

**Dispute
Resolution
Services**

International Court of Arbitration

*Resolving
Business Disputes
Worldwide*



International Chamber of Commerce

The world business organization

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Introduction

The ICC Court has administered over 16,000 international arbitration cases involving some 180 countries and territories.

The International Chamber of Commerce has long been the world's leading organization in the field of international commercial dispute resolution.

Established in 1923 as the arbitration body of ICC, the International Court of Arbitration has pioneered international commercial arbitration as it is known today. The Court took the lead in securing the worldwide acceptance of arbitration as the most effective way of resolving international commercial disputes. Since its creation, the Court has administered over 16,000 international arbitration cases involving parties and arbitrators from some 180 countries and territories.

The dispute resolution mechanisms developed by ICC have been conceived specifically for business disputes in an international context. These disputes pose unique difficulties and challenges. Usually, the parties will be of different nationalities, with different linguistic, legal and cultural backgrounds. They may also have very different expectations about how a dispute can be resolved reasonably and fairly. Distrust may be relatively strong, accompanied by uncertainty or a lack of information about the course to follow. These difficulties may be compounded by distance and the disadvantages one party may face in submitting to a procedure on the other's home ground.

For all these reasons, national courts in the country of one of the parties may not appear suitable to the other parties. ICC has always led the way in providing international business with alternatives to court litigation.

Even in a domestic context, parties increasingly prefer alternatives to the courts that are less costly and time-consuming. ICC arbitration offers both these advantages, as well as confidentiality and freedom for the parties to choose the arbitrators, the place of arbitration, the applicable rules of law, and even the language of the proceedings.

This brochure is designed to improve understanding of the widely acclaimed services that the ICC International Court of Arbitration affords international business for the resolution of commercial disputes anywhere in the world.

Advantages of arbitration

Among the available dispute resolution alternatives to the courts, arbitration is by far the most commonly used internationally. The reasons for this are clear:

Final, binding decisions

While several mechanisms can help parties reach an amicable settlement – for example using the ICC ADR Rules – all of them depend, ultimately, on the goodwill and cooperation of the parties. A final and enforceable decision can generally be obtained only by recourse to the courts or by arbitration. Because arbitral awards are not subject to appeal, they are much more likely to be final than the judgements of courts of first instance. Although arbitral awards may be subject to being challenged (usually in either the country where the arbitral award is rendered or where enforcement is sought), the grounds of challenge available against arbitral awards are limited.

International recognition of arbitral awards

Arbitral awards enjoy much greater international recognition than judgements of national courts. More than 140 countries have signed the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the “New York Convention”. The Convention facilitates enforcement of awards in all contracting states. There are several other multilateral and bilateral arbitration conventions that may also help enforcement.

Arbitral awards command greater international recognition than court judgements.

Neutrality

In arbitral proceedings, parties can place themselves on an equal footing in five key respects:

1. Place of arbitration
2. Language used
3. Procedures or rules of law applied
4. Nationality of the arbitrators
5. Legal representation

Arbitration may take place in any country, in any language and with arbitrators of any nationality. With this flexibility, it is generally possible to structure a neutral procedure offering no undue advantage to any party.

Arbitration may take place in any country, in any language and with arbitrators of any nationality.

Specialized competence of arbitrators

Judicial systems do not allow the parties to a dispute to choose their own judges. In contrast, arbitration offers the parties the unique opportunity to designate persons of their choice as arbitrators, provided they are independent. This enables the parties to have their disputes resolved by people who have specialized competence in the relevant field.

*Arbitration is faster
and less expensive than
going to court.*

Speed and economy

Arbitration is faster and less expensive than litigation in the courts. Although a complex international dispute may sometimes take a great deal of time and money to resolve, even by arbitration, the limited scope for challenge against arbitral awards, as compared with court judgements, offers a clear advantage. Above all, it helps to ensure that the parties will not subsequently be entangled in a prolonged and costly series of appeals. Furthermore, arbitration offers the parties the flexibility to set up proceedings that can be conducted as quickly and economically as the circumstances allow. In this way, a multi-million dollar ICC arbitration was once completed in just over two months.

Confidentiality

Arbitration hearings are not public, and only the parties themselves receive copies of the awards.

The New York Convention of 1958

The ICC International Court of Arbitration was the initiator and leader of the movement which led to the adoption of the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards. The New York Convention is the most important multilateral treaty on international arbitration.

Basically, it requires courts of each contracting state:

- to recognize arbitration agreements in writing and to refuse to allow a dispute to be litigated before them when it is subject to an arbitration agreement; and
- to recognize and enforce foreign arbitral awards.

Before entering into an international arbitration agreement, a party is advised to check whether the states of the other contracting party and, if appropriate, of the place of arbitration, have ratified the New York Convention or have signed other multilateral or bilateral treaties offering the same guarantees.

List of states in which the Convention is in force.*

The symbols indicate those states that have made one or more of the reservations mentioned below.

■ The state will apply the Convention only to awards made in the territory of another contracting state.

▲ With regard to awards made in the territory of non-contracting states, the state will apply the Convention only to the extent to which these states grant reciprocal treatment.

● The state will apply the Convention only to differences arising out of legal relationships which are considered as commercial under the national law.

| | | | | | |
|--------------------------|-------|----------------------------------|-----|---------------------------|-------|
| Afghanistan | ■ ● | Georgia | | New Zealand | ■ |
| Albania | | Germany | | Nicaragua | |
| Algeria | ■ ● | Ghana | | Niger | |
| Antigua and Barbuda | ■ ● | Greece | ■ ● | Nigeria | ■ ● |
| Argentina | ■ ● | Guatemala | ■ ● | Norway | ■ |
| Armenia | ■ ● | Guinea | | Oman | |
| Australia | | Haiti | | Pakistan | ■ |
| Austria | | Holy See | ■ ● | Panama | |
| Azerbaijan | | Honduras | | Paraguay | |
| Bahamas | | Hungary | ■ ● | Peru | |
| Bahrain | ■ ● | Iceland | | Philippines | ■ ● |
| Bangladesh | | India | ■ ● | Poland | ■ ● |
| Barbados | ■ ● | Indonesia | ■ ● | Portugal | ■ |
| Belarus | | Iran | ■ ● | Qatar | |
| Belgium | ■ ▲ | Ireland | ■ | Romania | ■ ▲ ● |
| Benin | | Israel | | Russian Federation | ▲ |
| Bolivia | | Italy | | Rwanda | |
| Bosnia and Herzegovina | ■ ● | Jamaica | ■ ● | St Vincent / Grenadines | ■ ● |
| Botswana | ■ ● | Japan | ■ | San Marino | |
| Brazil | | Jordan | | Saudi Arabia | ■ |
| Brunei Darussalam | ■ | Kazakhstan | | Senegal | |
| Bulgaria | ■ ▲ | Kenya | ■ | Serbia | ■ ● |
| Burkina Faso | | Korea (Republic of) | ■ ● | Singapore | ■ |
| Cambodia | | Kuwait | ■ | Slovakia | ■ ▲ |
| Cameroon | | Kyrgyzstan | | Slovenia | ■ ● |
| Canada | | Lao People's Democratic Republic | | South Africa | |
| Central African Republic | ■ ● | Latvia | | Spain | |
| Chile | | Lebanon | ■ | Sri Lanka | |
| China | ■ ● | Lesotho | | Sweden | |
| Colombia | | Liberia | | Switzerland | |
| Cook Islands | | Lithuania | ■ ▲ | Syria | |
| Costa Rica | | Luxembourg | ■ | Tanzania (United Rep. of) | ■ |
| Côte d'Ivoire | | Macedonia | ■ ● | Thailand | |
| Croatia | ■ ● | Madagascar | ■ ● | Trinidad and Tobago | ■ ● |
| Cuba | ■ ▲ ● | Malaysia | ■ ● | Tunisia | ■ ● |
| Cyprus | ■ ● | Mali | | Turkey | ■ ● |
| Czech Republic | ■ ▲ | Malta | ■ | Uganda | ■ |
| Denmark | ■ ● | Marshall Islands | | Ukraine | ▲ |
| Djibouti | | Mauritania | | United Arab Emirates | |
| Dominica | | Mauritius | ■ | United Kingdom | ■ |
| Dominican Republic | | Mexico | | United States of America | ■ ● |
| Ecuador | ■ ● | Moldova (Republic of) | ■ | Uruguay | |
| Egypt | | Monaco | ■ ● | Uzbekistan | |
| El Salvador | | Mongolia | ■ ● | Venezuela | ■ ● |
| Estonia | | Montenegro | ■ ● | Vietnam | ■ ▲ ● |
| Finland | | Morocco | ■ | Zambia | |
| France | ■ | Mozambique | ■ | Zimbabwe | |
| Gabon | | Nepal | ■ ● | | |
| | | Netherlands | ■ | | |

*on the basis of information available March 2009 (source: United Nations Commission on International Trade Law www.uncitral.org)

ICC arbitration: distinctive features

The ICC Court is the world's most widely representative dispute resolution institution, with members from 90 countries.

The ICC International Court of Arbitration

The ICC International Court of Arbitration (“the Court”) is the world’s foremost institution in the resolution of international business disputes. While most arbitration institutions are regional or national in scope, the ICC Court is truly international. Composed of members from 90 countries, the ICC Court is the world’s most widely representative dispute resolution institution.

The ICC Court is not a “court” in the ordinary sense. As the ICC arbitration body, the Court ensures the application of the Rules of Arbitration of the International Chamber of Commerce. Although its members do not decide the matters submitted to ICC arbitration – this is the task of the arbitrators appointed under the ICC Rules – the Court oversees the ICC arbitration process and, among other things, is responsible for: appointing arbitrators; confirming, as the case may be, arbitrators nominated by the parties; deciding upon challenges of arbitrators; scrutinizing and approving all arbitral Awards; and fixing the arbitrators’ fees. In exercising its functions, the Court is able to draw upon the collective experience of distinguished jurists from a diversity of backgrounds and legal cultures as varied as that of the participants in the arbitral process.

The Secretariat of the ICC Court

The Court is assisted by a Secretariat comprising over 70 full-time staff, who manage more than 1,300 ongoing cases on a day-to-day basis and provide educational and documentary support services to promote and facilitate the use of arbitration.

The Secretariat, with its headquarters in Paris and a fully operational branch office in Hong Kong, administers arbitrations throughout the world.

The core of the Secretariat lies in its eight case-management teams. Under the direction of a Counsel, assisted by two or more Deputy Counsel, each team has a distinct regional, cultural and linguistic focus, allowing parties and arbitrators to be assured of an understanding approach to their needs. Over 15 different languages are spoken within the Secretariat, whose members come from more than 20 different countries. The Secretariat’s lawyers are conversant with all major legal traditions.

Designation of arbitrators

It is commonly said that an arbitration is no better than the arbitrators. Selection of the arbitral tribunal is, therefore, one of the most critical steps in arbitration.

Under the ICC Rules, the Arbitral Tribunal is composed of one or more arbitrators. When only one arbitrator is to be designated, he or she is appointed by the Court, unless the parties agree otherwise. When three arbitrators are to be designated, each party nominates an arbitrator; the third arbitrator, who chairs the Arbitral Tribunal, is either nominated by mutual agreement of the parties or the co-arbitrators, or appointed by the Court. When the parties are unable to agree on the number of arbitrators, the ICC

Ad hoc or institutional arbitration?

Parties using arbitration have a choice between designating an institution, such as ICC, to administer it, or proceeding ad hoc outside an institutional framework. In ad hoc cases, the arbitration will be administered by the arbitrators themselves. However, should problems arise in setting the arbitration in motion or in constituting the arbitral tribunal, the parties may have to require the assistance of a state court, or that of an independent appointing authority such as ICC.

Although institutional arbitration requires payment of a fee to the administering institution, the functions performed by the institution can be critical in ensuring that the arbitration proceeds to a final award with a minimum of disruption and without the need for recourse to local courts. The services an institution may offer are exemplified by the role of the ICC Court, which provides the most thoroughly supervised form of administered arbitration in the world. Among other things, the ICC Court will, as necessary:

- (i) determine whether there is a prima facie agreement to arbitrate;
- (ii) decide on the number of arbitrators;
- (iii) appoint arbitrators;
- (iv) decide challenges against arbitrators;
- (v) ensure that arbitrators are conducting the arbitration in accordance with the ICC Rules and replace them if necessary;
- (vi) determine the place of arbitration;
- (vii) fix and extend time limits;
- (viii) determine the fees and expenses of the arbitrators; and
- (ix) scrutinize arbitral Awards.

Rules provide that the Court shall appoint a sole arbitrator, “save where it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators”.

When it comes to the appointment of arbitrators, ICC – unlike other arbitral institutions – enjoys the support of national committees in 90 different countries. National committees are able to identify potential arbitrators with appropriate qualifications all over the world. Unlike certain other institutions, ICC does not require that arbitrators be selected from pre-established lists, thus ensuring the greatest possible freedom of choice and flexibility in the constitution of the Arbitral Tribunal.

Monitoring the arbitral process

Unlike many other institutions, the ICC Court monitors the entire arbitral process, from the initial Request to the final Award. The ICC Rules require that, within two months of receiving the file, the Arbitral Tribunal prepare and submit to the Court a document defining its Terms of Reference. A unique feature of ICC arbitration, the Terms of Reference serve the useful purpose of bringing the arbitrators and parties together at an early stage, to identify the issues they will be required to deal with and the procedural details that need to be addressed. It is also sometimes possible at that stage for the parties to reach agreement on certain outstanding issues, such as the language of the arbitration or the governing substantive law. A fact which users should not overlook is that a significant proportion of ICC arbitration cases are amicably settled at the stage of the Terms of Reference.

During the proceedings, the Court regularly reviews the progress of all pending cases, and, in the process, considers whether there are any measures that need to be taken in order, for example, to help ensure that the case advances as quickly as reasonably possible and that the proceedings are being conducted in conformity with the Rules. In this connection, the staff of the Court’s Secretariat closely follow the case and receive copies of all written communications and pleadings exchanged in the arbitration proceedings.

Fixing arbitrator remuneration

The rules of many arbitral institutions provide either that the arbitrators fix the amount of their own fees or that the fees be established on the basis of a daily or hourly rate fixed or arranged by the institution.

Under the ICC Rules, however, the arbitrators are not remunerated on the basis of an hourly or daily rate, and the arbitrators play no role in determining their own fees. Rather, their fees are fixed by the Court at the end of the arbitration on the basis of a published scale attached to the ICC Rules. Under that scale, the arbitrators’ fees are fixed with reference to the amount in dispute. In fixing the arbitrators’ fees, the Court also considers the diligence of the arbitrators, the time spent, the rapidity of the

Fees and expenses are proportionate to the amount in dispute.

Time limits and duration of the arbitration

A practical study of the process of arbitration cannot escape the question of time limits. Legal disputes are a factor to be considered in corporate strategy, whether as a source of profits or losses. Before starting an ICC arbitration, many companies understandably want to know how long it will take before the final Award is handed down.

In most cases it would be unrealistic to expect that the final Award may be made in less than one year, although complex ICC arbitration proceedings have been conducted in as little as two and a half months.

Adherence to time limits is monitored closely by the Court and its Secretariat. Once the Arbitral Tribunal has been constituted and the financial and other conditions have been met, two important time limits govern the actual proceedings – the two months already referred to for transmitting the Terms of Reference to the Court, followed by six months for rendering the final Award. The Court can extend these time limits if circumstances so require.

The Court follows each case by means of progress reports that are submitted to it periodically by the Secretariat.

Parties may agree to shorten time limits set out in the Rules, subject to the Court's power to extend the time limits if this is necessary for compliance with the Rules.

In addition, the ICC system of arbitrator remuneration is designed to encourage the efficient conduct of the arbitration as the arbitrators are not paid on an hourly or daily basis.

proceedings and the complexity of the dispute. Thus, the Court, rather than the arbitrators, determines the final fees, taking into account the manner in which the arbitration was handled, and, in particular, the arbitrators' efficiency.

The fees and expenses system is therefore intended to encourage the efficient handling of cases within a financial framework that is proportionate to the amount at stake in the arbitration. The fact that the scales are based on the sum in dispute also has the virtue of discouraging the submission of frivolous claims and counterclaims, which could otherwise have an immediate and direct impact on the cost of the arbitration. The scales also help the parties at the outset to form a general idea of the cost of the arbitration.

Scrutinizing arbitral Awards

One of the most important functions of the Court is the scrutiny of arbitral Awards. The ICC Rules provide that the Court must approve all Awards as to their form and that the Court may also, without affecting the arbitrators' liberty of decision, draw their attention to points of substance. In ICC arbitration, scrutiny is a key element ensuring that arbitral Awards are of the highest possible standard and thus less susceptible to annulment in the national courts than they might otherwise be. The scrutiny process provides the parties with an additional layer of protection that would not otherwise be available, since arbitral awards are generally not subject to appeal. This unique quality-control mechanism thus enhances the reliability of ICC arbitration.

Drafting the arbitration agreement

ICC arbitration is possible only if there is an agreement between the parties providing for it. ICC recommends that all parties wishing to have recourse to ICC arbitration include the following standard clause in their contracts:

“All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.”

It may also be desirable for the parties to stipulate in the arbitration clause itself:

- the law governing the contract;
- the number of arbitrators;
- the place of arbitration; and
- the language of the arbitration.

Parties should also consider the possible need for special provisions in the event that arbitration is contemplated among more than two parties. In addition, the law in some countries may lay down certain requirements in respect of arbitration clauses.

In principle, parties should also always ensure that the arbitration agreement is:

- in writing. The effectiveness of an arbitration clause first of all depends on proof of its existence. It should therefore generally be in writing. The 1958 New York Convention specifically states (Art. II) that Contracting States shall recognize arbitration agreements “in writing”.
- carefully drafted. Time and again, the Court receives requests for arbitration based on ambiguous arbitration clauses. Badly worded clauses, at the very least, cause delay. At worst, they may impede the arbitration process.

Existence and validity of the arbitration agreement

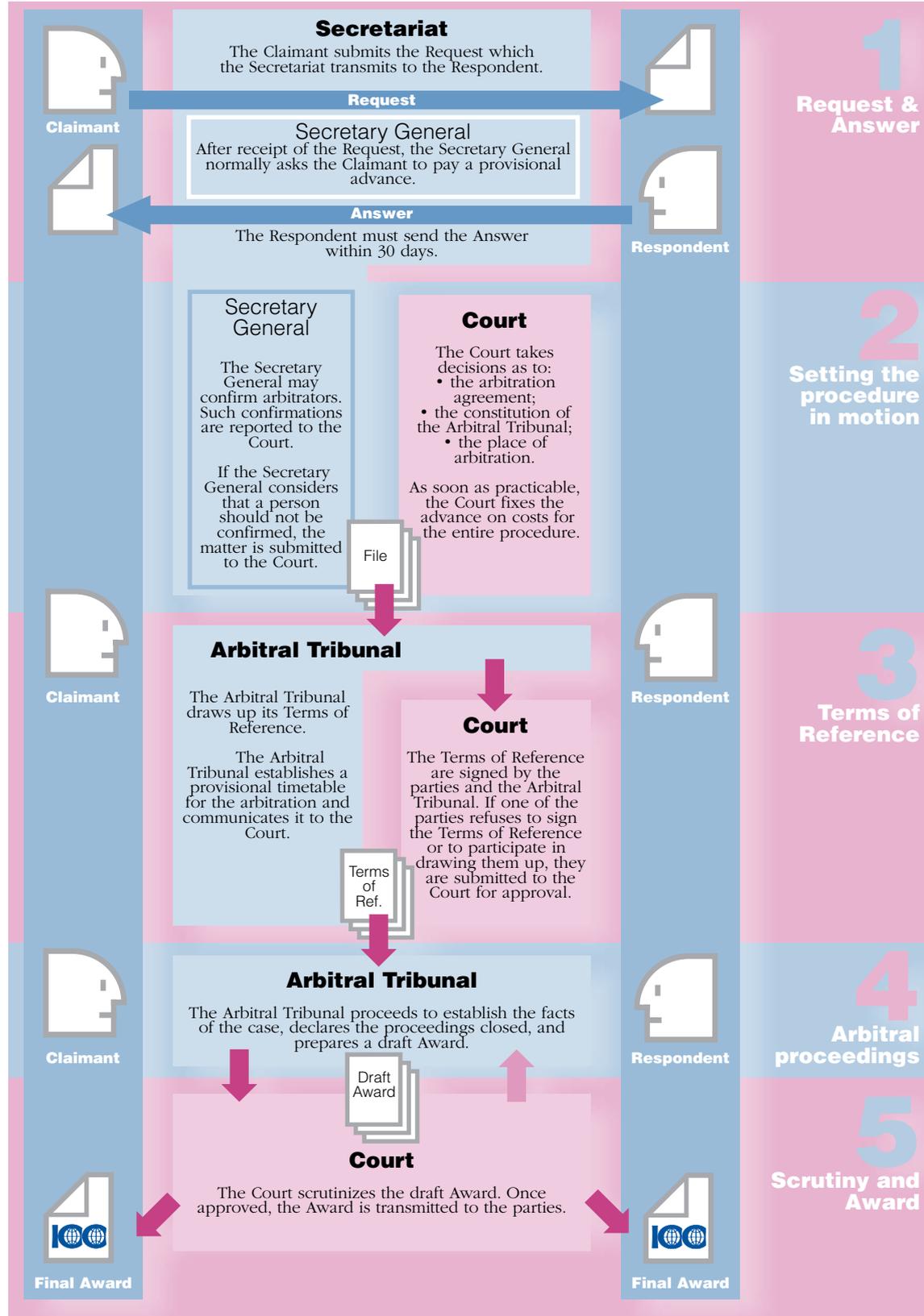
Issues concerning the existence and validity of the agreement to arbitrate are dealt with in the following way: If the Respondent does not file an Answer or if any party raises a plea concerning the existence, validity or scope of the arbitration agreement, the Court may decide, without prejudice to the admissibility or merits of the plea, that the arbitration shall proceed if it is prima facie satisfied that an arbitration agreement under the Rules may exist. In such a case, any decision as to the Arbitral Tribunal's jurisdiction is then taken by the Arbitral Tribunal itself. If the Court decides that the arbitration cannot proceed, the parties retain the right to ask any court having jurisdiction whether or not they are bound by an ICC arbitration agreement.

Processing a Request for Arbitration under the ICC Rules

Facts and figures on ICC arbitration

Between 1 January 2008 and 1 January 2009:

- 663 new Requests for Arbitration were filed with ICC;
- those Requests concerned 1,758 parties from 120 different countries and independent territories;
- of these parties some 53% were from Europe, 22% from the Americas and over 19% from Asia;
- 1,156 arbitrators of 74 different nationalities were appointed or confirmed;
- the place of arbitration was located in 50 different countries throughout the world;
- the amount in dispute was under one million US dollars in 27.5% of new cases.



The Claimant submits a Request for Arbitration to the Secretariat of the International Court of Arbitration in Paris. The Secretariat then transmits the Request to the other party or parties (the Respondent), which must send the Answer to the Request, together with any counterclaim, within 30 days. After receipt of the Request, the Secretary General normally requests the Claimant to pay a provisional advance intended to cover the costs of arbitration until the Terms of Reference have been drawn up. Depending on circumstances, this may be done after the receipt of the Answer.

The procedure is set in motion. When no Court decision is needed as to the prima facie existence, validity and scope of the arbitration agreement, the constitution of the Arbitral Tribunal or the place of arbitration, the procedure may be set in motion through the Secretary General, who may confirm arbitrators nominated by the parties or pursuant to their particular agreements. The Secretary General may confirm arbitrators provided they have filed a statement of independence without qualification or a qualified statement has not given rise to objections. The file is then transmitted to the Arbitral Tribunal. The Court otherwise sets the procedure in motion by taking the required decisions. As soon as practicable, the Court fixes the advance on costs in an amount likely to cover the fees and expenses of the arbitrators and the ICC administrative expenses. In some cases it may not be practicable for the Court to fix the advance before the file has been transmitted to the Arbitral Tribunal. The Secretariat transmits the file to the Arbitral Tribunal provided the advance on costs requested at this stage has been paid.

As soon as it has received the file, the Arbitral Tribunal draws up, on the basis of documents or in the presence of the parties and in the light of their most recent submissions, a document defining its Terms of Reference. These include the full names and description of the parties and arbitrators, the place of arbitration, a summary of the parties' respective claims, and particulars concerning the applicable procedural rules. They also contain a list of issues to be determined, unless the Arbitral Tribunal considers this inappropriate. At this stage, the Arbitral Tribunal establishes a procedural timetable for the arbitration and communicates it to the Court. The Terms of Reference are signed by the parties and the Arbitral Tribunal. If one of the parties refuses to sign the Terms of Reference or to take part in drawing them up, they are submitted to the Court for approval, whereupon the arbitration may proceed.

The Arbitral Tribunal proceeds within as short a time as possible to establish the facts of the case by all appropriate means. When it is satisfied that the parties have had a reasonable opportunity to present their cases, the Arbitral Tribunal declares the proceedings closed and prepares a draft Award.

The Court scrutinizes the draft Award. While not interfering with the arbitrators' liberty of decision, the Court may, if necessary, draw the Arbitral Tribunal's attention to points of substance and lay down modifications as to the form of the Award. Once approved, the Award is signed by the arbitrator(s) and notified to the parties by the Secretariat.

The ICC arbitral process

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ICC arbitrations are conducted under the Rules of Arbitration of the International Chamber of Commerce, the current version of which came into force on 1 January 1998. In all matters not expressly provided for in the Rules, the Court and the Arbitral Tribunal act in the spirit of the Rules and make every effort to ensure that the Award is enforceable at law.

I – Request for Arbitration and Respondent's Answer

The Request for Arbitration is registered on the day it reaches the Secretariat of the International Court of Arbitration at its Paris headquarters or at its recently opened branch in Hong Kong. The Secretariat acknowledges receipt of the Request and indicates to the Claimant the names and contact details of the Counsel and other members of the team in charge of the file. The Request should include the following elements:

- the name in full, description and address of each of the parties;
- a description of the nature and circumstances of the dispute giving rise to the claims;
- a statement of the relief sought, including, to the extent possible, an indication of any amount(s) claimed;
- the relevant agreements and, in particular, the arbitration agreement;
- all relevant particulars concerning the constitution of the Arbitral Tribunal; and
- any comments as to the place of arbitration, the applicable rules of law and the language of the arbitration.

The Request must be accompanied by a payment of US\$ 2,500, as an advance on administrative expenses. This sum is not refundable but is credited to any further cost advance payable by the Claimant. The Request should be supplied in as many copies as there are respondent parties, plus one for each arbitrator and one for the Secretariat. For example, five copies must be supplied if there are three arbitrators and one Respondent.

After a review of the documents, the Secretary General normally requests from the Claimant a provisional advance intended to cover the costs of the arbitration until the Terms of Reference have been drawn up. This payment is credited to the Claimant's share of the advance on costs fixed by the Court at a later stage.

A copy of the Request is communicated to the Respondent by the Secretariat. The Respondent's Answer, including any counterclaim(s), is to be submitted within 30 days from the day following the date of its receipt of the Request unless that period is extended by the Secretariat. The Respondent's Answer should be supplied in as many copies as there are arbitrators and other parties, plus one for the Secretariat.

II – Setting the arbitration in motion

The arbitral process is supervised by the International Court of Arbitration (while the dispute itself is decided by the Arbitral Tribunal). The Court meets in plenary

sessions once a month, and in committee sessions weekly throughout the year. All sessions of the Court are confidential. Neither the parties nor the arbitrators may attend.

Following receipt of the Respondent's Answer to the Request (or the expiration of the time limit for such receipt), the case is submitted, if necessary, to the Court, which takes such decisions as may be required to set the arbitration in motion. The Court may be called upon to decide whether it is *prima facie* satisfied that an agreement to arbitrate under the ICC Rules may exist between the parties.

The Secretariat directly notifies the parties of the Court's decisions.

Advance on costs: who pays?

The advance on costs is payable in equal shares by the Claimant and the Respondent. In certain circumstances, the Court may fix separate advances in respect of a principal claim and a counterclaim. A provisional advance intended to cover the costs of the arbitration until the Terms of Reference have been drawn up is normally requested from the Claimant. The amount of this provisional advance will be credited to the Claimant's share of the advance on costs.

Payment is staggered as follows:

- US\$ 2,500 is payable with the Request for Arbitration;
- after a review of the Request, the Secretary General normally requests the Claimant to pay a provisional advance;
- as soon as practicable, the Court fixes the advance on costs to be paid in equal shares by Claimant and Respondent (the amount of the provisional advance that has already been paid, which includes the initial US\$ 2,500, is credited to the Claimant's share).

If the Claimant or the Respondent pays its share and the other refuses to pay, the former will be invited to pay on behalf of the latter. A party that has already paid in full its share of the advance on costs may pay the unpaid portion of the advance owed by the defaulting party by posting a bank guarantee. The fees of the arbitrators and the ICC administrative expenses are fixed by the Court at the end of the proceedings. In its Award the Arbitral Tribunal decides which of the parties shall bear the costs of the arbitration or in what proportions the costs shall be borne by the parties.

Number of arbitrators

The parties are free to decide upon the number of arbitrators, either in their arbitration agreement or later. Failing agreement between the parties, the Court appoints a sole arbitrator save where it appears that the dispute is such as to warrant the appointment of three arbitrators. If the amount in dispute is small and the parties have chosen three arbitrators, the Secretariat draws the attention of the parties to the consequences of their choice, including the tripling of arbitrators' fees and expenses and the longer time generally required for cases with three rather than one arbitrator.

Appointment of arbitrators

The parties are also free to select the arbitrator or arbitrators of their choice. The Court or the Secretary General confirms arbitrators nominated by the parties.

The following examples are given for illustrative purposes only and do not bind the ICC Court. They are based on the cost scales effective as of 1 January 2008.

Example 1

The total amount of claims and counterclaims is **US\$ 1,000,000**; the case is to be settled by a sole arbitrator. The advance on costs, excluding the arbitrator's expenses, might be fixed as follows:

- administrative expenses US\$ 19,500
 - estimated arbitrator's fees US\$ 36,985
- (minimum US\$ 13,470 / maximum US\$ 60,500)

TOTAL US\$ 56,485

To sum up, for a dispute of one million dollars, settled by a single arbitrator, the advance on costs (excluding the arbitrator's expenses) may amount to some US\$ 56,485, that is approximately 5.6% of the amount in dispute.

Example 2

The total amount of claims and counterclaims is **US\$ 25,000,000**; the case is to be settled by three arbitrators.

- administrative expenses US\$ 64,900
 - estimated arbitrators' fees (US\$ 127,610 x 3) US\$ 382,830
- (per arbitrator: minimum US\$ 45,470 / maximum US\$ 209,750)

TOTAL US\$ 447,730

To sum up, for a dispute of 25 million dollars, the advance on costs (excluding the arbitrators' expenses) may amount to some US\$ 447,730, that is approximately 1.8% of the amount in dispute.



Percentages of Arbitral Tribunals with three arbitrators and one arbitrator in cases submitted to the ICC Court from 1998 to 2008.

ICC national committees in 90 countries support the Court in proposing arbitrators with the best qualifications.

The Court appoints arbitrators on behalf of defaulting parties and/or appoints sole or third arbitrators. Arbitrators may also be nominated by co-arbitrators or through other procedures for nomination.

In all cases, the prospective arbitrators are asked to declare their independence. If arbitrators disclose facts or circumstances that might call into question their independence in the eyes of the parties, such facts and circumstances are communicated to the parties for comments. All arbitrators not appointed by the Court must be confirmed.

Appointment of a sole arbitrator: When a dispute is referred to a sole arbitrator, failing an agreement between the parties, the arbitrator is appointed by the Court.

Appointment of three arbitrators: When a dispute is referred to three arbitrators and unless the parties have agreed otherwise, Claimant and Respondent each nominate an arbitrator for confirmation. If a party fails to nominate an arbitrator, the appointment is made by the Court. The third arbitrator, who chairs the Arbitral Tribunal, is appointed by the Court.

National committees: When appointing an arbitrator, the Court generally requests a proposal from an ICC national committee. The national committee is provided with relevant information on the dispute and on the qualifications required. The Court has the authority to accept or reject the national committee's proposal. The Court can also, in certain circumstances, select an arbitrator from a country where there is no national committee.

Nationality of the arbitrator: When the Court appoints a sole or a third arbitrator, the arbitrator comes from a "neutral" country. In other words, the sole or third arbitrator should be a national of a country other than those of the parties, unless none of the parties object. However, when the Court appoints an arbitrator on behalf of a party that has failed to nominate one (appointment of a co-arbitrator in a three-member arbitral panel), a proposal is requested from the national committee, if any, in the country of which that party is a national.

Challenge: In those exceptional cases where a party challenges one or several arbitrators, for alleged lack of independence or for other reasons, the Court decides on the challenge. Its decisions are final.

Place of arbitration

In the vast majority of ICC cases, the place of arbitration is agreed upon by the parties. When this place has not been agreed, it is fixed by the Court, normally in a "neutral" country, that is, neither the Claimant's nor the Respondent's country.

Fixing the advance on costs

As soon as practicable, the Court fixes an advance on costs intended to cover the estimated fees and expenses of the arbitrators, as well as the administrative expenses of ICC. The estimate of the arbitrators' fees and ICC's administrative

Many ICC arbitration cases are amicably settled at the early stage of the Terms of Reference.

Terms of Reference

The Terms of Reference offer various technical, psychological and legal benefits:

- they allow the claims and answers submitted by the parties to be ordered and structured;
- the document can also be used to record definitively an agreement between the parties on such important matters as the law applicable to the merits, the language to be used in the arbitration or even certain points pertaining to the merits of the dispute;
- the establishment of the Terms of Reference is said to encourage parties to reach a settlement by clarifying the issues; a significant proportion of ICC cases are in fact withdrawn at this stage, following a settlement between the parties.

expenses is made by applying the scales appended to the Rules of Arbitration. The scales are based on the amount in dispute in the arbitration. The advance fixed may be modified subsequently depending on developments in the arbitration. The scales are regressive: the higher the sum in dispute, the lower the percentage of the arbitration costs due by the parties.

The fees of the arbitrator(s) are finally fixed by the Court at the end of the arbitration proceedings, taking into account the diligence of the arbitrator, the time spent, the rapidity of the proceedings and the complexity of the dispute.

III – Terms of Reference

Transmitting the file to the Arbitral Tribunal

Once the Arbitral Tribunal has been constituted and the advance requested at this stage has been paid, the Secretariat transmits a copy of the file to each member of the Arbitral Tribunal. From that time on, the parties are requested to correspond directly with the Arbitral Tribunal (while sending copies of their correspondence and submissions to the Secretariat and to the other party or parties).

Establishing the Terms of Reference

Before the actual merits of the case can be addressed, the Arbitral Tribunal must first draw up the Terms of Reference.

The Terms of Reference should contain the particulars listed in the ICC Rules. These include the full names and descriptions of the parties and arbitrators, the place of arbitration, a summary of the parties' respective claims and details concerning the applicable procedural rules. The Terms of Reference also contain a list of issues to be determined, unless the Arbitral Tribunal considers this inappropriate. At this stage, the Arbitral Tribunal establishes a provisional timetable to be followed in the conduct of the arbitration.

The Terms of Reference must be transmitted to the Court within two months of the file being transmitted to the Arbitral Tribunal. Should one of the parties refuse to take part in drawing up or not sign the Terms of Reference, the latter are submitted to the Court for approval, whereupon the arbitration may proceed.

IV – Proceedings

The Terms of Reference become operative once they have been signed by the parties and the arbitrators, or have been approved by the Court where a party has failed to sign them. The Arbitral Tribunal must then proceed to establish the facts of the case. When it is satisfied that the parties have had a reasonable opportunity to present their cases, the Arbitral Tribunal declares the proceedings closed and proceeds to draft an Award, indicating to the Secretariat the approximate date by which the draft Award will be submitted to the Court.

The ICC International Court of Arbitration Bulletin – a leading publication on international commercial arbitration

Established in 1990 and now distributed in more than 100 countries, the Bulletin is at the forefront of information on dispute resolution developments in international trade. It is published in English and French twice a year, with an annual supplement. The Bulletin provides first-hand information such as essential documents on arbitration, extracts from ICC arbitral Awards and carefully selected articles on the law and practice of international arbitration. Although its chief focus is on arbitration, the Bulletin also covers ICC's other dispute resolution services.
www.iccbooks.com



The Bulletin is available online in the ICC Dispute Resolution Library

This dynamic database provides instant access to over 1,000 documents from ICC's key dispute resolution titles. With its user-friendly navigation aids and search tools, it brings speed and efficiency to information research.
www.iccdrl.com

The Award is rendered within six months from the signature or approval of the Terms of Reference, a time limit which the Court may extend.

Rules governing the proceedings

The parties and arbitrators are free to fix the rules of procedure to be applied in the arbitration, subject to any mandatory provisions that may be applicable. The parties may determine, for instance, whether and to what extent discovery or cross-examination will be allowed. The Arbitral Tribunal proceeds within as short a time as possible to establish the facts of the case by all appropriate means. The parties have the right to be heard; the Arbitral Tribunal may also decide to hear witnesses and experts, and may summon any party to provide additional evidence.

Language of the proceedings

If not agreed by the parties, the Arbitral Tribunal determines the language or languages of the arbitration.

Conservatory measures

The Rules provide that the Arbitral Tribunal can order interim or conservatory measures. This does not affect the right of the parties, in appropriate circumstances, to apply to any competent judicial authority for such measures.

Law applicable to the merits

In the absence of an agreement between the parties as to the applicable rules of law, the Arbitral Tribunal applies the rules of law which it determines to be appropriate. In all cases the Arbitral Tribunal takes account of the provisions of the contract and the relevant trade usages. If the parties have agreed to give it such powers, the Arbitral Tribunal may act as *amiable compositeur* or decide *ex aequo et bono*.

V – Scrutiny and final Award

Submission of the draft Award and scrutiny

After the closing of the proceedings, the Arbitral Tribunal draws up a draft Award which is submitted to the Court's scrutiny. The Court may lay down modifications as to form and, without affecting the Arbitral Tribunal's liberty of decision, may draw its attention to points of substance. In scrutinizing draft Awards, the Court considers, to the extent practicable, the requirements of mandatory law at the place of arbitration.

Notification of the Award

Once approved by the Court, the Award is signed by the arbitrators. It is deemed to be made at the place of the arbitration on the date it indicates. It is then notified to the parties by the Secretariat.

Other dispute resolution services

ADR

The ICC ADR Rules offer a framework for settling business disputes and differences amicably with the help of a third party, known as a Neutral. The Rules allow the parties to choose whichever settlement technique they consider best suited to resolving their dispute. This may be mediation, where the Neutral acts as facilitator to help the parties come to an amicable settlement by negotiation; neutral evaluation, where the Neutral gives an opinion on one or more matters; a mini-trial, where a panel comprising the Neutral and an executive of each party to the ICC ADR proceedings, if such parties are companies, gives an opinion or seeks a solution acceptable to all concerned; or another technique or combination of various techniques. Under the Rules, mediation will be the fall-back technique if the parties do not express a preference for a particular method. The parties may jointly designate the Neutral or agree upon the qualifications or attributes required of him or her, when appointed by ICC. Once the proceedings have begun, an initial discussion takes place between the parties and the Neutral in order to define the procedure to be followed with a view to resolving the dispute.

Four alternative ADR clauses have been proposed by ICC for parties to insert in their contracts. They are not model clauses but rather suggestions that may be adapted to the parties' needs. They are presented in order of increasing obligations upon the parties, from the mere encouragement to submit any dispute to ICC ADR to a binding commitment to do so. They include a two-tiered clause providing for initial ICC ADR proceedings followed by ICC arbitration if an amicable settlement is not reached.

www.iccadr.org

Expertise

Experts with specialized knowledge in technical, legal, financial or other areas may be useful in a variety of situations: to serve as witnesses, to help solve differences, or simply in the ordinary course of business. The ICC International Centre for Expertise, established in 1976, may be called upon for any or all of the following services: the proposal of an expert, the appointment of an expert, and the administration of expertise proceedings. When administering proceedings, the Centre appoints or confirms experts, initiates and supervises various aspects of the procedure, and reviews and issues the expert's report. The Centre has provided experts for such matters as the evaluation of shares, the revaluation of contract prices, the causes of defects in industrial processes, the operational capacity and performance of production units, the condition of machinery with a view to its buy-back price, the scope and interpretation of contractual provisions, and to assist dispute adjudication boards in international construction projects.

ICC proposes four alternative expertise clauses for use by parties wishing to provide for recourse to the Centre's services. They include a clause giving parties the possibility of submitting disputes to administered expertise proceedings under the ICC Rules for Expertise, and two clauses obliging

www.iccexpertise.org

them to do so, with provision for subsequent ICC arbitration in one case. The fourth clause provides for recourse to the Centre to appoint an expert in party-administered expertise proceedings.

DOCDEX

www.iccdocdex.org

The International Centre for Expertise also administers the ICC Rules for Documentary Instruments Dispute Resolution Expertise (DOCDEX), drawn up by the ICC Banking Commission to facilitate the rapid settlement of disputes under the ICC Uniform Customs and Practice for Documentary Credits, the ICC Uniform Rules for Bank-to-Bank Reimbursement under Documentary Credits, the ICC Uniform Rules for Collections and the ICC Uniform Rules for Demand Guarantees. Cases are decided by a panel of three experts, whose decision is scrutinized by the technical adviser of the Banking Commission to check that it conforms with the applicable ICC Rules and their interpretation by the Banking Commission. The DOCDEX decision is issued by the International Centre for Expertise, and is not binding unless the parties have agreed otherwise.

Pre-arbitral referee procedure

In force since 1990, the Rules established for this procedure allow parties to apply to a “referee” for urgent provisional measures in relation to a dispute. The parties themselves may select the referee, who, failing that, is appointed by the Chairman of the ICC International Court of Arbitration. Measures the referee orders are binding until decided otherwise by a court or arbitral tribunal. Application of the ICC pre-arbitral referee procedure requires written agreement between the parties, concluded either as part of the relevant contract or later.

The standard clause recommended by ICC states:

“Any party to this contract shall have the right to have recourse to and shall be bound by the pre-arbitral referee procedure of the International Chamber of Commerce in accordance with its Rules for a Pre-Arbitral Referee Procedure.”

Where parties wish to have recourse to ICC arbitration as well as the ICC pre-arbitral referee procedure, specific reference should be made to both procedures. The following standard clause is recommended:

“Any party to this contract shall have the right to have recourse to and shall be bound by the pre-arbitral referee procedure of the International Chamber of Commerce in accordance with its Rules for a Pre-Arbitral Referee Procedure.

All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.”

www.iccarbitration.org

Appointing authority for ad hoc arbitrations

Parties who decide to resolve their differences by way of *ad hoc* arbitration proceedings may call upon ICC for assistance in constituting the arbitral tribunal. This is a delicate task for which ICC's experience in appointing arbitrators worldwide makes it particularly well placed. When providing this service, ICC acts within the framework of a special set of rules, in force as of 1 January 2004, covering both proceedings conducted under the UNCITRAL Arbitration Rules and non-UNCITRAL *ad hoc* proceedings. Under the Rules of ICC as Appointing Authority, the function of appointing authority is carried out by the ICC International Court of Arbitration. In addition to appointments, the Rules also allow the Court to provide other services, including that of deciding on challenges against arbitrators, whether or not appointed by the Court.

www.iccarbitration.org

Dispute Boards

Dispute Boards (DBs) are standing bodies, comprising one or three members, normally set up at the outset of a contract to help the parties resolve any disagreements and disputes that may subsequently arise during its performance. The Dispute Board fulfils this role by offering the parties informal assistance, if they so desire, and by making Recommendations or Decisions regarding disputes referred to it by any of the parties. For this purpose, it is kept fully informed of the performance of the contract by such means as progress reports, meetings and, if relevant, site visits. ICC has established a set of documents providing a comprehensive and flexible framework for establishing and operating Dispute Boards in a wide range of contracts in different industries. These documents include the ICC Dispute Board Rules, which govern DB proceedings, and a Model Dispute Board Member Agreement, covering such matters as the DB member's undertaking and remuneration and the duration of the DB Member Agreement. In addition, ICC proposes three standard clauses, each providing for a different type of Dispute Board, followed by arbitration as the ultimate recourse if a dispute is not resolved through the Dispute Board. The three alternatives available to parties are: (i) Dispute Review Board, which issues Recommendations; (ii) Dispute Adjudication Board, which issues Decisions and (iii) Combined Dispute Board, which normally issues Recommendations but may issue Decisions at a party's request.

www.iccdisputeboards.org

Information on ICC arbitration
and other ICC dispute resolution
services may be obtained at the
following address:

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**ICC International
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The ICC International Court of Arbitration is an administrative body that assists parties and arbitral tribunals in the conduct of arbitration procedures under the ICC Rules of Arbitration. While the ICC Court meets in Paris, ICC arbitral tribunals conduct procedures in many different countries throughout the world. Over 16,000 arbitration cases have been handled by ICC involving parties of some 180 different nationalities.

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