proceedings do come with a cost. An applicant must pay upfront a total of \$40,000; \$10,000 for ICC administrative expenses and \$30,000 for the emergency arbitrator's fees and expenses, with the potential for increased costs to be determined by the President of the ICC Court.¹⁰⁹ Finally, Article 29 paragraph 7 does not preclude any party from seeking urgent interim or conservatory measures from a judicial authority.¹¹⁰

The new Emergency Arbitrator Provisions provide many advantages for parties seeking urgent interim relief. First, the emergency arbitrator administers a temporary solution in the form of a binding order.¹¹¹ Although it is not an award, relief is still administered. Second, the whole process is expeditious and not meant to last longer than three weeks, from the submission of the application for an emergency arbitrator to the issuance of the order.¹¹² Third, the emergency arbitrator does not impinge on the arbitral proceeding itself because an emergency arbitrator's involvement ceases once the arbitral tribunal is formed.¹¹³ In addition, the emergency arbitrator cannot "act as an arbitrator in any arbitration relating to the dispute that gave rise to the Application."¹¹⁴ The final advantage of the Emergency Arbitrator Provisions is the avoidance of the court. Seeking a state court for urgent interim relief does not always guarantee relief. In some instances, utilizing a state court may not even be an option under the arbitration agreement if state court jurisdiction has been excluded. However, even if the option to seek relief from judicial authority exists, it may be undesirable to do so. Seeking urgent interim relief from a state court would contradict the initial intention of the parties to proceed to arbitration, to avoid the courts. Therefore, the new Emergency Arbitrator Provisions offer a viable option for parties seeking urgent interim relief.

One weakness of the emergency arbitrator provisions is the issue of enforceability. The Order is not an award that can be enforced by state courts. However, the drafters acknowledge this weakness by confirming in Article 29 paragraph 7 that the new Emergency Arbitrator Provisions do not hinder parties from seeking urgent interim relief from state courts.¹¹⁵ Another disadvantage of the new provisions is the high cost. The minimum fee of \$40,000 for an application is quite significant, even for large monetary claims.¹¹⁶ Ultimately, parties considering urgent interim relief through the Emergency Arbitrator Provisions will need to weigh the advantages and disadvantages of the provisions as opposed to seeking relief through judicial authority. The new provisions offer a detailed process that has the potential to be effective in providing urgent interim relief. The potential advantages of the new Emergency Arbitrator Provisions will help continue to make ICC arbitration attractive.

¹⁰⁸ ICC RULES OF ARB. arts. 29(5)-(6) (2012).

¹⁰⁹ ICC RULES OF ARB. app. V, arts. 7(1)-(2) (2012).

¹¹⁰ ICC RULES OF ARB. art. 29(7) (2012).

¹¹¹ ICC RULES OF ARB. art. 29(2) (2012); app. V, arts. 6(1), 6(6) (2012).

¹¹² ICC RULES OF ARB. app. V, arts. 2(1), 5(1), 6(4) (2012).

¹¹³ ICC RULES OF ARB. art. 29(3) (2012).

¹¹⁴ ICC RULES OF ARB. app. V, art. 2(6) (2012).

¹¹⁵ ICC RULES OF ARB. art. 29(7) (2012).

¹¹⁶ Revised ICC Rules of Arbitration, *supra* note 20.

VII. AWARDS

Under the Awards section of the new Rules, a provision on remission of awards is included in Article 35, which is not in the 1998 Rules.¹¹⁷ Although remission of arbitral awards is rare, Article 35 instructs the Court to “apply mutatis mutandis to any addendum or award”¹¹⁸ and remit the case back to the same tribunal, which must consider the reasons for the remission.

VIII. COSTS

New provisions are included in Article 36 and 37 concerning costs.¹¹⁹ Article 36 paragraph 4 now addresses the other new Articles in section three of the 2012 Arbitration Rules involving joinder of additional parties and claims between multiple parties.¹²⁰ Article 36 authorizes the Court to fix advances on costs and allocate them to the parties.¹²¹ Article 37 includes the new provision, also discussed above, which empowers the arbitral tribunal to take into account the behavior of the party and whether the party conducted the arbitration in an expeditious and cost-effective manner when apportioning costs.¹²² The same Article also includes a provision where in the event the arbitration is terminated before a final award is rendered or claims are withdrawn, the Court is to “fix the fees and expenses of the arbitrators and the ICC administrative expenses.”¹²³ The arbitral tribunal is authorized to decide the allocation of costs if the parties have no agreement on this issue.¹²⁴

IX. MISCELLANEOUS

The only change within the Miscellaneous section of the new Rules is in Article 40 addressing limitation of liability. Under the 1998 Rules, arbitrators, the Court and its members, the ICC and its employees, or the ICC National Committees cannot be liable for any act or omission connected to the arbitration.¹²⁵ The new Rules include the same language, but add “except to the extent such limitation of liability is prohibited by applicable law.”¹²⁶

X. CONCLUSION

The 2012 ICC Rules of Arbitration maintains the essential framework of the 1998 Rules while also making a genuine effort to modernize the Rules to reflect the present demands of international arbitration. The revised Rules codify existing practices¹²⁷ and address issues arising

¹¹⁷ ICC RULES OF ARB. art. 35(4) (2012).

¹¹⁸ *Id.*

¹¹⁹ ICC RULES OF ARB. arts. 36, 37 (2012).

¹²⁰ ICC RULES OF ARB. art. 36(4) (2012).

¹²¹ *Id.*

¹²² ICC RULES OF ARB. art. 37(5) (2012).

¹²³ ICC RULES OF ARB. art. 37(6) (2012).

¹²⁴ ICC RULES OF ARB. art. 37(5) (2012).

¹²⁵ *ICC Rules of Arbitration 1998* at art. 34.

¹²⁶ ICC RULES OF ARB. art. 40 (2012).

¹²⁷ *See, e.g.*, ICC RULES OF ARB. art. 3 (2012).

in international commercial disputes involving multiple parties and contracts.¹²⁸ The new emergency arbitrator provisions also reflect the evolutionary nature of the 2012 Rules,¹²⁹ and new and revised provisions ensure expeditious and cost-efficient arbitral proceedings.¹³⁰ The revised Rules guarantee that the ICC will continue to be one of the world's leading arbitral institutions.

¹²⁸ *See, e.g.*, ICC RULES OF ARB. arts. 7-10 (2012).

¹²⁹ *See, e.g.*, ICC RULES OF ARB. art. 29; app. V (2012).

¹³⁰ *See, e.g.*, ICC RULES OF ARB. arts. 7, 10, 22(1), 22(2), 24 (2012).