

HERMAN VERBIST

Attorney at the Brussels Bar

Guest Professor at the University of Ghent

Former Counsel at the International Court of Arbitration of the International Chamber of Commerce

and

CHRISTOPHE IMHOOS *

Attorney at the Geneva Bar

Former Counsel at the International Court of Arbitration of the International Chamber of Commerce

THE NEW 1998 ICC RULES OF ARBITRATION **OUTLINE

A.	<u>Foreword</u>	2
B.	<u>Timeframe of application of the New Rules</u>	5
C.	<u>Changes in the Rules that should contribute to reduce delays in the conduct of ICC arbitration procedures</u>	5
	• At the introductory stage of the arbitration procedure	5
	• At the stage of the constitution of the Arbitral Tribunal	6
	• Advance on the arbitration costs	7
	• At the stage of drawing up the Terms of Reference	8
	• Establishing of a provisional timetable for the procedure	8
	• At the stage of the payments of the advance on costs	8
	• Closing of the debates	9
	• Fast track arbitration	10
D.	<u>Changes in the Rules that should lead to a greater transparency and should reduce uncertainties in the conduct of the ICC arbitrations</u>	11
	• International and national matters	11
	• <i>Prima facie</i> control by the ICC Court	11

•	General provisions regarding the constitution of the Arbitral Tribunal	12
•	Challenge and replacement of arbitrators	13
•	Multi-party arbitrations	13
•	Place of the hearings	15
•	Procedural rules	15
•	Law applicable on the merits	15
•	Interim or conservatory measures	16
•	News claims	17
•	Taking of evidence	18
E.	<u>Changes that should improve the Rules and eliminate certain perceived lacunae in the Rules</u>	18
•	Confidentiality	18
•	Truncated Arbitral Tribunals	19
•	Arbitral awards	19
•	Costs of arbitration	20
•	Bank guarantees	21
•	V.A.T.	22
•	Waiver clause	22
•	Correction and interpretation of awards	23
•	Exclusion of liability	24
F.	<u>Conclusion</u>	25
	<u>ENDNOTES</u>	26
A.	<u>Foreword</u>	
1.	On April 7, 1997 the International Chamber of Commerce (hereafter "ICC") at its Congress in Shanghai adopted the New Rules of Arbitration. The New Rules entered	

into force on January 1, 1998 and therefore shall, from now on, commonly be referred to as the New "1998 Rules".

2. The start for the revision project was given on April 20, 1995 during the meeting of the ICC Commission on International Arbitration. It all started with a proposal by the ICC International Court of Arbitration (hereafter "the Court") to modify the Rules in order to deal with a few salient matters in the Rules. These modifications or additions to the Rules had been conceived by the Court in order to deal on a general basis with specific problems that had been encountered by the Court and which could not be sufficiently dealt with under the then existing Rules. These problems were : the problems relating to the constitution of Arbitral Tribunals in multi-party arbitrations; the problems with truncated Arbitral Tribunals; the power of Arbitral Tribunal to order interim or conservatory measures; the power of the Court to fix in exceptional circumstances the place of arbitration in another place than the venue fixed or agreed; the obligation of confidentiality; the Court's power to extend time-limits even when they are fixed (shortened) by the parties; the correction or interpretation of arbitral awards; the possibility to include new claims in the arbitration after the establishment of the Terms of Reference. **(1)**
3. Pursuant to Article 3 of Appendix I of the existing Rules ("Statutes of the International Court of Arbitration") the Court laid, therefore, these proposals before the Commission on International Arbitration. The Commission, which is composed of delegates of the various National Committees of the ICC, examined the proposals of the Court and expressed the view, shared by a majority of the delegates, that it was preferable to create a working group which should examine the need for a more complete review of the Rules. Thereupon a Working Group was created to review the ICC Rules of Arbitration, under the chairmanship of Mr. Yves Derains and the vice-chairmanship of Mr. Stephen Bond, each of them having been Secretary General of the Court.
4. The Working Group rapidly took the position that it would not be appropriate to limit the revision of the Rules to a few additions as proposed by the Court in April 1995, but that a more general review of the Rules be made. The Working Group considered that such general revision should be undertaken immediately and be finished within twelve to eighteen months. Following the first comments of the Working Group, the Commission on International Arbitration at its session of October 19, 1995 decided that the revision of the ICC Rules of Arbitration should aim at :
 - reducing delays;
 - reducing unpredictability;
 - rationalising costs;
 - improving any defective rules,

while respecting the fundamental characteristics of ICC arbitration and ensuring that the guarantees to which users are accustomed are preserved. **(2)**

5. The Working Group had found that, with the then existing Rules, practice had shown that only in exceptional circumstances an ICC arbitration could be achieved in less than twelve months, namely when there were no procedural complications, a full

cooperation of the parties with the Secretariat and efficient arbitrators. (3) It wished

to tackle as much as possible all delays in the administrative process of the arbitration, by proposing measures to accelerate the constitution of the Arbitral Tribunal, the transmission of the file to the arbitrators and the start of the time-limit within which the Arbitral Tribunal can instruct the matter.

It also was of the view that the structure of the Rules might be confusing for the users, since they did not follow the chronology of the various steps in an arbitration procedure. Finally, the Working Group found that the Rules contained only scarce provisions regarding the arbitral procedure. It considered it appropriate to add a series of provisions, which were to deal with specific difficulties and questions that had been encountered in practice.

6. The Working Group, which worked at a remarkable speed, submitted to the ICC Commission on International Arbitration a first text for discussion at its session of December 3, 1996. Following the discussion in the Commission and the receipt of the comments of the National Committees of the ICC, a revised text for approval was communicated to the ICC Commission on International Arbitration at its session of February 27, 1997. The ICC Court having given thereupon its final views on the new draft, the text was finally adopted in April 1997 in Shanghai.

Thus, the deadline of two years which the ICC Commission on International Arbitration had set for itself in April 1995 in order to finalize the revision of the Rules of Arbitration, had been fully complied with.

7. The result of this thorough revision is most remarkable and the 1998 Rules constitute an evolution rather than a revolution in respect of the old text. (4) The Rules are fully brushed up, although the essential characteristics of ICC arbitration were preserved. These characteristics are the role played by the ICC Court and its secretariat, the National Committees of the ICC, the universal character of ICC arbitration, the requirement to establish Terms of Reference before instructing the matter, the scrutiny by the ICC Court of arbitral awards in draft form prior to their notification to the parties.

The New Rules contain a large number of new provisions. In addition the provisions of the old Rules and their 3 annexes were considerably restructured. The various provisions are now contained in 35 Articles in the Rules divided into seven chapters (*Introductory Provisions; Commencing the Arbitration; The Arbitral Tribunal; The Arbitral Proceedings; Awards; Costs; Miscellaneous*).

The ICC Rules of Arbitration which exist since 1922 have undergone their most important revision since 1975. The various modifications shall be highlighted in this contribution.

8. It is of note that the Rules of Conciliation of the International Chamber of Commerce have not been revised. The ICC Conciliation Rules appear now at the end of the ICC Publication No. 581 which contained the 1998 ICC Arbitration Rules.
9. In addition, the standard ICC arbitration clause has been modified so to refer exclusively to ICC arbitration. It now reads as follows : "*All disputes arising out of*

or in connection with the present contract shall be finally settled under the Rules of

Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules". (5)

B. Timeframe of application of the New Rules

10. The New Rules entered into force on January 1, 1998. They do not contain any provisions relating to their application on procedures pending before the ICC International Court of Arbitration prior to January 1, 1998.

The New Rules do provide, however, in the new Article 6.1. that, unless the parties agree otherwise, the applicable rules shall be those in force on the date of receipt of the Request for Arbitration by the Secretariat of the Court. This provision is intended to eliminate uncertainties that may arise when the Rules are revised. It implies that the 1998 Rules shall apply also on matters introduced with the ICC after January 1, 1998 on the basis of arbitration clauses signed prior to January 1, 1998. Pursuant to Article 6.1 the parties shall keep the right to agree on the application of an earlier version of the ICC Rules of Arbitration, in particular the version as applicable at the time they signed their arbitration clause.

Regarding arbitration proceedings pending at the entry into force of the New Rules, it may be advisable that the Secretariat of the Court encourage the parties to apply the 1998 Rules, as it has done so during the previous revision of 1988.

11. It is to be noted that the new fee scales contained in the new Appendix III to the Rules (Arbitration Costs and Fees) and the advance payment of US\$ 2'500,-- on the administrative expenses to be made with the filing of the Request for Arbitration are applicable on all arbitrations already pending on January 1, 1998, irrespective of the version of the Rules applying to the arbitration procedure. (new Article 4.1 of Appendix III to the Rules)

C. Changes in the Rules that should contribute to reduce delays in the conduct of ICC arbitration procedures

12. The New Rules intend to accelerate the constitution process of the Arbitral Tribunal and the transmission of the file, on the basis of which the Terms of Reference shall be established.

• **At the introductory stage of the arbitration procedure**

13. The filing of a Request for Arbitration can no longer be made through a National Committee, but must henceforth be made directly with the Secretariat of the Court in Paris at the ICC's Headquarters. (new Article 4.1)
14. In order to accelerate the setting in motion of an arbitration procedure, the New Rules have changed the requirements regarding the elements which should be

included in the Request for Arbitration and in the Answer to the Request for Arbitration.

The provision of Article 3.2 of the old Rules which stated that the Request for Arbitration contained inter alia "*b) a statement of the Claimant's case*", has led to some discussions as to whether or not Claimant's Request for Arbitration contain the necessary elements, and as to whether or not Defendant was required or in a position to provide its Answer to the Request for Arbitration, when it considered that the Request did not sufficiently "*state Claimant's case*".

The New Rules in Article 4.3. provide that the Request for Arbitration shall inter alia contain "*b) a description of the nature and circumstances of the dispute giving rise to the claims*" and "*c) a statement of the relief sought, including, to the extent possible, an indication of any amounts claimed*". Pursuant to this provision, Claimant can limit its Request for Arbitration to a "*description*" of the "*nature and circumstances*" of the dispute. (6) It is not be required to file a substantial submission in which all its arguments are already fully developed. Said provision does not fundamentally differ from the text proposed under the draft revised rules of the London Court of International Arbitration ("LCIA"). (7)

Likewise, Defendant (which, in the New Rules, is referred to as "*the Respondent*") does not need anymore, within the initial 30-day time-limit as fixed by the Secretariat with the notification of the Request for Arbitration, "*to set out his defence and supply relevant documents*" (as stipulated in the previous Article 4.1). It suffices that the Respondent file "*its comments as to the nature and circumstances of the dispute giving rise to the claims*" and "*its position as to the relief sought*" (new Article 5.1.b and c).

The Respondent is thus not required to provide in its Answer at once all the arguments it may wish to develop in order to support its defence. However, the Respondent shall need, with its Answer, to file "*any comments as to the place of arbitration, the applicable rules of law and the language of the arbitration*". (new Article 5.1.e)

What matters for the Court is to obtain as quickly as possible an indication on the nature and the circumstances of the dispute, so that it can take more rapidly the necessary decisions regarding the setting in motion of the arbitration, *i.e.* the determination of the number of arbitrators if this has not been agreed among the parties, the constitution of the Arbitral Tribunal and in particular the selection of the sole arbitrator or the chairman of the Arbitral Tribunal if the Court has to appoint him, the fixing of the place of arbitration in absence of an agreement of the parties, and the fixing of the advance on costs.

- **At the stage of the constitution of the Arbitral Tribunal**

15. Pursuant to the new provision of Article 9.2, the Secretary General of the Court may henceforth confirm as co-arbitrators, sole arbitrators and chairmen of the Arbitral Tribunals any individual nominated by the parties or pursuant to their particular agreements, as soon as he or she has filed a statement of independence without qualification or a qualified statement of independence which has not given rise to objections from the parties. The Secretary General reports such confirmation to the

Court at its next session. He needs not to wait anymore, as was the practice under the old Rules, for the confirmation to be made by the Court during a Court session. If the

Secretary General considers, however, that a co-arbitrator, sole arbitrator or chairman of the Arbitral Tribunal should not be confirmed, the matter is submitted to the Court for final decision.

16. Where the Court decides to submit the dispute to an Arbitral Tribunal with three members, in a situation where the parties have not agreed upon the number of arbitrators, "*the Claimant shall nominate an arbitrator within a period of 15 days from the receipt of the decision of the Court, and the Respondent shall nominate an arbitrator within a period of 15 days from the receipt of the notification of the nomination made by the Claimant.*" (new Article 8.2)

Through this new provision, the Court shortens the time-limit within which a party is required to nominate a co-arbitrator, that is fifteen days instead of thirty days under the previous practice. In addition, in such situation, Claimant must henceforth nominate its co-arbitrator first, the Respondent nominating its co-arbitrator only after having been informed of the nomination made by Claimant.

- **Advance on the arbitration costs**

17. Pursuant to the new provision of Article 30.1, the Secretary General has the power to fix, as from the very beginning of an arbitration procedure, a provisional advance on costs to be paid by the Claimant, in order to cover the costs of the arbitration until the Terms of Reference have been established.

Article 1.2 of Appendix III to the New Rules provides that the provisional advance on costs fixed by the Secretary General according to Article 30.1 of the Rules shall normally not exceed the amount obtained by adding together the administrative expenses, the minimum of the fees based upon the amount of the claim and the expected reimbursable expenses of the Arbitral Tribunal incurred with respect to the drafting of the Terms of Reference. If the amount of the claim is not quantified, the provisional advance shall be fixed at the discretion of the Secretary General. The amount paid by the Claimant for the provisional advance shall be credited to its share of the definitive advance on costs which shall be fixed by the Court.

As a consequence thereof, the file can be transmitted more rapidly to the Arbitral Tribunal, upon its constitution, for the establishment of the Terms of Reference. The Claimant does not have to wait anymore until the Defendant has paid its half share of the first part of the advance on costs, before the Arbitral Tribunal can start acting in the arbitration. The Claimant therefore does not have to suffer anymore the delays caused by recalcitrant parties, who tardily pay their shares within the time-limit fixed by the Secretariat or which refuse to pay after the granting of an additional time-limit. The Claimant is henceforth mainly responsible for the rapidity of the transmission of the file to the Arbitral Tribunal. (new Articles 13 and 30.1)

18. Article 30.2 provides that "*as soon as practicable*", the Court shall fix the advance on costs for the claims and counterclaims which have been submitted to it. The Rules now also clearly set out that the amount of the advance on costs may be adjusted by the Court at any time during the arbitration. This provision confirms a long standing

practice of the Court, whereby the Court fixes the advance on costs "*subject to later readjustment*".

- **At the stage of drawing up the Terms of Reference**

19. Pursuant to the 1998 Rules, the Arbitral Tribunal still has the duty to draw up the Terms of Reference **(8)** before it can start the examination of the claims and the determination of the issues (Article 18 of the New Rules). The Terms of Reference thus remain, in spite of a certain criticism by some commentators, one of the essential characteristics of ICC arbitration, as they have been since the first version of the ICC Arbitration Rules in 1922. The Working Group examined, i.a. the question of whether or not Terms of Reference should be preserved. It considered that the advantages of such a document outweigh the negative effect which they may have on the speed of the procedure. It held that, by setting forth the particulars of the dispute and, above all, the claims of the parties within one document, the Terms of Reference are extremely helpful in *ultra petita* control, not only for the Arbitral Tribunal when it drafts its award but also for the ICC Court when scrutinizing the draft arbitral award before it is rendered. **(9)**

However, some flexibility has now been incorporated in the Rules with respect to the inclusion of the list of the issues to be determined. The New Rules state that the Terms of Reference shall include : "... d) *unless the Arbitral Tribunal considers it inappropriate, a list of issues to be determined.*" (new Article 18.1.d) Although this formulation contains a strong recommendation in favour of listing the issues to be determined in the Terms of Reference, it is now left to the appreciation of the Arbitral Tribunal to decide whether or not it shall include the issues to be determined. This option shall be useful in such circumstances, where the establishment of the Terms of Reference is blocked or delayed by one or more of the parties in respect of the drafting of the list of issues, or if such listing does not appear necessary when the parties' claims are sufficiently clear, or is simply inappropriate.

- **Establishing of a provisional timetable for the procedure**

20. Another new provision in the Rules aiming to accelerate the procedure concerns the requirement for the Arbitral Tribunal to establish as soon as possible a procedural calendar for the conduct of the arbitration. Pursuant to the new Article 18.4, this "*provisional timetable*" is established by the Arbitral Tribunal "*when drawing up the Terms of Reference, or as soon as possible thereafter*" and it is made "*after having consulted the parties*". The procedural calendar as well as any subsequent modifications to the calendar must be communicated to the parties and to the Court. The New Rules thus wish that the Arbitral Tribunal take the initiative of organising the procedure by fixing a procedural calendar. This will not only serve parties with respect to the time by which they are expected to file their submissions, but also the ICC Court in its supervision of the proceedings, in particular in the setting or prolongation of the time-limits for the rendering of the award.

- **At the stage of the payments of the advance on costs**

21. The Arbitral Tribunal does no longer have to wait until the advance on costs has been fully paid by the parties or by one of them, before it can examine the parties' claims and establish the procedural calendar.

22. The six-month time-limit within which the Arbitral Tribunal must render the award starts to run from the date of the last signature by the Arbitral Tribunal or the parties of the Terms of Reference or, in case one of the parties refuses to sign the Terms of Reference or to participate in its drawing up, the six-month time-limit runs from the date of the notification to the Arbitral Tribunal by the Secretariat of the approval of the Terms of Reference by the Court. (new Article 24.1)

The New Rules thus have eliminated the requirement, in case the Terms of Reference have not been signed by one of the parties but have been approved by the Court, that they have only become operative after the expiration of a time-limit for such party to sign such Terms of Reference. (10)

23. The New Rules maintain, however, in Article 1.3 of Appendix III the provision which is contained in Article 9.4 of the old Rules, which provides that the Arbitral Tribunal shall only proceed with respect to these claims or counterclaims in regard to which the whole of the advance on costs has been duly paid to the ICC. In order to avoid that the time-limit for the rendering of the award runs while the Arbitral Tribunal is unable to proceed with the claims or counterclaims, the Secretariat of the Court shall have to watch out carefully that the parties rapidly pay the requested advance on costs.
24. In case a request for an advance on costs has not been complied with, the Secretariat may, pursuant to the new Article 30.4 "*after consultation with the Arbitral Tribunal, [...] direct the Arbitral Tribunal to suspend its work and set a time-limit, which must be not less than 15 days, on the expiry of which the relevant claims, or counterclaims, shall be considered as withdrawn*". This provision corresponds to Article 15 of Appendix II of the old Rules, but has shortened the final time-limit which the Secretariat may set. Pursuant to said Article 15, the Secretariat is required to set a time-limit of "*not less than 30 days*". The New Rules thus allow the Secretariat to act more quickly, when setting a final deadline for the payment of the balance of the advance on costs, after having consulted, however, with the Arbitral Tribunal.
25. The failure to pay in full the advance on costs fixed by the Court has as only result that the Court is prevented from notifying the award to the parties, once it is rendered by the Arbitral Tribunal. (new Article 28.1.)

The Secretariat must avoid, however, that an Arbitral Tribunal conduct full proceedings and draft the award while the advance on costs has not been fully paid, unless in exceptional circumstances. Normally, the Secretariat shall have already applied the provision of the new Article 30.4, so to avoid also that there be not sufficient money available in order to pay the arbitrators for the work done.

- **Closing of the debates**

26. Another new provision aiming to accelerate the arbitration procedure is contained in the new Article 22 of the 1998 Rules. Pursuant to this new section, the Arbitral Tribunal henceforth is urged to declare the proceedings closed, "*when it is satisfied*

that the parties have had a reasonable opportunity to present their cases". (new Article 22.1) Moreover, the New Rules require that "When the Arbitral Tribunal has

declared the proceedings closed, it shall indicate to the Secretariat an approximate date by which the draft award will be submitted to the Court for approval pursuant to Article 27." (new Article 22.2)

- **Fast track arbitration**

27. Under the New Rules, the parties have the possibility to accelerate themselves the arbitration procedure. Both the Court and the ICC Commission on International Arbitration have carefully considered the possibility to provide in the Rules a specific "*fast-track*" procedure or at least to incorporate a *fast-track* clause in the Rules. (11) The Working Group which reviewed the Rules, although at one stage of its discussions it had proposed to insert a special "*fast-track*" arbitration clause, (12) finally decided to delete such clause. It was considered that such an article was useless for trained practitioners and dangerous for new comers to ICC arbitration. (13) The Working Party was also of the view that independently from the question of "*fast track arbitration*", the Rules should take care of the problem created in practice by excessive reduction of the time-limits by the parties in specific arbitration agreements.

Therefore, a new Article 32 was added, which provides : "*The parties may agree to shorten the various time-limits set out in these Rules. Any such agreement entered into subsequent to the constitution of an Arbitral Tribunal shall become effective only upon the approval of the Arbitral Tribunal.*" (new Article 32.1) Pursuant to this provision, parties are limited in their liberty to reduce the time-limits (including the time-limit to establish Terms of Reference and to render the final award), once the Arbitral Tribunal has been constituted. In such case, the arbitrators shall have to express their agreement with such new agreement, of which they were not aware when they accepted their appointment as arbitrator.

A safeguard from the procedural and administrative point of view has been provided in the new Article 32.2 which reads : "*The Court may extend any time-limit which has been modified pursuant to Article 31.1 on its own initiative if it decides that it is necessary to do so in order that the Arbitral Tribunal or the Court may fulfil their responsibilities in accordance with these Rules.*" This provision confirms the general power of the Court, as supervising administrative body, to extend the time-limits within which the arbitration procedure is to be conducted and finalized. It may be recalled that, pursuant to the new Article 18.2 (which section corresponds to Article 13.2 al. 1 of the old Rules), the Court may extend the two-month time-limit for the drawing up of the Terms of Reference, pursuant to a reasoned request from the Arbitral Tribunal "*or on its own initiative if it decides it is necessary to do so*". Likewise, pursuant to the new Article 24.2 (which section corresponds to Article 18.2 of the old Rules) the Court may extend the six-month time-limit for the rendering of the final award, pursuant to a reasoned request from the Arbitral Tribunal "*or on its own initiative, if it decides it is necessary to do so*".

The Court may thus preserve the regularity of the arbitration procedure, if it appears that the arbitration can not be finished within the reduced time-limit as agreed upon by the parties, either before or at the time the dispute arose. This power of the Court

is in line with the General Rule contained in the last provision of the Rules (the new Article 35, corresponding to Article 26 in the old Rules) pursuant to which "*In all*

matters not expressly provided for in these Rules, the Court and the Arbitral Tribunal shall act in the spirit of these Rules and shall make every effort to make sure that the Award is enforceable at law."

D. Changes in the Rules that should lead to a greater transparency and should reduce uncertainties in the conduct of the ICC arbitrations

28. The previous ICC Rules contained only very few provisions dealing with the conduct of the arbitration procedure. Practice has shown that this limited amount of provisions and their drafting have not always shown the clarity and the transparency sought by the parties. In this regard, various provisions have been redrafted and some new provisions have been added.

- **International and national matters**

29. The 1998 Rules provide that the Court "*if empowered by an arbitration agreement, shall also provide for the settlement by arbitration in accordance with these Rules of business disputes not of an international character*". (new Article 1.1)

This provision states more explicitly that the Court "*shall*" have jurisdiction with respect to domestic arbitrations than it is the case in the old Article 1 of Appendix II to the Rules (Internal Rules of the International Court of Arbitration). Said section of the previous rules only stated that the Court "*may*" accept jurisdiction over business disputes not of an international business nature, if its has jurisdiction by reason of an arbitration agreement. Such formulation seemed to cast some doubt in the eyes of the parties as to whether the Court would or would not in any case accept jurisdiction.

- ***Prima facie* control by the ICC Court**

30. The 1998 Rules have redrafted the provision dealing with the *prima facie* control of the existence of an arbitration clause by the Court.

The old Rules (in Article 7) stated that "*Where there is no prima facie agreement between the parties to arbitrate or where there is an agreement but it does not specify the International Chamber of Commerce, and if the Defendant does not file an Answer within the period of 30 days provided by paragraph 1 of Article 4 or refuses arbitration by the International Chamber of Commerce, the Claimant shall be informed that the arbitration cannot proceed.*"

In addition, Article 12 of Appendix II to the old Internal Rules provided that "*Where there is no prima facie arbitration agreement between the parties or where there is an agreement but it does not specify the ICC, the Secretariat draws the attention of the Claimant to the provisions laid down in Article 7 of the Rules of Arbitration. The Claimant is entitled to require the decision to be taken by the International Court of Arbitration.*"

The provision of the old Article 7 was felt difficult to read and not easy to apply. Pursuant to this provision, the Secretariat or, when required pursuant to Article 12 of

the Internal Rules, the Court could indeed decide that an arbitration procedure could not proceed, if the conditions set out in the provision were complied with. The Court could, however, also decide pursuant to Article 8.3 of the old Rules, without prejudice to the admissibility or merits of the plea or pleas, that the arbitration would proceed, "*should [it] be satisfied of the prima facie existence of such an agreement [to arbitrate]*". In practice, parties often had big arguments with the Court and its Secretariat when a discussion arose as to whether or not there was a *prima facie* arbitration agreement referring to the ICC and as to whether it was for the Court or for the Arbitral Tribunal to determine that the arbitration could or could not proceed.

In order to eliminate this ambiguity, the New Rules now provide in Article 6.2 : "*If the Respondent does not file an Answer, as provided by Article 5, or if any party raises one or more pleas concerning the existence, validity or scope of the arbitration agreement, the Court may decide, without prejudice to the admissibility or merits of the plea or pleas, that the arbitration shall proceed, if it is prima facie satisfied that an arbitration agreement under the Rules of Arbitration of the ICC may exist. In such a case, any decision as to the jurisdiction of the Arbitral Tribunal shall be taken by the Arbitral Tribunal. If the Court is not so satisfied, the parties shall be notified that the arbitration cannot proceed. In such a case, any party retains the right to ask any court having jurisdiction whether or not there is a binding arbitration agreement.*"

On the basis of this new Article, the matter as to whether or not the arbitration can proceed is brought immediately before the Court. The Secretariat does not first "*draw the attention of the Claimant to the provisions laid down in Article 7*" anymore.

This new provision has a larger scope than the previous Article 7. It concerns not only pleas raised by a party with respect to the "*existence*" or the "*validity*" of an arbitration agreement, but also pleas regarding its "*scope*". Moreover, in case such pleas are raised, the Court may decide to set the arbitration in motion if it is *prima facie* satisfied that an arbitration agreement referring to the ICC Rules "*may exist*". This change in the *prima facie* control by the Court of the existence or validity of an arbitration agreement, makes, henceforth, it much more difficult for the Court to decide not to set the arbitration in motion, and in particular to decide not to submit the question to the Arbitral Tribunal for its decision. **(14)** Thus, this new provision has a larger scope than the previous Articles 7 and 8.3.

From this new drafting of the Rules, one may regret the deletion of the mention of the administrative nature of the Court's decision to set in motion the arbitration (Article 12, 2nd paragraph of the old Internal Rules), whose aim was to stress - especially to the occasional users of ICC arbitrations - the non jurisdictional powers of the Court which is very often a source of confusion and misunderstanding.

- **General provisions regarding the constitution of the Arbitral Tribunal**
31. One of the seven chapters in the New Rules contains all the provisions relating to the Arbitral Tribunal. It is of note that this chapter starts with a new Article 7 to set out

the "*General Provisions*" which shall have to be respected by all arbitrators and also by the parties in all cases. These *General Provisions* may be considered as mandatory provisions of the ICC Arbitration Rules.

32. The new Article 7 closes with a paragraph 6 which reads "*Insofar as the parties have not provided otherwise, the Arbitral Tribunal shall be constituted in accordance with the provisions of Articles 8, 9 and 10*".

Whereas Article 7.6 was already incorporated in the old Rules, in Article 2.1, the way in which this stipulation is presented in the new Rules makes much clearer the distinction between the provisions of which parties may not derogate and those of which the parties may derogate with respect to the constitution of the Arbitral Tribunal (*i.e.* provisions of Articles 8, 9 and 10). In other words, no derogation shall be possible from the provisions such as those contained in Articles 11 (Challenge of arbitrators) and 12 (Replacement of arbitrators). **(15)**

- **Challenge and replacement of arbitrators**

33. In this respect, the principle of greater transparency is also adopted in the Rules, more particularly as regards the way the ICC Court deals with challenges filed against arbitrators or with procedures leading to the replacement of arbitrators.

Both in the event a party challenges an arbitrator, as in the event the Court takes the initiative to replace an arbitrator, "*when it decides that he is prevented de jure or de facto from fulfilling his functions, or that he is not fulfilling his functions in accordance with the Rules or within the prescribed time-limits*" (Article 2.11 al. 1 of the old Rules; Article 12.2 of the new Rules), the ICC Court decides the matter after the challenged arbitrator, the parties and any other members of the Arbitral Tribunal have had an opportunity to comment in writing within a suitable period of time.

According to its previous practice, the ICC Court did not communicate to the parties and the other members of the Arbitral Tribunal the comments sent by the arbitrator concerned, unless the latter had requested that it be done. Through this practice, the Court sought to avoid a debate between the parties and the arbitrator on his challenge and/or the reasons which may lead the Court to replace the arbitrator.

In tune with the spirit of transparency, the New Rules in their Articles 11.3 and 12.3 now provide that all "*such comments*" shall be communicated, without making any distinction between the comments of the parties and those of the arbitrators. It would appear important, however, that the Secretariat take care that no comments be communicated to the parties which reveal indications on the internal dealings within the Arbitral Tribunal.

34. When an arbitrator is to be replaced, the Court shall henceforth have discretion to decide whether or not to follow the original nominating process. (new Article 12.4) This new Article provides without any doubt a very strong weapon in a situation where a member of the Arbitral Tribunal manifestly is not independent vis-à-vis the party who proposed him.

- **Multi-party arbitrations**

35. An important new section (and more particularly one of the three new sections that had been initially proposed by the Court) concerns the constitution process of the Arbitral Tribunal in multi-party arbitrations.

The New Rules first of all confirm the principle that, in case there are multiple parties either on the Claimants' and/or on the Respondent's side and in case a three-member Arbitral Tribunal is to be constituted, *"the multiple Claimants, jointly, and the multiple Respondents, jointly, shall nominate an arbitrator for confirmation pursuant to Article 9."* Actually, this provisions confirms the long-standing practice of the Court in such situations.

However, the Court has added a completely new section in order to deal with a situation where there is no joint nomination by the multiple parties on one of the sides in the procedure. The new Article 10.2 provides that in such a case *"and where all parties are unable to agree to a method for the constitution of the Arbitral Tribunal, the Court may appoint each member of the Arbitral Tribunal and shall designate one of them to act as chairman. In such case the Court shall be at liberty to choose any person whom it regards as suitable to act as arbitrator, applying Article 9 when it considers it appropriate."*

This new Article is a clear response to the criticism which had been given by the French Cour de Cassation in the *Dutco* case. **(16)** In the *Dutco* arbitration procedure, where one Claimant was opposed to two Defendants, the ICC Court had invited the Claimant to nominate a co-arbitrator and had called upon the Defendants to jointly nominate one co-arbitrator, according to its standard practice. The Defendants objected against the Court's decision to request the Defendants to make a joint proposal, pointing out that they had conflicting interests. Under protest, they finally made a joint proposal, but later on filed a motion before the French courts against the Arbitral Tribunal's award, while alleging that the Arbitral Tribunal had been irregularly constituted. With the *Dutco* decision, the French Court de Cassation held that the parties enjoy a right of equality in the constitution of the Arbitral Tribunal, and that such right can not be validly waived in an arbitration agreement entered into before a dispute has arisen. It should be noted that the Court and the ICC Commission on International Arbitration had already been reflecting a long time before the *Dutco* case as to what practice to adopt in multi-party arbitration. **(17)**

With the principle set out in the new Article 10.2, in case the multiple Respondents do not manage to jointly propose a co-arbitrator for a three-member Arbitral Tribunal, and where all parties are unable to agree on a method for the constitution of the Arbitral Tribunal, the ICC Court is henceforth in a position to appoint all three arbitrators, including the co-arbitrator on the side where there is only one party, and so avoids that there be an inequality between the parties as regards their participation in the constitution of the Arbitral Tribunal. Moreover, the Court is free to appoint the arbitrator of its choice, and is not required to call upon a National Committee to make a proposal in this respect or and does not need to have regard thereby to the parties' nationalities and the prospective arbitrator's nationality. Only when it considers it appropriate, the Court thereby applies these principles as set out in the new Article 9.

It is to be noted that the draft revised LCIA Rules, in Article 8, also grants the power to the arbitral institution to set up the Arbitral Tribunal in case of absence of an agreement to the contrary between the parties in a multi-party situation. **(18)**

- **Place of the hearings**

36. With respect to the place of arbitration, the New Rules explicitly provide that "*The Arbitral Tribunal may, after consultation with the parties, conduct hearings and meetings at any location it considers appropriate, unless otherwise agreed by the parties.*" (new Article 14.2) and also that "*The Arbitral Tribunal may deliberate at any location it considers appropriate.*" (new Article 14.3)

These new provisions of the 1998 Rules confirm a practice which has been adopted already for quite some time, and which is contained, *inter alia*, in the UNCITRAL Model Law on International Commercial Arbitration of 1985 (hereafter "the UNCITRAL Model Law"), but which sometimes raised queries from critical commentators with respect to ICC arbitrations. The fact that hearings are held elsewhere and that the Arbitral Tribunal deliberates at any other location does not alter the principle that the award is deemed to be made in the city formally designated as the place of arbitration. **(19)** The new provision may be helpful in cases where the place of arbitration is in a country where, at the time of the arbitration procedure, the security situation is questionable and where the parties do not agree to change the place of arbitration.

- **Procedural rules**

37. As regards the rules governing the proceedings also, the 1998 Rules have reformulated the provisions of the previous Rules or have added some provisions.
38. The new Article 15.1 has slightly reformulated the provision of Article 11, without changing its essence. The new provision now reads "... *whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration*", whereas the old Article 11 states "... *whether or not reference is thereby made to a municipal procedural law to be applied to the arbitration*" (emphasis added) which rules of procedure the parties or, failing them, the Arbitral Tribunal may settle in particular when the ICC Rules are silent in that respect.
39. In the new Article 15.2, the Rules now state that "*In all cases, the Arbitral Tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case*". This section incorporates a generally recognised principle which is essential for a good administration of justice. This principle is contained, *inter alia*, in Articles 18 of the UNCITRAL Model Law, 14.1 (i) of the draft revised Rules of the LCIA and 16.1. of the International Arbitration Rules of the American Arbitration Association ("AAA") entered into force in April of last year. The fact that this principle is now enacted in the ICC Rules, may serve the parties in such circumstances where they would consider that the Tribunal has not acted in such way.

- **Law applicable on the merits**

40. With respect to the law applicable on the merits of the dispute, the 1998 Rules stipulate that, in the event the parties have not agreed upon the "rules of law" to be applied, "*the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate*". This provision contains two changes compared to Article 13.3 of the old Rules.

First of all, it refers to "*rules of law*" whereas the previous Rules refer to "*the law*". This new language, which is in line with Article 28.1 of the UNCITRAL Model Law and close to the provisions of Article 28.1 of the 1997 AAA International Arbitration Rules, confirms that arbitrators shall not be restricted to determining the law of a national legal system. **(20)**

Secondly, this new provision eliminates the requirement that the Arbitral Tribunal shall determine the applicable law "*designated as the proper law by the rule of conflict which he deems appropriate*", as contained in Article 13.3 of the old Rules. The ICC Rules consequently make it easier for the arbitrators to determine the applicable law, since they need not to determine anymore beforehand which rule of conflict they apply in order to make their choice of the applicable law. This new formulation in Article 17.1 put the ICC Rules in tune with a practice, which has shown that arbitrators more and more often decide to determine the applicable law by the "*voie directe*", without reference to any national law systems or conflict of law rules. **(21)**

- **Interim or conservatory measures**

41. Another new provision in the Rules concerns the Arbitral Tribunal's powers to grant interim or conservatory measures.

The new Article 23.1 of the 1998 Rules provides that "*Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the Arbitral Tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The Arbitral Tribunal may make the granting of any such measure subject to the appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or an Award, as the Arbitral Tribunal considers appropriate.*"

The new Article 23.1 is added to the Rules as a response to the decision taken by the English House of Lords in the *Ken Ren* case (an ICC arbitration procedure which was conducted in London). **(22)** In this case, the House of Lords has decided that English courts have the power to make an order that, as a condition of an arbitration in England being allowed to proceed, the Claimant shall provide adequate security for any costs which may be awarded against him in the event of the claim being unsuccessful. This decision led to lots of criticism since international arbitration procedures conducted in England might henceforth be put into abeyance by the intervention of English courts, on the basis of a request of a Defendant party in an arbitration claiming for security for its costs. The new English Arbitration Act of 1996 repealed this decision, by providing that English courts will have no power to order a Claimant to put up security for the costs of the arbitration. **(23)**

The previous ICC Rules with respect to the matter of interim or conservatory measures only provided in their Article 8.5 : "*Before the file is transmitted to the*

arbitrator, and in exceptional circumstances even thereafter, the parties shall be at liberty to apply to any competent judicial authority for interim or conservatory measures, and they shall not by so doing be held to infringe the agreement to arbitrate or to affect the relevant powers reserved to the arbitrator."

The ICC sought to avoid that decisions like the English House of Lords decision in the *Ken-Ren* cases further occur and therefore explicitly provided that the Arbitral Tribunal "*order any interim or conservatory measure it deems appropriate*", and "*may make the granting of such measure subject to appropriate security*" to be furnished by the requesting party. The question whether such decision should take the form of an order or an Award is left for the appreciation of the Arbitral Tribunal. The new Article 23.1 stresses however that if the Arbitral Tribunal takes its decision relating to interim or conservatory measures by an order, it should reason its order.

- **News claims**

42. The New Rules consider differently the matter of filing new claims or counterclaims in the course of an ICC arbitration procedure, after the Terms of Reference have been established.

Under the old Rules, a party after having signed the Terms of Reference could only file new claims or counterclaims "*on condition that these [remained] within the limits fixed by the Terms of Reference provided for in Article 13 or that they [were] specified in a Rider to that document, signed by the parties and communicated to the International Court of Arbitration*". (Article 16 of the old Rules)

Pursuant to this provision, a party in an arbitration could prevent the opposing party from filing new claims or counterclaims in a pending arbitration, if these claims were not within the limits of the Terms of Reference, by refusing to sign a Rider to the Terms of Reference. The old Rules provided that a Rider to the Terms of Reference ought to be signed by all the parties, whereas no such requirement was provided for the Terms of Reference. If a party refused to sign the Terms of Reference or to take part in the drawing up of the Terms of Reference, the document signed by the other party alone could be approved by the Court "*if it [was] satisfied that case [was] one of those mentioned in paragraphs 2 and 3 of Article 8*". (Article 13.2 of the old Rules) Consequently, under those Rules, a party facing a refusal of the other side to sign a Rider with respect to new claims which were not within the limits of the Terms of Reference ought to initiate itself a separate, new arbitration procedure, unless the Arbitral Tribunal considered that the new claims did remain within the limits of the Terms of Reference. **(24)**

The new Article 19 of the 1998 Rules deals with this situation by providing : "*After the Terms of Reference have been signed or approved by the Court, no party shall make new claims or counter-claims which fall outside the limits of the Terms of Reference unless it has been authorised to do so by the Arbitral Tribunal, which shall have regard to the nature of such new claims or counterclaims, the stage of the arbitration and other relevant circumstances.*"

Consequently, there is no more requirement to have a Rider to the Terms of Reference established and signed by the parties. It is left for the Arbitral Tribunal to

decide, in light of the stage of the arbitration and other relevant circumstances, to decide whether or not it accepts the new claims. This change shall certainly contribute to a greater flexibility in the conduct of the arbitration, and shall probably weaken certain criticisms with respect to the obligatory nature of the Terms of Reference and their bearing. (25)

- **Taking of evidence**

43. The 1998 Rules provide that "*At any time during the proceedings, the Arbitral Tribunal may summon any party to provide additional evidence.*" (new Article 20.5)

This new provision confirms a practice which has been adopted already a long time by more experienced arbitrators. It has the merit to draw the attention of less experienced arbitrators to the fact that they have the power to take certain initiatives vis-à-vis the parties with respect to the examination of the matter. However, such a provision leaves open the issue of whether the arbitrator has the power to request from the parties any clarification on specific points of law. (26)

It is to be noted that the contents of Article 20.5 of the New Rules are almost similar to those adopted in Article 24.3 of the 1976 UNCITRAL Arbitration Rules.

With respect to the matter of taking the evidence by appointing experts, the old Rules provided in Article 14.2 that "*the arbitrator [could] appoint one or more experts, define their Terms of Reference, receive their reports and/or hear them in person*". The New Rules henceforth set forth that "*at the request of a party, the parties shall be given the opportunity to question at a hearing any such expert appointed by the Tribunal*". (new Article 20.4) This new provision incorporates a practice that has been followed by various arbitrators. It confirms that the parties have the opportunity to question through examinations and cross-examinations the experts appointed by the Arbitral Tribunal, if they so request.

- E. **Changes that should improve the Rules and eliminate certain perceived lacunae in the Rules**

44. Finally, some changes in the Rules have been made in order to deal with items which have been perceived as missing in the previous Rules.

- **Confidentiality**

45. With respect to the previous Rules, it was often perceived that the ICC Rules did not contain any provision dealing with the confidential nature of the proceedings and of the documents filed in the course of an arbitration, which may serve a party who seeks to claim the respect of confidentiality from its opposing party.

The old Rules contained in their Articles 2, 3 and 4 of Appendix II of the Internal Rules of the work of the International Court of Arbitration a few provisions on the "*Confidential character of the work of the International Court of Arbitration*". These provisions only imposed the respect of the confidential nature of work of the Court to all those who participated in the work of the Court in whatever capacity. (27)

The 1998 Rules in their Article 20.7 provide that : "*The Arbitral Tribunal may take measures for protecting trade secrets and confidential information.*" Although this new provision does not create an explicit positive duty of confidentiality on the part of participants in ICC arbitration, it certainly serves the interests of the parties that

seek to obtain a greater degree of security with respect to the information they produce in the course of an arbitration procedure.

- **Truncated Arbitral Tribunals**

46. The New Rules contain a provision which should eliminate difficulties that may arise at the deliberation stage of an arbitral award, when one of the members of the Arbitral Tribunal would no more be able or would no longer accept to participate in the deliberation and the rendering of the award.

In order to cope with such situations which occasionally arise, **(28)** the 1998 Rules have added a new Article 12.5 which reads : "*Subsequent to the closing of the proceedings, instead of replacing an arbitrator who has died or been removed by the Court pursuant to Articles 12(1) and 12(2), the Court may decide, when it considers it appropriate, that the remaining arbitrators shall continue the arbitration. In making such determination, the Court shall take into account the views of the remaining arbitrators and of the parties and such other matters that it considers appropriate in the circumstances.*"

The New Rules thus allow "*truncated Arbitral Tribunals*" in exceptional circumstances to continue the arbitration and to render an award, if one of the members would either die, refuse to participate in the deliberation of the award, resign, or if the Court would accept a challenge against him, after the closing of the debates. This solution, which is in all likelihood resorted to very exceptionally, may be useful, in cases where a member of the Arbitral Tribunal for a particular reason would try to obstruct or delay the making of the award.

This new provision joins those adopted in the AAA 1997 International Arbitration Rules (Article 11.1) and in the draft revised LCIA Rules (Article 12).

- **Arbitral awards**

47. With respect to arbitral awards in general, it is to be stressed that the New Rules provide in the new Article 2 ("*Definitions*") that "*Awards includes, inter alia, an interim, partial or final Award*".

The old Rules, in their Article 21, only referred to "*partial or definitive*" awards. The fact that "*interim*" awards are now also referred to in the New Rules does not mean that a new type of awards is created. This reference should be understood as the confirmation of a practice, whereby the terms "*interim*" and "*partial*" awards in the ICC arbitration are used virtually interchangeably. **(29)**

The New Rules contain a new Article 25.2 which sets out that "*the Award shall state the reasons upon which it is based*". This provision confirms in fact a long standing practice of the ICC Court to require that an arbitral award be reasoned. Under the old Rules, this requirement was, however, not explicitly stated. Reference was only

made in the previous Article 17 of Appendix II to the Rules to "*reasons for awards*" within the framework of the "*formal requirements laid down by the law applicable to the proceedings and, where relevant, by the mandatory rules of the place of arbitration*" to which the Court pays attention when it scrutinizes draft arbitral awards. On the

basis of the new provision, it is now clear that an Arbitral Tribunal in ICC proceedings is required to provide reasons in its award, even if the law applicable to the proceedings would not contain such requirement.

It may further be noted that the old Article 17 of Appendix II was reformulated in the new Article 6 of Appendix II as follows : "*When the Court scrutinizes draft awards in accordance with Article 27 of the Rules, it considers, to the extent practicable, the requirements of mandatory law at the place of arbitration*".

- **Costs of arbitration**

48. With respect to the matter of costs, the New Rules contain a new provision. Whereas under the old Rules, the costs of the arbitration were fixed by the Court at the end of the procedure, when it scrutinized and decided to approve the draft final award of the Arbitral Tribunal (pursuant to Article 20.1 of the old Rules) or at the time the Court took note of the withdrawal of the arbitration procedure, **(30)** the New Rules provide in the new Article 31.2 that "*Decisions on costs other than those fixed by the Court may be taken by the Arbitral Tribunal at any time during the proceedings*". Consequently, the Arbitral Tribunal is able to fix such "*other costs*" by Interim or Partial Award.

The Court itself fixes, at the end of the arbitration, the administrative expenses and the arbitrators' fees in accordance with the scale annexed to the Rules and takes note of the expenses incurred by the arbitrators during the arbitration. Consequently, having regard to the new Article 31.1 (corresponding to Article 20.2 of the old Rules), "*other costs*" shall include "*the expenses, if any, of the arbitrator, the fees and expenses of any experts, and the normal legal costs incurred by the parties*". Also under the old Rules, these "*others costs*" are fixed by the Arbitral Tribunal. Under the New Rules, the Arbitral Tribunal must not, however, wait anymore until the end of the arbitration in order to fix them.

49. As regards the scale of administrative expenses and of arbitrator's fees, contained in Article 5 of Appendix III of the old Rules, this scale was revised upwards. The last revision of the scale occurred on January 1, 1993. As a result of this change, the parties henceforth have to pay a filing fee of US\$ 2'500,-- (instead of previously US\$ 2'000,--) when they introduce a Request for Arbitration with the ICC. Pursuant to the New Article 1 of Appendix III to the Rules (corresponding to Article 3.c of the old Appendix III), this advance payment of US\$ 2'500,-- is not refundable, in case the arbitration does not proceed after its introduction.

Under the new scales, the highest amount for administrative expenses that may be fixed by the Court shall henceforth be US\$ 75'800,-- (instead of previously US\$ 65'500,--), namely with respect of amounts in dispute of over US\$ 80'000'000,--.

As regards the scale of arbitrators' fees, the "*minimum*" and "*maximum*" amounts provided for fees have been increased with respect to all the ranges relating to the different amounts in dispute.

- **Bank guarantees**

50. The New Rules contain in their Appendix III (Arbitration Costs and Fees) some new provisions dealing with the matter of paying the advance on costs.

The new Article 1.5 of this appendix stipulates that "*each party shall pay in cash its share of the total advance on costs. However, if its share exceeds an amount fixed from time to time by the Court, a party may post a bank guarantee for this additional amount*". This provision confirms a practice which had been adopted for many years by the Secretariat of the Court, in particular in cases where the parties had to pay a high advance on costs. Under such current practice, the Secretariat allowed a party to open a bank guarantee "*in respect of a part of the advance on costs whenever it has already advanced at least US\$ 300'000,-- in cash, to the extent that the circumstances of the case so allow*". (31)

In case a party wishes to avail itself the option to use a bank guarantee, it should first contact the Secretariat in order to be advised of the relevant conditions for the issuance of such bank guarantee. (new Article 1.9 of Appendix III)

When a party has to substitute for the share of a defaulting party, it is allowed to pay the portion of the defaulting party by posting a bank guarantee, after having already paid in full (in cash) its share of the advance on costs fixed by the Court. (new Article 1.6 of Appendix III) The New Rules do not explicitly require a minimum amount to be paid in cash for the posting of a bank guarantee in such a situation. The full portion of the defaulting party may be paid by posting a bank guarantee, regardless of the size of the amount to be paid.

The 1998 Rules also provide the option to post a bank guarantee in the event the Court fixes separate advances on costs for the principal claim (filed by the Claimant) and the counterclaim or even the set-off (filed by the Respondent). In the new Article 1.8 of Appendix III it is provided that "*when as a result of the fixing of separate advances on costs, the separate advance fixed for the claim of either party exceeds one-half of such global advance as was previously fixed (in respect of the same claims and counterclaims that are the object of separate advances), a bank guarantee may be posted to cover any such excess amount*".

On the basis of this provision, a party may now be more inclined to request separate advances on costs, rather than substituting itself for the share of the defaulting party, more particularly when the amount of its claim is disproportionately smaller than the claim of the opposing party, or even in case the amounts are relatively equal in size. A party may wish to request separate advances on costs, even if the advance to be paid for its own claims shall, as a result of the regressive nature of the scale of the Administrative Expenses and Arbitrator's Fees (contained in Article 4 of Appendix III to the Rules), be higher than the party's one-half share of the global advance on

costs. In the past, parties often hesitated to request the fixing of separate advances on costs where the amounts of the claims and counterclaims were roughly equivalent, since they had to pay the separate advance for their own claims fully in cash and since the separate advance for their claims in such situation, as a result of the regressive nature of the said scale, typically turn out to be higher than the one-half share to be paid by the party under a global advance on costs. (32)

51. By requesting separate advances on costs and paying the amount fixed for its claims, a party may obtain that the arbitration proceed with respect to its claims and that the claims of the opposing party which fails to pay its separate advance be not dealt with (pursuant to Article 9.4, second paragraph of the old Rules; Article 1.3 of Appendix III to the New Rules).
52. Last but not least, it may be noted that the New Rules do not modify the current situation whereby the parties' deposits are not remunerated during the arbitration proceedings.

- **V.A.T.**

53. With regard to costs to be paid, it is interesting to note that the New Rules refer for the first time to the issue of taxes that may have to be paid by the parties on the amounts for costs.

The new Article 2.9 of Appendix III stipulates namely that "*amounts paid to the arbitrator do not include any possible value-added taxes (VAT) or other taxes or charges and imposts applicable to the arbitrator's fees. Parties are expected to pay any such taxes or charges; however, the recovery of any such charges or taxes is a matter solely between the arbitrator and the parties*".

So far, the ICC Secretariat addressed the topic of taxes only in a "*Note to all arbitrators*" which was sent systematically to the arbitrators and copied to the parties, whereby the arbitrators were reminded that, in the event they must pay taxes on their fees, it was their responsibility to tackle the problem by claiming from the parties the amount of the tax due. Since such tax claim does not arise until the arbitrator has received his fees and since this shall typically occur only after the arbitration procedure is terminated, the arbitrator may find it difficult to claim back such taxes from the parties. The new provision in the Rules now clearly sets the obligation of the parties to pay "*any such taxes or charges*".

The new provision, however explicitly adds that the recovery of such charges and claims is a matter to be handled solely between the arbitrators and the parties. This means that the ICC does not intervene in these tax matters.

- **Waiver clause**

54. In order to avoid that a recalcitrant party try to block or delay the arbitration procedure at a late stage by raising a plea regarding the regularity of the proceedings, the New Rules provide a "waiver" clause, which reads as follows: "*A party which proceeds with the arbitration without raising its objection to a failure to comply with any provisions of these Rules or any other rules applicable to the proceedings, any direction given by the Arbitral Tribunal or any requirement under the arbitration*

agreement relating to the constitution of the Arbitral Tribunal or to the conduct of the proceedings, shall be deemed to have waived its right to object." (new Article 33)

A party therefore shall be well advised to raise without further delay any plea or objection it may have with respect to a lack of compliance with the ICC Rules or with the arbitration agreement, or with respect to the constitution of the Arbitral Tribunal or the conduct of the arbitration by the Arbitral Tribunal.

The principle set forth by this new article, which is an expression of the *bona fide* principle, is not only important for maintaining the integrity of the arbitral proceedings, but even more important for any subsequent proceedings before the state courts, *e.g.* in the framework of a challenge against the award or in the framework of recognition and enforcement proceedings. **(33)**

Moreover, this new provision embodies in the Rules a principle widely recognised by state courts, or legislation on international arbitration, or even by institutional arbitration rules such as *inter alia* the 1997 AAA International Arbitration Rules (Article 25).

- **Correction and interpretation of awards**

55. An important new provision (as a matter of fact, the third one which the ICC Court had proposed itself from the outset) concerns the correction and interpretation of the Award.

Whereas the Court has the power, by scrutinizing awards before they are rendered, to "*lay down modifications as to the form of the Award, and without affecting the Arbitral Tribunal's liberty of decision, may also draw its attention to points of substance*" (pursuant to the new Article 27 which corresponds to the old Article 21), the old Rules did not explicitly provide any power for the Court to accept corrections of an Award. Nevertheless, the Court was to face over the last few years with an increasing number of requests for rectification of errors and also with requests for interpretation of Awards.

In the absence of an explicit rule, the Court considered to have the power to accept a rectification of an Award, pursuant to the "General Rule" laid down in Article 26 of the previous Rules. The Court felt the need, however, to have the principle of correcting and interpreting Awards laid down in a clear stipulation.

This principle is now contained in the new Article 29 which reads :

"(1) On its own initiative, the Arbitral Tribunal may correct a clerical, computational or typographical error, or any error of similar nature contained in an Award, provided such correction is submitted for approval to the Court within 30 days of the date of such Award.

(2) Any application of a party for the correction of an error of the kind referred to in Article 29.1, or for the interpretation of an Award, must be made to the Secretariat within 30 days of the receipt of the Award by such party, in a number of copies as stated in Article 3.1. After transmittal of the application to the Arbitral Tribunal, it shall grant the other party a short time-limit, normally not exceeding 30 days, from the receipt of the application by that party to submit any comments thereon. If the Arbitral Tribunal decides to correct or interpret the Award, it shall submit its

decision in draft form to the Court not later than 30 days following the expiration of the time-limit for the receipt of any comments from the other party or within such other period as the Court may decide.

(3) The decision to correct or to interpret the Award shall take the form of an addendum and shall constitute part of the Award. The provisions of Articles 25, 27 and 28 shall apply mutatis mutandis."

The New Rules thus clearly set a limitation in time as regards the right of a party to request a correction or an interpretation of an Award, and as regards the right of an arbitrator to take the initiative to correct his Award. Such limitation in time is logic and necessary, since the finality of the Award would be jeopardized if it were considered possible to file indefinitely requests for correction and interpretation of Awards.

The new provision stipulates that each decision to correct or interpret an Award must be scrutinized by the Court like any other Award, and that the arbitrator's decision to correct or interpret the award takes the form of an Addendum which is considered to be part of the Award.

As regards corrections of Awards, the new provision sets out a variety of reasons which may urge an Arbitral Tribunal to correct its Award, or which may urge parties to request such correction : "*a clerical, computational or typographical error, or any error of similar nature contained in an Award*". Thus, in case such a problem arises, arbitrators and parties will certainly find legal support in this provision in order to validly correct the Award.

Regarding the correction of awards, one may wonder, however, about the insertion of such a clause in the New Rules since the existence of clerical mistakes or alike should be identified during the approval process of awards by the ICC Court. The possibility of correction of awards should be limited to exceptional cases and therefore, should remain the exception.

It is of note, furthermore, that the correction of awards is dealt with - like interpretation of awards - by Article 30 of the 1997 AAA International Arbitration Rules, while the draft revised LCIA Rules also provide for correction of clerical mistakes contained in an award in Article 27.

- **Exclusion of liability**

56. Finally, it is to be noted that the New Rules have added an Article dealing with the question of liability or, rather, exclusion of liability.

Since fear is growing for liability actions, also in the field of resolving disputes through arbitration, the ICC felt the need to add an article on this matter.

The new Article 34 which was finally adopted, reads as follows : "*Neither the arbitrators, nor the Court and its members, nor the ICC and its employees, nor the ICC National Committees shall be liable to any person for any act or omission in connection with the arbitration.*"

Such a clause is on purpose broad and similar to those contained in Articles 35 of the 1997 AAA International Arbitration Rules and 31.1 of the draft revised LCIA Rules, which add, however, the exception of the case of conscious and deliberate wrongdoing.

Actually, the principle of having an exclusion of liability provided in the Rules was highly debated at the session of the ICC Commission on International Arbitration

which examined the matter. Already beforehand the question had been thoroughly examined and discussed by a special Working Group within the framework of the Commission on International Arbitration. That the issue was so highly debated was due to the fact that in the United States arbitrators and arbitral institutions under all circumstances benefit from a general exclusion of liability, whereas in most other countries such total exclusion of liability would be ineffective, in case the arbitrator would be accused of certain particularly serious faults. (34)

It remains to be seen now what shall be the effect of this new clause in the ICC Rules. It will, however, not grant *carte blanche* to the arbitrator to do *n'importe quoi* and the latter shall be advised not to rely too much on this provision. (35)

F. Conclusion

57. Whereas the ICC Court, when it launched the initiative for a revision of the Rules of Arbitration, had in mind to add only three new provisions to the Rules, the Court's initiative was welcomed by the National Committees and the members of the Commission on International Arbitration as a basis in order to review the Rules more profoundly.

The New Rules, which entered into force as from January 1, 1998, were largely freshed up by this revision, while maintaining nevertheless their fundamental characteristics. As a consequence of the restructuring of the various articles, the Rules have become much easier to read and therefore shall become more accessible to those having not a great experience in ICC arbitration.

The new Articles which have been added shall no doubt assure that the Rules, which celebrate in 1997 their 75th anniversary, are well adapted and fit in order to meet the new challenges and the new difficulties that may come up in the field of international commercial arbitration in a changing world where other arbitration rules, such as the LCIA and AAA Rules, were also revised.

The authors of the revised Rules have successfully avoided to add a considerable amount of new provisions therein, thus insuring the sober and concise contents of the Rules while maintaining the principle of fully administered arbitration, and thus preserving rules which are universally applicable in the different legal cultures of the world.

The International Chamber of Commerce remains the most important arbitration institution in the world, receiving on an annual basis more than 400 new arbitration cases with parties from more than 95 different countries in the world. (36)

By adopting these New Rules, the ICC stands by its fundamental objective which is to offer the best possible service to the international business community, including an excellent method for the settlement of business disputes.

ENDNOTES

- * The authors kindly thank Mrs Corinne TRUONG, assistant-legal counsel with the Secretariat of the ICC International Court of Arbitration, for having reviewed the text of the present contribution and provided her comments.
The views expressed therein only bind the authors and not the Institution to which they have belonged.
- ** This article was originally published in the *Revue du Droit des Affaires Internationales/International Business Law Journal*, 1997, No. 8, at pp. 989-1022
- (1) ICC Document N° 420/338 - Encl. I for the Agenda of the April 20, 1995 session of the Commission on International Arbitration.
 - (2) ICC Document N° 420/344 - Report of the October 19, 1995 session of the Commission on International Arbitration; see also R.H. KREINDLER, *Impending Revision of the ICC Arbitration Rules - Opportunities and Hazards for Experienced and Inexperienced users Alike*, *Journal of International Arbitration*, Vol. 13, No. 2, June 1996, pp. 45-114.
 - (3) ICC Document N° 420/344, *Idem*.
 - (4) H. GRIGERA NAON, *New Arbitration Rules of the ICC*, Newsletter of Committee D (Arbitration and ADR) of the International Bar Association section on Business Law, Vol. 2, No. 2, September 1997, pp. 7-10; S.R. BOND and C.R. SEPPALA, *The New (1998) Rules of Arbitration of the International Chamber of Commerce*, Mealey's International Arbitration Report, May 1997, pp. 33-38.
 - (5) ICC Publication N° 581, p. 8.
 - (6) See M. PHILIPPE-GAZON, *Role of the ICC International Court of Arbitration*, *International Business Law Journal*, No. 4, 1997, p. 447 item A.1.
 - (7) Article 1.1 (c) in Newsletter of the London Court of International Arbitration, August 1997, pp. 2-10.
 - (8) For an analysis of the scope of the Terms of Reference, see *Terms of Reference under the 1988 ICC Arbitration Rules - A practical guide*, issued by the ICC's Commission on International Arbitration, *The ICC International Court of Arbitration Bulletin*, Vol. 3/No. 1, May 1992, pp. 24-43; E. SCHÄFER, *The ICC Arbitral Process - Part II : Terms of Reference in the past and at present*, *The ICC International Court of Arbitration Bulletin*, Vol. 3/No. 1, May 1992, pp. 8-13.
 - (9) ICC Document N° 420/344 - Report of the October 19, 1995 session of the Commission on International Arbitration, para. 40.
 - (10) See ICC Secretariat's Note of October 15, 1997 on "*Amended ICC Rules of Arbitration in force as from 1 January 1998*", item 2.ii).
 - (11) For a description of the proceedings in an ICC fast-track arbitration case and the experience of the various participants in an ICC fast-track procedure, see : "*Fast*

- track arbitration : Different perspectives*", the ICC International Court of Arbitration Bulletin, Vol. 3/No. 2, November 1992, pp. 4-17.
- (12) ICC Document N° 420/350 dated October 8, 1996 of the Commission on International Arbitration.
- (13) ICC Document N° 420/358 dated January 13, 1997 of the Commission on International Arbitration. The draft revised LCIA Rules contains only one provision dealing with the "expedited formation" of the Arbitral Tribunal (Article 9) : see Newsletter of the London Court of International Arbitration, *idem*.
- (14) S.R. BOND and C.R. SEPPALA, *op. cit.*, p. 35, Item 2.a.
- (15) Cf. K. LIONNET, *ICC Rules of Arbitration 1998*, Betriebs-Berater, No. 37, Annex 13, 1997, p. 16.
- (16) Siemens AG and BKMI Industrieanlagen GmbH v. Dutco Construction Co, French Cour de Cassation, January 7, 1992, see *Revue de l'Arbitrage*, 1992, p. 470, comments by P. BELLET, and *Journal du Droit International* 1992, 707, comments by C. JARROSSON; M. PHILIPPE-GAZON, *op. cit.*, p.452; in English : Mealey's International Arbitration Report, February 1992, p. 20, comments by M. JALILI. On this topic: E.A. SCHWARTZ, *Multi-party Arbitration and the ICC - In the Wake of Dutco*, *Journal of International Arbitration*, Vol. 10, No. 3, September 1993, pp. 5-19; S. GRAVEL, *Multiparty arbitration and multiple arbitrations*, *The ICC International Court of Arbitration Bulletin*, Vol. 7/No. 2, December 1996, pp. 45-53.
- (17) Already in 1982 the ICC published a *Guide to Multi-Party Arbitration* (ICC publication N° 404). the ICC Institute of International Business Law and Practice published a *Dossier on Multi-party Arbitration* in 1991, ICC Publishing, Publication No. 480/1. The *Final Report on Multi-party Arbitrations of the ICC Commission on International Arbitration* has been published in the ICC International Court of Arbitration Bulletin, Vol. 6/No. 1, May 1995, pp. 26-50.
- (18) Article 8, Newsletter of the London Court of International Arbitration, *idem*.
- (19) W.L. CRAIG, W.W. PARK, J. PAULSSON, *International Chamber of Commerce Arbitration*, 2nd Edition, 1990, at p. 119; H. VERBIST, *The Practice of the ICC International Court of Arbitration With Regard to the Fixing of the Place of Arbitration*, *Arbitration International*, Vol. 12/N° 3, p. 347. This new provision is rather similar to those contained in other arbitration Rules, such as those of the LCIA (Article 7.2 of the current Rules) and of the A.A.A. (American Arbitration Association 1997 International Arbitration Rules, Article 13.2).
- (20) S.R. BOND and C.R. SEPPALA, *op. cit.* , p. 36, Item 2.d.
- (21) CRAIG-PARK-PAULSSON, *op. cit.*, p. 292.
- (22) Coppée-Lavalin SA/NV v. Ken-Ren Chemicals and Fertilizers Ltd and Voest-Alpine v. Ken-Ren Chemicals and Fertilizers Ltd., House of Lords, May 5, 1994, *Yearbook Commercial Arbitration*, Vol. XX, 1995, pp. 223-236; [1994] 2. W.L.R. 631, [1994] 2 ALL E.R. 449; in *French Revue de l'Arbitrage*, 1995, p. 513, comments by Daphna KAPELIUK-KLINGER. See also in this respect D. SARRE, *Security for costs in ICC arbitration in England, The Ken-Ren cases, International Commercial Arbitration in Europe*, Special Supplement to the ICC International Court of Arbitration Bulletin, ICC Publication N° 537, 1994, pp. 58-63.
- (23) Articles 42, 43, 44 and 45 of the English Arbitration Act 1996 henceforth determine the powers of English courts in relation to arbitral proceedings; see V.V. VEEDER, *Report on England*, *Yearbook International Commercial Arbitration*, 1996, Vol. XXI, p. 372.

- (24) For an analysis of the situation under the previous Rules, see A. REINER, *Terms of Reference : the function of the International Court of Arbitration and application of Article 16 by the arbitrators*, The ICC International Court of Arbitration Bulletin, Vol. 7/N° 2, December 1996, pp. 59-71; see also Jean-Jacques ARNALDEZ, *L'acte déterminant la mission de l'arbitre* in *Études offertes à Pierre BELLET*, Litec 1991, pp. 1-31.

- (25) S.R. BOND and C.R. SEPPALA, *op. cit.*, p. 36, Item 2.f.
- (26) S. JARVIN, *Establishing the facts of the case*, key notes submitted at the ICC Conference on June 4, 1997 on the New 1998 ICC Rules of Arbitration, pp. 8-9; see also report made on the Conference in Bulletin of the Swiss Arbitration Association, 1997, No. 2, p. 197.
- (27) On the subject see : J. PAULSSON and N. RAWDING, *The trouble with confidentiality*, The ICC International Court of Arbitration Bulletin, Vol. 5/No. 1, May 1994, pp. 48-59; see also J.-L. DEVOLVE, *Vraies et fausses confidences, ou les petits et grands secrets de l'arbitrage*, Revue de l'Arbitrage, 1996, p. 373.
- (28) On the subject, see : S. SCHWEBEL, *The validity of an arbitral award rendered by a truncated Arbitral Tribunal*, The ICC International Court of Arbitration Bulletin, Vol. 6/No. 2, November 1995, pp. 19-32.
- (29) See Final Report on Interim and Partial Awards of the Working group on dissenting opinions and interim and partial awards of the ICC Commission on International Arbitration, ICC International Court of Arbitration Bulletin, Vol. 1/No. 2, December 1990, p. 26.
- (30) On the subject, see : E.A. SCHWARTZ, *The ICC Arbitral Process - Part IV : The costs of ICC arbitration*, The ICC International Court of Arbitration Bulletin, Vol. 4/No. 1, May 1993, pp. 8-23.
- (31) *Note from the Secretariat of the International Court of Arbitration to all parties, for information concerning the application of the schedule of conciliation and arbitration costs*, dated January 1st, 1993 which is sent to all parties as soon as a Request for Arbitration is filed with the ICC and notified to the Respondent; E.A. SCHWARTZ, *op. cit.*, p. 27.
- (32) E.A. SCHWARTZ, *op. cit.*, pp. 9 and 19.
- (33) M. BLESSING, *Provisions in the 1998 ICC Rules Relating to the Making of the Arbitral Decision*, key notes submitted at the ICC Conference of 4th June 1997 on the New 1998 ICC Rules of Arbitration, p. 9.
- (34) On the subject, see : *Final Report on the Status of the Arbitrator*, The ICC International Court of Arbitration Bulletin, Vol. 7/No. 1, May 1996, pp. 27-58.
- (35) M. BLESSING, *op. cit.*, p. 10.
- (36) *1996 Statistical Report*, The ICC International Court of Arbitration Bulletin, Vol. 8/ No. 1, May 1997, pp. 6-7.

*