

18 International Commercial Arbitral Institutions and Other International Bodies

A. *International Commercial Arbitral Institutions and Their Arbitration Rules*

1) Introduction

The last chapter looked briefly at international commercial arbitration, including the United Nations Commission on International Trade Law (UNCITRAL) Model Arbitration Law and the New York Convention. Part A of this chapter looks at a number of the international commercial arbitral institutions and their arbitration rules, Part B considers the Arbitration Rules of UNCITRAL and Part C looks at arbitration under the Rules of the Chartered Institute of Arbitrators.

It is obviously not possible in this Manual to consider all of the international arbitral institutions: there are many, and only a small selection can be looked at in the space available.⁸¹ Moreover, because their rules tend to follow a similar pattern, it is unnecessary to look in detail at each and every one of them. Instead, only the rules of the first institution considered – the London Court of International Arbitration (LCIA) – will be looked at in any detail.

The structure of the arbitration rules of the institutions considered includes:

- commencement of the arbitration;
- constitution of the arbitral tribunal: number of arbitrators, appointment, challenge and replacement of arbitrators;
- duties of arbitrators;
- powers of the tribunal, including *competence / competence* and interim and conservatory measures;
- place and language of the arbitration;
- governing law, and whether the tribunal may decide *ex aequo et bono* or act as *amiable compositeur*;
- pleadings: statement of case, statement of reply, etc;
- documentary evidence and factual and expert evidence;
- provisions as to hearings, which may include provisions relating to the examination of witnesses;
- provisions as to the award, including correction and interpretation and finality of the award.

81 For example, four Regional International Commercial Arbitration Centres in Cairo, Kuala Lumpur, Lagos and Tehran have been set up under the auspices of the Asian-African Legal Consultative Organisation (AALCO). A fifth Regional Centre is due to open in Nairobi. AALCO has 47 member countries and has UN Observer Status.

However, the rules of different institutions have their particular features. For example:

- The LCIA Rules contain a provision for the expedited constitution of the tribunal in cases of exceptional urgency. The Rules also lay emphasis on the general duty of the tribunal, a reflection of provisions in the English Arbitration Act, and include the warning that arbitrators shall not *“act in the arbitration as advocates for any party”*. The Rules are unusual in that, in the provisions relating to pleadings, there is an express requirement that a Reply be served.
- The International Chamber of Commerce (ICC) Rules provide for Terms of Reference and for the scrutiny of the draft award by the ICC Court.
- The International Rules of the American Arbitration Association’s (AAA) international division, the International Centre for Dispute Resolution, contain a very useful provision for a preparatory conference with the parties *“for the purpose of organizing, scheduling and agreeing to procedures to expedite the subsequent proceedings”*. The Rules also contain a provision excluding the award of punitive damages, as well as a unique provision that permits a party to seek emergency relief through the appointment of an emergency arbitrator (who will be appointed within one day of a request for such relief).
- One of the significant features of the China International Economic and Trade Arbitration Commission (CIETAC) Rules is the emphasis on the *“combination of arbitration with conciliation”*.

The next section will consider in some detail the LCIA Arbitration Rules, thus enabling the other institutional rules to be dealt with more briefly.

2) London Court of International Arbitration

i) Introduction

The LCIA is one of the longest established of the major international commercial arbitral institutions and is a truly international organisation. Although it is based in London, there is no more reason for an LCIA arbitration to be held in that city than there is for an ICC arbitration to be held in Paris.

The LCIA operates under a three-tier structure, comprising the Company, the Arbitration Court and the Secretariat. The formation of the Arbitration Court in 1985 is regarded by the LCIA as a major step towards its internationalisation:

“The LCIA Court is made up of up to thirty-five members, selected to provide and maintain a balance of leading practitioners in commercial arbitration, from the major trading areas of the world. UK membership of the LCIA Court is restricted to 25 per cent. Other members are drawn from as far afield as Hungary and Australia, Nigeria and the United States, Tunisia and China.

“The LCIA Court is the final authority for the proper application of the LCIA Rules. Its principal functions are the appointment of tribunals, the determination of challenges to arbitrators, and the control of costs. The functions of the LCIA Court are performed, in the name of the LCIA Court, by the President, by a Vice President or by a Division

of the LCIA Court of three or five members, of whom one will be the President or a Vice President, or, in the case of administrative functions, by the Registrar.

"It is the LCIA's view that a carefully selected and, therefore, specifically suitable tribunal will issue a reasoned, well-drafted award in which the parties may have confidence, without the need for external scrutiny. There is, therefore, no LCIA Court scrutiny of LCIA awards, so parties receive their award promptly, and subject only to the payment of the costs of the arbitration."

The Secretariat of the LCIA is based at the International Dispute Resolution Centre in Fleet Street, London. The Secretariat, headed by the Registrar, is responsible for the administration of arbitrations referred to the LCIA. It *"aims to assist the parties and their counsel promptly and with the minimum of bureaucracy, as and when required, and to ensure that proceedings are not allowed to flounder for want of proper supervision."*

"The Secretariat also organises all necessary back-up for hearings and meetings, including video and teleconferences, court reporting and simultaneous translation. The Secretariat receives many requests for information each day. Many of these enquiries do not relate to LCIA cases, either projected or pending. The LCIA provides a free information service in the interest of promoting private dispute resolution generally. The aim of the LCIA is first and foremost to provide a service to its users."

The LCIA has established Users' Councils around the world that are aimed at keeping the LCIA *"informed about developments in other jurisdictions and provide local support and advice for the London Secretariat"*. The Users' Councils are

- the European Council, covering Europe and the Middle East;
- the North American Council, covering North America and adjacent countries;
- the Asia-Pacific Council, covering South East Asia and the Pacific Rim;
- the Pan-African Council, covering the whole of Africa; and
- the Latin American Council, covering Central and South America and the Caribbean.

The LCIA says that the nature and value of its arbitration casework is

"very substantial, with major international users entrusting the administration of their arbitrations to the LCIA. Many of the cases are technically and legally complex and sums in issue can run into billions of US dollars. Parties come from a very large number of jurisdictions, of both civil law and common law traditions.

"The subject matter of contracts in dispute is wide and varied, and includes all aspects of international commerce, including, in particular, telecommunications, insurance, oil and gas exploration, construction, shipping, aviation, pharmaceuticals, IT, finance and banking."

Full information concerning the LCIA can be found on its website.⁸²

ii) The LCIA Arbitration Rules

The current LCIA Arbitration Rules came into effect on 1 January 1998. The revision of the Rules was to some extent made in the light of the new English Arbitration Act of 1996.

Request for Arbitration

The commencement of an LCIA arbitration is made by a Request for Arbitration. The Request seeks a considerable amount of detailed information. Article 1 of the Rules provides that a written request is to be sent to the Registrar and is to contain or be accompanied by:

- “(a) the names, addresses, telephone, facsimile, telex and e-mail numbers (if known) of the parties to the arbitration and of their legal representatives;*
- (b) a copy of the written arbitration clause or separate written arbitration agreement invoked by the Claimant (‘the Arbitration Agreement’), together with a copy of the contractual documentation in which the arbitration clause is contained or in respect of which the arbitration arises;*
- (c) a brief statement describing the nature and circumstances of the dispute, and specifying the claims advanced by the Claimant against another party to the arbitration (‘the Respondent’);*
- (d) a statement of any matters (such as the seat or language(s) of the arbitration, or the number of arbitrators, or their qualifications or identities) on which the parties have already agreed in writing for the arbitration or in respect of which the Claimant wishes to make a proposal;*
- (e) if the Arbitration Agreement calls for party nomination of arbitrators, the name, address, telephone, facsimile, telex and e-mail numbers (if known) of the Claimant’s nominee;*
- (f) the fee prescribed in the Schedule of Costs (without which the Request shall be treated as not having been received by the Registrar and the arbitration as not having been commenced);*
- (g) confirmation to the Registrar that copies of the Request (including all accompanying documents) have been or are being served simultaneously on all other parties to the arbitration by one or more means of service to be identified in such confirmation.”*

The date on which the Registrar receives the Request is treated as the commencement date of the arbitration. However, this is subject to the Article 1.1 (f) provision that the Request shall be treated as not having been received, and the arbitration as not having been commenced, if the prescribed registration fee has not been paid.

Response

Article 2 provides for service of a Response by the Respondent that is to contain or be accompanied by:

- “(a) confirmation or denial of all or part of the claims advanced by the Claimant in the Request;*

- (b) a brief statement describing the nature and circumstances of any counterclaims advanced by the Respondent against the Claimant;*
- (c) comment in response to any statements contained in the Request, as called for under Article 1.1(d), on matters relating to the conduct of the arbitration;*
- (d) if the Arbitration Agreement calls for party nomination of arbitrators, the name, address, telephone, facsimile, telex and e-mail numbers (if known) of the Respondent's nominee; and*
- (e) confirmation to the Registrar that copies of the Response (including all accompanying documents) have been or are being served simultaneously on all other parties to the arbitration by one or more means of service to be identified in such confirmation."*

Failure by the Respondent to send a Response *"shall not preclude the Respondent from denying any claim or from advancing a counterclaim in the arbitration. However, if the Arbitration Agreement calls for party nomination of arbitrators, failure to send a Response or to nominate an arbitrator within time or at all shall constitute an irrevocable waiver of that party's opportunity to nominate an arbitrator."*

LCIA Court and Registrar

Article 3 deals with the functions of the LCIA Court and the Registrar.

Notices and periods of time

Provisions as to notices and periods of time are contained in Article 4. The Arbitral Tribunal may extend time (even where the period has expired) or abridge any period of time, both under the Rules and under the Arbitration Agreement (Article 4.7).

Formation of the Arbitral Tribunal

Article 5 sets out the provisions relating to the formation of the Arbitral Tribunal, which Article 5.1 defines as including *"a sole arbitrator or all the arbitrators where more than one"*. Article 5.2 deals with impartiality and independence. All arbitrators conducting an arbitration under the LCIA rules *"shall be and remain at all times impartial and independent of the parties; and none shall act in the arbitration as advocates for any party. No arbitrator, whether before or after appointment, shall advise any party on the merits or outcome of the dispute."*

In that respect, Article 5.3 states that before appointment by the LCIA Court *"each arbitrator shall furnish to the Registrar a written résumé of his past and present professional positions; he shall agree in writing upon fee rates conforming to the Schedule of Costs; and he shall sign a declaration to the effect that there are no circumstances known to him likely to give rise to any justified doubts as to his impartiality or independence, other than any circumstances disclosed by him in the declaration. Each arbitrator shall thereby also assume a continuing duty forthwith to disclose any such circumstances to the LCIA Court, to any other members of the Arbitral Tribunal and to all the parties if such circumstances should arise after the date of such declaration and before the arbitration is concluded."*

Article 5.4 deals with the timescale within which the LCIA Court is to appoint the Arbitral Tribunal, which is as soon as practicable after the receipt by the Registrar of the Response, or 30 days after the service of the Request if no response is received.

Only the LCIA Court is empowered to appoint arbitrators. The Court *“will appoint arbitrators with due regard for any particular method or criteria of selection agreed in writing by the parties. In selecting arbitrators consideration will be given to the nature of the transaction, the nature and circumstances of the dispute, the nationality, location and languages of the parties and (if more than two) the number of parties”* (Article 5.5).

In the case of a three-member Tribunal, the chairman – who will not be a party-nominated arbitrator – will be appointed by the LCIA Court (Article 5.6). This provision is sometimes misunderstood as meaning that the parties may not jointly select the Chairman, or that the party nominees may not do so. That is not the case. The provision is intended to say that, where there is party nomination, neither of the party-nominated arbitrators may preside. In all cases, all arbitrators must be *appointed* by the LCIA Court, irrespective of who nominates them.

Tribunal and the nationality of arbitrators

Article 6 contains detailed provisions dealing with the nationality of arbitrators. Where parties are of different nationalities *“a sole arbitrator or chairman of the Arbitral Tribunal shall not have the same nationality as any party unless the parties who are not of the same nationality as the proposed appointee all agree in writing otherwise”*. The nationality of parties includes that of controlling shareholders or interests. A person who is a citizen of two or more States *“shall be treated as a national of each State; and citizens of the European Union shall be treated as nationals of its different Member States and shall not be treated as having the same nationality”*.

Tribunal – party and other nominations

Article 7 demonstrates the strict control that the LCIA maintains over the appointment of arbitrators. Article 7.1 states that

“If the parties have agreed that any arbitrator is to be appointed by one or more of them or by any third person, that agreement shall be treated as an agreement to nominate an arbitrator for all purposes. Such nominee may only be appointed by the LCIA Court as arbitrator subject to his prior compliance with Article 5.3. The LCIA Court may refuse to appoint any such nominee if it determines that he is not suitable or independent or impartial.”

Article 7.2 contains default provisions in relation to the nomination and appointment of arbitrators:

“Where the parties have howsoever agreed that the Respondent or any third person is to nominate an arbitrator and such nomination is not made within time or at all, the LCIA Court may appoint an arbitrator notwithstanding the absence of the nomination and without regard to any late nomination. Likewise, if the Request for Arbitration does not contain a nomination by the Claimant where the parties have howsoever agreed that the Claimant or a third person is to nominate an arbitrator, the LCIA Court

may appoint an arbitrator notwithstanding the absence of the nomination and without regard to any late nomination.”

Tribunal – three or more parties

Article 8 contains default provisions for the appointment of the Tribunal in an arbitration where there are three or more parties:

“Where the Arbitration Agreement entitles each party howsoever to nominate an arbitrator, the parties to the dispute number more than two and such parties have not all agreed in writing that the disputant parties represent two separate sides for the formation of the Arbitral Tribunal as Claimant and Respondent respectively, the LCIA Court shall appoint the Arbitral Tribunal without regard to any party’s nomination.”

In those circumstances, the Arbitration Agreement is to be treated as a written agreement by the parties for the appointment of the Tribunal by the LCIA Court.

Expedited formation of Tribunal

Article 9 makes provision for the expedited formation of an Arbitral Tribunal. Article 9.1 states that in cases of exceptional urgency, on or after the commencement of the arbitration *“any party may apply to the LCIA Court for the expedited formation of the Arbitral Tribunal, including the appointment of any replacement arbitrator under Articles 10 and 11 of these Rules”*.

The application is to be made in writing to the LCIA Court (copied to all the parties) and is to set out the grounds relied on for the exceptional urgency in the formation of the Tribunal. The Court has a discretion whether to abridge or curtail any time limit under the Rules for formation of the Tribunal, including *“service of the Response and of any matters or documents adjudged to be missing from the Request. The LCIA Court shall not be entitled to abridge or curtail any other time-limit.”*

Revocation of arbitrator’s appointment

Provisions relating to the revocation, challenge and replacement of arbitrators are contained in Articles 10 and 11. Article 10.1 states that

“If either (a) any arbitrator gives written notice of his desire to resign as arbitrator to the LCIA Court, to be copied to the parties and the other arbitrators (if any) or (b) any arbitrator dies, falls seriously ill, refuses, or becomes unable or unfit to act, either upon challenge by a party or at the request of the remaining arbitrators, the LCIA Court may revoke that arbitrator’s appointment and appoint another arbitrator. The LCIA Court shall decide upon the amount of fees and expenses to be paid for the former arbitrator’s services (if any) as it may consider appropriate in all the circumstances.”

Article 10.2 provides that

“If any arbitrator acts in deliberate violation of the Arbitration Agreement (including these Rules) or does not act fairly and impartially as between the parties or does not conduct or participate in the arbitration proceedings with reasonable diligence,

avoiding unnecessary delay or expense, that arbitrator may be considered unfit in the opinion of the LCIA Court.”

An arbitrator may also be challenged “by any party if circumstances exist that give rise to justifiable doubts as to his impartiality or independence. A party may challenge an arbitrator it has nominated, or in whose appointment it has participated, only for reasons of which it becomes aware after the appointment has been made” (Article 10.3).

Article 10.4 states that a party who intends to challenge an arbitrator “shall, within 15 days of the formation of the Arbitral Tribunal or (if later) after becoming aware of any circumstances referred to in Article 10.1, 10.2 or 10.3, send a written statement of the reasons for its challenge to the LCIA Court, the Arbitral Tribunal and all other parties. Unless the challenged arbitrator withdraws or all other parties agree to the challenge within 15 days of receipt of the written statement, the LCIA Court shall decide on the challenge.”

Nomination and replacement of arbitrators

The nomination and replacement provisions are contained in Article 11: “In the event that the LCIA Court determines that any nominee is not suitable or independent or impartial or if an appointed arbitrator is to be replaced for any reason, the LCIA Court shall have a complete discretion to decide whether or not to follow the original nominating process”. If the Court does so decide, “any opportunity given to a party to make a re-nomination shall be waived if not exercised within 15 days (or such lesser time as the LCIA Court may fix), after which the LCIA Court shall appoint the replacement arbitrator”.

Majority power to continue proceedings

Provisions to deal with the situation where an arbitrator on a three-member Tribunal persistently fails to participate in the process are set out in Article 12:

“If any arbitrator on a three-member Arbitral Tribunal refuses or persistently fails to participate in its deliberations, the two other arbitrators shall have the power, upon their written notice of such refusal or failure to the LCIA Court, the parties and the third arbitrator, to continue the arbitration (including the making of any decision, ruling or award), notwithstanding the absence of the third arbitrator.”

In deciding whether to continue with the arbitration, the other two arbitrators are to take into account “the stage of the arbitration, any explanation made by the third arbitrator for his non-participation and such other matters as they consider appropriate in the circumstances of the case. The reasons for such determination shall be stated in any award, order or other decision made by the two arbitrators without the participation of the third arbitrator.”

Where those two arbitrators decide not to continue without the participation of the third arbitrator “the two arbitrators shall notify in writing the parties and the LCIA Court of such determination; and in that event, the two arbitrators or any party may refer the matter to the LCIA Court for the revocation of that third arbitrator’s appointment and his replacement under Article 10.”

Communications between parties and the Arbitral Tribunal

Provisions dealing with communications between the parties and the Tribunal are set out in Article 13. Until the Tribunal is formed, all communications are through the Registrar. Communications continue through the Registrar after formation, unless the Tribunal decides otherwise.

Conduct of the proceedings

The Rules now move to the conduct of the arbitral proceedings. Article 14.1 states that the parties may agree on the conduct of their arbitral proceedings and are encouraged to do so

“consistent with the Arbitral Tribunal’s general duties at all times:

- (i) to act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent; and*
- (ii) to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay or expense, so as to provide a fair and efficient means for the final resolution of the parties’ dispute.”*

That reference to the Tribunal’s general duties mirrors the provisions of Article 33 of the English Arbitration Act.

Any agreement made by the parties is to be recorded in writing. Unless the parties agree otherwise, Article 14.2 provides that the Tribunal *“shall have the widest discretion to discharge its duties allowed under such law(s) or rules of law as the Arbitral Tribunal may determine to be applicable; and at all times the parties shall do everything necessary for the fair, efficient and expeditious conduct of the arbitration”*.

Where there is a three-member Tribunal, the Chairman, with the consent of the other two arbitrators, may make procedural rulings alone.

Submission of written statements and documents

Save to the extent that the parties have agreed otherwise under Article 14.1 (or the Tribunal determines differently), the provisions for the written stage of the arbitral process are set out in Article 15. Article 15.2 provides that:

“Within 30 days of receipt of written notification from the Registrar of the formation of the Arbitral Tribunal, the Claimant shall send to the Registrar a Statement of Case setting out in sufficient detail the facts and any contentions of law on which it relies, together with the relief claimed against all other parties, save and insofar as such matters have not been set out in its Request.”

Within 30 days of the receipt of that Statement of Case (or a written notice from the Claimant that it elects to treat the Request as its Statement of Case) Article 15.3 requires the Respondent to *“send to the Registrar a Statement of Defence setting out in sufficient detail which of the facts and contentions of law in the Statement of Case or Request (as the case may be) it admits or denies, on what grounds and on what other facts and contentions of law it relies. Any counterclaims shall be submitted with the Statement of Defence in the same manner as claims are to be set out in the Statement of Case.”*

The LCIA Rules are unusual in that they expressly require the service of a Statement of Reply. Article 15.4 states that within 30 days of the receipt of the Statement of Defence *“the Claimant shall send to the Registrar a Statement of Reply which, where there are any counterclaims, shall include a Defence to Counterclaim in the same manner as a defence is to be set out in the Statement of Defence.”* Where the Statement of Reply contains a Defence to Counterclaim, the Respondent is to serve a Statement of Reply to Counterclaim within 30 days (Article 15.5).

The pleadings are to be accompanied by copies of documents or lists: *“All Statements referred to in this Article shall be accompanied by copies (or, if they are especially voluminous, lists) of all essential documents on which the party concerned relies and which have not previously been submitted by any party, and (where appropriate) by any relevant samples and exhibits.”* Following the receipt of the pleadings, the Tribunal is to proceed with the arbitration *“in such manner as has been agreed in writing by the parties or pursuant to its authority under these Rules”*.

Default provisions are contained in Article 15.8: *“If the Respondent fails to submit a Statement of Defence or the Claimant a Statement of Defence to Counterclaim, or if at any point any party fails to avail itself of the opportunity to present its case in the manner determined by Article 15.2 to 15.6 or directed by the Arbitral Tribunal, the Arbitral Tribunal may nevertheless proceed with the arbitration and make an award.”*

Seat of arbitration, place of hearings and law applicable to the arbitration

The provisions relating to the seat of the arbitration and the place of the hearings are contained in Article 16. Article 16.1 provides that the parties may agree in writing *“the seat (or legal place) of their arbitration. Failing such a choice, the seat of arbitration shall be London, unless and until the LCIA Court determines in view of all the circumstances, and after having given the parties an opportunity to make written comment, that another seat is more appropriate.”*

While the seat of the arbitration is fixed, hearings, meetings and deliberations may be held *“at any convenient geographical place in its discretion; and if elsewhere than the seat of the arbitration, the arbitration shall be treated as an arbitration conducted at the seat of the arbitration and any award as an award made at the seat of the arbitration for all purposes”*.

The law applicable to the arbitration (if any) *“shall be the arbitration law of the seat of arbitration, unless and to the extent that the parties have expressly agreed in writing on the application of another arbitration law and such agreement is not prohibited by the law of the arbitral seat”*.

The law applicable to the conduct of the arbitral proceedings is to be distinguished from the law governing the contract, which is dealt with in Article 22.3 of the LCIA Rules.

Language of arbitration

Article 17 deals with the language of the arbitration. Article 17.1 states that the initial language of the arbitration *“shall be the language of the Arbitration Agreement, unless*

the parties have agreed in writing otherwise and providing always that a non-participating or defaulting party shall have no cause for complaint if communications to and from the Registrar and the arbitration proceedings are conducted in English”.

Where the Arbitration Agreement is written in more than one language *“the LCIA Court may, unless the Arbitration Agreement provides that the arbitration proceedings shall be conducted in more than one language, decide which of those languages shall be the initial language of the arbitration”.*

Once the Tribunal has been formed (and unless the parties have agreed otherwise) *“the Arbitration Tribunal shall decide upon the language(s) of the arbitration, after giving the parties an opportunity to make written comment and taking into account the initial language of the arbitration and any other matter it may consider appropriate in all the circumstances of the case”.*

As to documents: *“If any document is expressed in a language other than the language(s) of the arbitration and no translation of such document is submitted by the party relying upon the document, the Arbitral Tribunal or (if the Arbitral Tribunal has not been formed) the LCIA Court may order that party to submit a translation in a form to be determined by the Arbitral Tribunal or the LCIA Court, as the case may be.”*

Party representation

The parties may be represented by legal practitioners or other representatives (Article 18). The Tribunal *“may require from any party proof of authority granted to its representative(s) in such form as the Arbitral Tribunal may determine”.*

Hearings

Unless the parties have agreed in writing on a documents-only arbitration, *“Any party which expresses a desire to that effect has the right to be heard orally before the Arbitral Tribunal on the merits of the dispute.”* The Tribunal is to fix the date, time and place of any meetings and hearings in the arbitration, giving reasonable notice to the parties.

In advance of any hearing, the Tribunal may *“submit to the parties a list of questions which it wishes them to answer with special attention”.*

Unless the parties agree otherwise, or unless the Tribunal directs otherwise, meetings and hearings are to be in private. The Tribunal has authority to establish time limits for such meetings and hearings (Article 19).

Witnesses and experts

Article 20 and 21 deal with witnesses and with experts to the Tribunal.

Article 20 states that: *“Before any hearing, the Arbitral Tribunal may require any party to give notice of the identity of each witness that party wishes to call (including rebuttal witnesses), as well as the subject matter of that witness’s testimony, its content and its relevance to the issues in the arbitration.”* The Tribunal may determine *“the time, manner*

and form in which such materials should be exchanged between the parties and presented to the Arbitral Tribunal; and it has a discretion to allow, refuse, or limit the appearance of witnesses (whether witness of fact or expert witness)".

Unless the Tribunal orders otherwise, the testimony of a witness may be in written form, either as a signed statement or as a sworn affidavit. However, any party may request that a witness attend the hearing for oral questioning. If the witness fails to attend without good cause *"the Arbitral Tribunal may place such weight on the written testimony (or exclude the same altogether) as it considers appropriate in the circumstances of the case"*. A witness giving oral evidence may be questioned by the parties – but under the control of the Tribunal – and the Tribunal itself may put questions. Article 20.6 states that, subject to the mandatory provisions of any applicable law *"it shall not be improper for any party or its legal representatives to interview any witness or potential witness for the purpose of presenting his testimony in written form or producing him as an oral witness"*.

Article 20.7 provides that any individual intending to testify to the Tribunal, either on any issue of fact or of expertise *"shall be treated as a witness under these Rules notwithstanding that the individual is a party to the arbitration or was or is an officer, employee or shareholder of any party"*.

Article 21.1 states that, unless otherwise agreed by the parties in writing, the Tribunal

- "(a) may appoint one or more experts to report to the Arbitral Tribunal on specific issues, who shall be and remain impartial and independent of the parties throughout the arbitration proceedings; and*
- (b) may require a party to give any such expert any relevant information or to provide access to any relevant documents, goods, samples, property or site for inspection by the expert"*.

The Tribunal-appointed experts may be required to attend the hearing: *"Unless otherwise agreed by the parties in writing, if a party so requests or if the Arbitral Tribunal considers it necessary, the expert shall, after delivery of his written or oral report to the Arbitral Tribunal and the parties, participate in one or more hearings at which the parties shall have the opportunity to question the expert on his report and to present expert witnesses in order to testify on the points at issue"* (Article 21.2).

Under Article 24 the fees and expenses of any such expert are to be paid out of the deposits payable by the parties and form part of the costs of the arbitration.

Additional powers of the Arbitral Tribunal

Article 22 contains a series of important provisions relating to the additional powers of the Tribunal – including production of documents, rectification, joinder of parties and governing law. Article 22.1 sets out a list of procedural powers. Unless the parties have agreed otherwise in writing:

"the Arbitral Tribunal shall have the power, on the application of any party or of its own motion, but in either case only after giving the parties a reasonable opportunity to state their views:

- (a) *to allow any party, upon such terms (as to costs and otherwise) as it shall determine, to amend any claim, counterclaim, defence and reply*
- (b) *to extend or abbreviate any time-limit provided by the Arbitration Agreement or these Rules for the conduct of the arbitration or by the Arbitral Tribunal's own orders;*
- (c) *to conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient, including whether and to what extent the Arbitral Tribunal should itself take the initiative in identifying the issues and ascertaining the relevant facts and the law(s) or rules of law applicable to the arbitration, the merits of the parties' dispute and the Arbitration Agreement;*
- (d) *to order any party to make any property, site or thing under its control and relating to the subject matter of the arbitration available for inspection by the Arbitral Tribunal, any other party, its expert or any expert to the Arbitral Tribunal;*
- (e) *to order any party to produce to the Arbitral Tribunal, and to the other parties for inspection, and to supply copies of, any documents or classes of documents in their possession, custody or power which the Arbitral Tribunal determines to be relevant;*
- (f) *to decide whether or not to apply any strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material tendered by a party on any matter of fact or expert opinion; and to determine the time, manner and form in which such material should be exchanged between the parties and presented to the Arbitral Tribunal;*
- (g) *to order the correction of any contract between the parties or the Arbitration Agreement, but only to the extent required to rectify any mistake which the Arbitral Tribunal determines to be common to the parties and then only if and to the extent to which the law(s) or rules of law applicable to the contract or Arbitration Agreement permit such correction; and*
- (h) *to allow, only upon the application of a party, one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented thereto in writing, and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration...."*

The joinder power contained in Article 22.1 (h) is a significant power – and may well be without parallel in any other major set of Arbitration Rules. The provision permits a willing third party (or parties), which is a party neither to the arbitration agreement nor to the contract in dispute, to be joined to the arbitration on the application of *one* of the parties to the arbitration. This is so notwithstanding the objection of another party to the arbitration, although all parties will have their say on the joinder application.

By agreeing to LCIA arbitration *"the parties shall be treated as having agreed not to apply to any state court or other judicial authority for any order available from the Arbitral Tribunal under Article 22.1, except with the agreement in writing of all parties"*.

Article 22.3 deals with the vitally important matter of governing law and rules of law:

"The Arbitral Tribunal shall decide the parties' dispute in accordance with the law(s) or rules of law chosen by the parties as applicable to the merits of their dispute. If and to the extent that the Arbitral Tribunal determines that the parties have made no such

choice, the Arbitral Tribunal shall apply the law(s) or rules of law which it considers appropriate."

Article 22.4 states that the Tribunal shall only apply to the merits of the dispute principles deriving from "*ex aequo et bono*", "*amiable composition*" or "*honourable engagement*" where the parties have so agreed expressly in writing. The LCIA is happy to use the Latin and French terms avoided in Section 46 of the English Arbitration Act.

Jurisdiction of the Arbitral Tribunal

The jurisdiction of a Tribunal is a matter of considerable significance in international commercial arbitration. The question of *competence / competence* is dealt with in Article 23. The Tribunal:

"shall have the power to rule on its own jurisdiction, including any objection to the initial or continuing existence, validity or effectiveness of the Arbitration Agreement. For that purpose, an arbitration clause which forms or was intended to form part of another agreement shall be treated as an arbitration agreement independent of that other agreement. A decision by the Arbitral Tribunal that such other agreement is non-existent, invalid or ineffective shall not entail ipso jure the non-existence, invalidity or ineffectiveness of the arbitration clause."

Article 23.2 states that:

"A plea by a Respondent that the Arbitral Tribunal does not have jurisdiction shall be treated as having been irrevocably waived unless it is raised not later than the Statement of Defence; and a like plea by a Respondent to Counterclaim shall be similarly treated unless it is raised no later than the Statement of Defence to Counterclaim. A plea that the Arbitral Tribunal is exceeding the scope of its authority shall be raised promptly after the Arbitral Tribunal has indicated its intention to decide on the matter alleged by any party to be beyond the scope of its authority, failing which such plea shall also be treated as having been waived irrevocably. In any case, the Arbitral Tribunal may nevertheless admit an untimely plea if it considers the delay justified in the particular circumstances."

The Tribunal may determine the matter of its jurisdiction or authority either in an interim award or in the award on the merits (Article 23.3). Article 23.4 states that by agreeing to LCIA arbitration "*the parties shall be treated as having agreed not to apply to any state court or other judicial authority for any relief regarding the Arbitral Tribunal's jurisdiction or authority, except with the agreement in writing of all parties to the arbitration or the prior authorisation of the Arbitral Tribunal or following the latter's award ruling on the objection to its jurisdiction or authority*".

Deposits

Article 24 deals with deposits. The LCIA Court may direct the parties to make interim or final payments on account costs. In the event that a party fails or refuses to provide a deposit, the Court "*may direct the other party or parties to effect a substitute payment to allow the arbitration to proceed (subject to any award on costs). In such circumstances, the party paying the substitute payment shall be entitled to recover that amount as a debt*

immediately due from the defaulting party.” Failure by a claimant or counterclaiming party to provide a deposit “*may be treated by the LCIA Court and the Arbitral Tribunal as a withdrawal of the claim or counterclaim respectively*”.

Interim and conservatory measures

Article 25 contains provisions relating to interim and conservatory measures. Article 25.1 states that, unless the parties have agreed otherwise in writing, the Tribunal has the power on the application of any party

- “(a) to order any respondent party to a claim or counterclaim to provide security for all or part of the amount in dispute, by way of deposit or bank guarantee or in any other manner and upon such terms as the Arbitral Tribunal considers appropriate. Such terms may include the provision by the claiming or counterclaiming party of a cross-indemnity, itself secured in such manner as the Arbitral Tribunal considers appropriate, for any costs or losses incurred by such respondent in providing security. The amount of any costs and losses payable under such cross-indemnity may be determined by the Arbitral Tribunal in one or more awards;*
- (b) to order the preservation, storage, sale or other disposal of any property or thing under the control of any party and relating to the subject matter of the arbitration; and*
- (c) to order on a provisional basis, subject to final determination in an award, any relief which the Arbitral Tribunal would have power to grant in an award, including a provisional order for the payment of money or the disposition of property as between any parties.”*

Article 25.2 gives power to the Tribunal to order the provision of security for its legal or other costs.

Article 25.3 deals with the right of parties to apply to state courts for interim or conservatory measures prior to the formation of the Tribunal, and, in exceptional circumstances, even after the formation of a Tribunal: “*Any application and any order for such measures after the formation of the Arbitral Tribunal shall be promptly communicated by the applicant to the Arbitral Tribunal and all other parties. However, by agreeing to arbitration under these Rules, the parties shall be taken to have agreed not to apply to any state court or other judicial authority for any order for security for its legal or other costs available from the Arbitral Tribunal....*”

Awards – separate awards, consent awards and finality of awards

Articles 26 and 27 deal with awards. The award is to be in writing and, unless the parties have agreed otherwise, is to state the reasons on which is based. The award is to state the date it was made and the seat of the arbitration. It is to be signed by the Tribunal.

Article 26.2 states that if any arbitrator “*fails to comply with the mandatory provisions of any applicable law relating to the making of the award, having been given a reasonable opportunity to do so, the remaining arbitrators may proceed in his absence and state in their award the circumstances of the other arbitrator’s failure to participate in the making of the award*”.

Decision is by a majority. Failing a majority decision on any issue, the chairman decides that issue. If any arbitrator refuses or fails to sign the award, *“the signatures of the majority or (failing a majority) of the chairman shall be sufficient, provided that the reason for the omitted signature is stated in the award by the majority or chairman”*.

The sole arbitrator or chairman delivers the award to the LCIA Court, which transmits certified copies to the parties (provided that the costs have been paid). The award may be expressed in any currency and simple compound interest may be awarded *“at such rates as the Arbitral Tribunal determines to be appropriate, without being bound by legal rates of interest imposed by any state court, in respect of any period which the Arbitral Tribunal determines to be appropriate ending not later than the date upon which the award is complied with”*.

The Tribunal has power to make separate awards on different issues at different times.

Article 26.8 makes provision for a Consent Award in the event of a settlement of the dispute during the arbitral process:

“In the event of a settlement of the parties’ dispute, the Arbitral Tribunal may render an award recording the settlement if the parties so request in writing (a ‘Consent Award’), provided always that such award contains an express statement that it is an award made by the parties’ consent. A Consent Award need not contain reasons. If the parties do not require a Consent Award, then on written confirmation by the parties to the LCIA Court that a settlement has been reached, the Arbitral Tribunal shall be discharged and the arbitration proceedings concluded, subject to payment by the parties of any outstanding costs of the arbitration under Article 28.”

Article 26.9 contains the important provisions on finality of the arbitral award. All awards shall be final and binding on the parties: *“By agreeing to arbitration under these Rules, the parties undertake to carry out any award immediately and without any delay (subject only to Article 27); and the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other judicial authority, insofar as such waiver may be validly made.”*

Correction of awards and additional awards

The above reference to Article 27 is to the provisions relating to correction of awards and to additional awards. On the request of a party, or on its own initiative, the Tribunal has the power *“to correct in the award any errors in computation, clerical or typographical errors or any errors of a similar nature. If the Arbitral Tribunal considers the request to be justified, it shall make the corrections within 30 days of receipt of the request. Any correction shall take the form of separate memorandum dated and signed by the Arbitral Tribunal or (if three arbitrators) those of its members assenting to it; and such memorandum shall become part of the award for all purposes.”*

The Tribunal also has power on the written application of a party *“to make an additional award as to claims or counterclaims presented in the arbitration but not determined in any award. If the Arbitral Tribunal considers the request to be justified, it shall make the*

additional award within 60 days of receipt of the request. The provisions of Article 26 shall apply to any additional award."

Arbitration and legal costs

Article 28 contains detailed provisions dealing with arbitration and legal costs. The allocation of costs in the award is dealt with in Article 28.2:

"The Arbitral Tribunal shall specify in the award the total amount of the costs of the arbitration as determined by the LCIA Court. Unless the parties agree otherwise in writing, the Arbitral Tribunal shall determine the proportions in which the parties shall bear all or part of such arbitration costs. If the Arbitral Tribunal has determined that all or any part of the arbitration costs shall be borne by a party other than a party which has already paid them to the LCIA, the latter party shall have the right to recover the appropriate amount from the former party."

The parties' legal and other costs may be determined by the Tribunal: *"The Arbitral Tribunal shall also have the power to order in its award that all or part of the legal or other costs incurred by a party be paid by another party, unless the parties agree otherwise in writing. The Arbitral Tribunal shall determine and fix the amount of each item comprising such costs on such reasonable basis as it thinks fit"* (Article 28.3).

The 'costs follow the event' principle is reflected in Article 28.4: *"Unless the parties otherwise agree in writing, the Arbitral Tribunal shall make its orders on both arbitration and legal costs on the general principle that costs should reflect the parties' relative success and failure in the award or arbitration, except where it appears to the Arbitral Tribunal that in the particular circumstances this general approach is inappropriate. Any order for costs shall be made with reasons in the award containing such order."*

Article 28.5 makes provision for costs where the arbitration is abandoned, suspended or concluded before a final award is made.

Decisions by the LCIA Court

Article 29 deals with decisions by the LCIA Court. Such decisions are conclusive and binding on the parties and the Tribunal, and are to be treated as *"administrative in nature and the LCIA Court shall not be required to give any reasons"*. Further, to the extent permitted by the law of the seat of the arbitration *"the parties shall be taken to have waived any right of appeal or review in respect of any such decisions of the LCIA Court to any state court or other judicial authority. If such appeals or review remain possible due to mandatory provisions of any applicable law, the LCIA Court shall, subject to the provisions of that applicable law, decide whether the arbitral proceedings are to continue, notwithstanding an appeal or review."*

However, although under the Rules the LCIA is not required to give reasons for its decisions, its publicly stated policy is nevertheless to give reasons where it is required to decide on a challenge to an arbitrator. That is because the LCIA believes that it is important that the parties and the challenged arbitrator understand why the decision has been made.

Confidentiality

Article 30 states that the arbitral proceedings are confidential:

"Unless the parties expressly agree in writing to the contrary, the parties undertake as a general principle to keep confidential all awards in their arbitration, together with all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain – save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right or to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority" (Article 30.1).

Similarly, the deliberations of the Tribunal are confidential to its members *"save and to the extent that disclosure of an arbitrator's refusal to participate in the arbitration is required of the other members of the Arbitral Tribunal under Articles 10, 12 and 26"*.

Article 30.3 states that the LCIA Court does not publish any award or part of an award without the prior written consent of the parties and the Tribunal.

The English Arbitration Act (see Chapter 16) does not contain provisions dealing with confidentiality. The Report of the Departmental Advisory Committee (DAC) of December 1996 stated that a small number of key areas had not been included in the draft Arbitration Bill: *"one such example concerns privacy and confidentiality in arbitration... Privacy and confidentiality have long been assumed as general principles in English commercial arbitration, subject to important exceptions. It is only recently that the English courts have been required to examine both the legal basis of such principles and the breadth of certain of these exceptions, without seriously questioning the existence of the general principles themselves."*

The Report considered various decisions of the English and Australian courts and noted that the decision of the High Court of Australia in *Esso/BHP v Plowman* had *"troubled users of commercial arbitration far outside Australia. The first response has been for arbitral institutions to amend their arbitration rules to provide expressly for confidentiality and privacy. The new WIPO Rules have sought to achieve this and we understand that both the ICC and the LCIA are currently amending their respective rules to similar effect."*

The DAC concluded that no attempt should be made to codify English law on the privacy and confidentiality of English arbitration in the Bill, but stated that *"none doubt at English law the existence of the general principles of confidentiality and privacy... Where desirable, institutional rules can stipulate for these general principles, even where the arbitration agreement is not governed by English law."*

Exclusion of liability

Provisions dealing with the exclusion of liability in relation to the LCIA, the LCIA Court, the Registrar, arbitrators and tribunal experts are set out in Article 31.1, save to the extent that *"the act or omission is shown by that party to constitute conscious and deliberate wrongdoing committed by the body or person alleged to be liable to that party"*.

Article 31.2 states that after the award has been made *“and the possibilities of correction and additional awards referred to in Article 27 have lapsed or been exhausted, neither the LCIA, the LCIA Court (including its President, Vice Presidents and individual members), the Registrar, any deputy Registrar, any arbitrator or expert to the Arbitral Tribunal shall be under any legal obligation to make any statement to any person about any matter concerning the arbitration, nor shall any party seek to make any of these persons a witness in any legal or other proceedings arising out of the arbitration”*.

General rules

The final Article deals with waiver and matters not specifically provided for in the Rules. Article 32.1 states that: *“A party who knows that any provision of the Arbitration Agreement (including these Rules) has not been complied with and yet proceeds with the arbitration without promptly stating its objection to such non-compliance, shall be treated as having irrevocably waived its right to object.”*

Article 32.2 states that: *“In all matters not expressly provided for in these Rules, the LCIA Court, the Arbitral Tribunal and the parties shall act in the spirit of these Rules and shall make every reasonable effort to ensure that an award is legally enforceable.”*

iii) Other LCIA dispute resolution processes

Like many of the other major international commercial arbitral institutions, the LCIA will not only administer arbitrations under its own Rules. For example, the LCIA will administer ad hoc arbitrations subject to the UNCITRAL Arbitration Rules (considered later in this chapter).

The LCIA also provides other dispute resolution procedures such as mediation. Alternative dispute resolution (ADR) is considered in the next chapter.

3) The International Chamber of Commerce

i) Introduction

The International Chamber of Commerce (ICC) is arguably the most well known of the international arbitral institutions. The ICC's International Court of Arbitration was established in 1923 and, according to its website, *“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 well over 13,000 international arbitration cases involving parties and arbitrators from more than 100 countries and territories. Demand for its services grows in line with the expansion of international trade and the rapid globalization of the world economy.”*

The dispute resolution mechanisms developed by the 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."

The full background to the ICC and to the International Court of Arbitration can be found on the ICC's website.⁸³

ii) The ICC Arbitration Rules

Introductory provisions

The first section of the Rules deals with Introductory Provisions. Article 1, dealing with the ICC Court, states that the Court itself does not settle disputes but ensures the application of the Rules. Article 2 contains definitions and Article 3 deals with written notifications or communications and time limits.

Commencement of the arbitration

Articles 4, 5 and 6 are concerned with the commencement of the arbitration. Article 4 deals with the Request for Arbitration and Article 5 with the Answer to the Request and Counterclaims. The Claimant is to file a Reply to any Counterclaim within a certain time limit. Article 6 deals with the effect of the arbitration agreement: For example, if a plea is raised concerning the existence, validity or scope of the arbitration agreement, the ICC Court may decide that the arbitration shall proceed if it is satisfied *prima facie* that an arbitration agreement under the Rules may exist. The decision as to the jurisdiction of the Tribunal is then to be taken by the Tribunal itself.

The arbitral tribunal

Articles 7 to 12 deal with the arbitral tribunal. Article 7 contains general provisions – for example, the requirement regarding the independence of arbitrators. The number of arbitrators is dealt with in Article 8: either a sole arbitrator or three arbitrators. Article 9 deals with the appointment and confirmation of arbitrators. Provisions dealing with the appointment of arbitrators where there are multiple parties are set out in Article 10. The challenge to arbitrators and replacement of arbitrators are dealt with in Articles 11 and 12.

The arbitral proceedings – including the Terms of Reference

The arbitral proceedings provisions are contained in Articles 13 to 23. These include transmission of the file by the Secretariat to the Tribunal (Article 13); the place of arbitration – fixed by the Court, unless agreed on by the parties (Article 14); and Rules governing the proceedings (Article 15). The ICC Rules govern, and the Tribunal is to "*act fairly and impartially and ensure that each party has a reasonable opportunity to present its case*".

Unless the parties have agreed on the language of the arbitration, the matter is to be determined by the Tribunal (Article 16).

Article 17 deals with the applicable rules of law. If not decided by the parties, the Tribunal applies the rules of law “*which it determines to be appropriate*”. In all cases the Tribunal is to take account of the provisions of the contract and the relevant trade usages. Only if the parties have agreed may the Tribunal assume the powers of *amiable compositeur* or decide *ex aequo et bono*.

The Terms of Reference and the procedural timetable are dealt with in Article 18. The Tribunal is to draw up, in the presence of the parties and on the basis of the documents and submissions, a document that sets out various particulars. These include a summary of the parties’ claims and the relief sought; an indication (if possible) of the amount claimed or counterclaimed; a list of issues to be determined (unless the Tribunal considers it inappropriate); the place of arbitration; and particulars of the applicable procedural rules (and whether there is power conferred on the Tribunal to act as *amiable compositeur* or decide *ex aequo et bono*). The Tribunal and the parties sign the Terms of Reference. A provisional timetable is also to be drawn up.

The Terms of Reference and the procedural timetable are peculiar to ICC arbitration and have been criticised by some. However, the requirement that the Tribunal draw up a Terms of Reference is a great benefit to the forward planning of the course of the arbitration. Indeed, the very process of drawing them up may result in a narrowing of the issues. Unless the Tribunal so authorises, no new claims or counterclaims are to be made that fall outside the limits of the Terms of Reference (Article 19).

The Tribunal is to proceed to establish the facts of the case (Article 20). Provisions as to hearings are set out in Article 21. When the Tribunal is satisfied that the parties have had a reasonable opportunity to present their cases, it is to declare the proceedings closed (Article 22). Unless the parties have agreed otherwise, the Tribunal has power to order interim or conservatory measures.

The award – including scrutiny of the award

Articles 24 to 29 deals with awards. The time limit for rendering the award is six months from the date of the Terms of Reference. The Court can extend the time limit (Article 24). Where there is more than one arbitrator, the award is by majority decision. Failing a majority the award is made by the chairman alone. Reasons must be given for this (Article 25).

If a settlement is reached, such settlement is to be recorded in the form of an award made by consent, if requested by the parties and if the Tribunal agrees (Article 26).

Article 27 contains the scrutiny of award provisions. Again, these provisions are a unique feature of ICC arbitration and, as in the case of the Terms of Reference provisions, they have been criticised by some as being an interference with the role of the Tribunal. However, it is reasonable to argue that the scrutiny provisions are necessary to ensure the high standard of ICC awards in circumstances where many such awards are made by arbitrators from different parts of the world. The ICC’s stamp of approval on an international arbitral award is beyond any doubt a matter of importance and value.

Article 27 states that, before the signing of the award, the Tribunal is to submit it in draft form to the Court. The Court *“may 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. No award shall be rendered by the Arbitral Tribunal until it has been approved by the Court as to its form.”*

Provisions concerning the notification, deposit and enforceability of the award are set out in Article 28. The Tribunal may correct clerical, computational and typographical errors, subject to the approval of the Court. A party may apply for interpretation of the award (Article 29).

Costs and miscellaneous provisions

Articles 30 and 31 deals with costs. Miscellaneous provisions relating to modified time limits, waiver, exclusion of liability and the general rule relating to matters not expressly provided for in the Rules are contained in Articles 32 to 35.

iii) Other ICC dispute resolution processes

The ICC provides amicable dispute resolution services that will be considered in Chapter 19 on alternative dispute resolution.

Chapter 23 in Part V of the Manual, which deals with online dispute resolution, will consider the ICC’s specialist system for dealing with documentary credit disputes: DOCDEX.

4) The American Arbitration Association at the International Centre for Dispute Resolution

i) Introduction

The American Arbitration Association (AAA) – commonly referred to as the triple A – was founded in 1926. It is the leading arbitral institution in the United States, where it has over 30 regional offices. Its Commercial Arbitration Rules are used in domestic arbitrations.

In the 1990s the AAA promulgated its International Arbitration Rules, which are largely based on an administered version of the UNCITRAL Arbitration Rules, and established its international division: the International Centre for Dispute Resolution (ICDR). The ICDR maintains offices in New York and Dublin, Ireland. In addition, the ICDR established an office in Mexico City through a cooperative agreement with the Commission of the Mexico City National Chamber of Commerce, and announced a joint venture with the Singapore International Arbitration Centre to establish a dispute resolution centre in Singapore.

The AAA says that the international business community *“uses arbitration to resolve commercial disputes arising in the global marketplace. Supportive laws are in place. The New York Convention of 1958 has been widely adopted, providing a favorable legislative climate that enables the enforcement of arbitration clauses. International commercial arbitration awards are recognized by national courts in most parts of the world, even more than foreign court judgments.”*

Of the ICDR, the AAA says that its *“experience, international expertise and multilingual staff form an integral part of the dispute resolution process. The ICDR’s international system is premised on its ability to move the matter forward, facilitate communications, ensure that qualified arbitrators and mediators are appointed, control costs, understand cultural sensitivities, resolve procedural impasses and properly interpret and apply its International Arbitration and Mediation Rules. Additionally, the ICDR has many cooperative agreements with arbitral institutions around the world for facilitating the administration of its international cases.”*

ii) The AAA’s International Arbitration Rules

Commencing the arbitration

Article 1 provides that where the parties have agreed in writing to arbitrate disputes *“under these International Arbitration Rules or have provided for arbitration of an international dispute by the International Centre for Dispute Resolution or the American Arbitration Association without designating particular rules, the arbitration shall take place in accordance with these rules, as in effect at the date of commencement of the arbitration, subject to whatever modifications the parties may adopt in writing.”*

The Rules govern the arbitration, except that where *“any such rule is in conflict with any provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail”*.

The Rules specify the duties and responsibilities of the administrator: *“the International Centre for Dispute Resolution, a division of the American Arbitration Association. The administrator may provide services through its Centre, located in New York, or through the facilities of arbitral institutions with which it has agreements of cooperation.”*

Article 2 provides for the initiation of the arbitration process by service of a written notice by the claimant on both the respondent and the administrator. The notice of arbitration is to contain details of the claim. The respondent is to serve a defence and any counterclaim (Article 3). The pleadings may be amended (Article 4).

The Tribunal

Articles 5 to 11 deal with the Tribunal: the number of arbitrators; appointment of arbitrators; impartiality and independence of arbitrators; and challenge and replacement of arbitrators.

General Conditions

The General Conditions (Articles 12 to 37) deal with the arbitration process following the appointment of the Tribunal.

Pleas as to jurisdiction

Article 15 contain provisions relating to pleas as to jurisdiction: *“The tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.”*

Conduct of the arbitration

Article 16 states that: *“Subject to these rules, the tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.”*

Article 16 (2) contains the extremely useful provision, less detailed than the ICC’s Terms of Reference, that the Tribunal in its discretion may hold a preparatory conference with the parties *“for the purpose of organizing, scheduling and agreeing to procedures to expedite the subsequent proceedings”*.

A further very practical provision is set out in Article 16 (3): *“The tribunal may in its discretion direct the order of proof, bifurcate proceedings, exclude cumulative or irrelevant testimony or other evidence, and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.”*

Further written statements

Article 17 states that the Tribunal has the power to decide whether the parties shall present further pleadings in addition to the statements of claim, counterclaim and defence.

Notices and evidence

Article 18 contains provisions as to notices and Article 19 deals with evidence.

Hearings

Hearings are dealt with in Article 20. The Tribunal is to give the parties at least 30 days advance notice of the date, time and place of the initial oral hearing, and reasonable notice of any subsequent hearings. At least 15 days before the hearings *“each party shall give the tribunal and the other parties the names and addresses of any witnesses it intends to present, the subject of their testimony and the languages in which such witnesses will give their testimony”*. The Tribunal may require witnesses to retire during the testimony of other witnesses. The evidence of witnesses may also be given in the form of written statements. The Tribunal is to determine *“the admissibility, relevance, materiality and weight of the evidence offered by any party. The tribunal shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client.”*

Interim and emergency measures of protection

Articles 21 and 37 deal with measures of protection. Article 21 addresses the subject of interim measures of protection and the authority of arbitrators to award such relief during the arbitral proceeding and after the tribunal is appointed. Article 37, however, deals with the procedure for making available emergency measures of protection. This procedure is unique among the rules of international arbitration providers, and permits a party to seek emergency relief prior to the constitution of the tribunal. Pursuant to Article 37 (2), a party in need of emergency relief *“shall notify the administrator and all other parties in writing of the nature of the relief sought and the reasons why such relief is required on an*

emergency basis". The ICDR thereafter, within one business day, appoints a single emergency arbitrator to rule on the application after a reasonable opportunity to be heard is provided to the parties. Article 37 (5) gives the emergency arbitrator the "*power to order or award any interim or conservancy measure the arbitrator deems necessary*". In addition, the emergency arbitrator has no further power to act after the tribunal is constituted, and may not serve as a member of the tribunal unless the parties agree otherwise.

Experts

Article 22 contains provisions dealing with experts.

Default

Default of the parties in relation to the filing of statements, appearance at hearings and production of evidence is set out in Article 23.

Closure of hearing

Article 24 deals with the closure of hearings and provides that: "*After asking the parties if they have any further testimony or evidentiary submissions and upon receiving negative replies or if satisfied that the record is complete, the tribunal may declare the hearings closed.*" The Tribunal has a discretion, either on its own motion or on an application by a party, to reopen the hearings at any time before the award is made.

Waiver

Waiver provisions are contained in Article 25: "*A party who knows that any provision of the rules or requirement under the rules has not been complied with, but proceeds with the arbitration without promptly stating an objection in writing thereto, shall be deemed to have waived the right to object.*"

Awards, decisions and rulings

Articles 26 and 27 deal with awards, decisions and rulings. Awards may be made by a majority of arbitrators. The presiding arbitrator may be authorised to make rulings on questions of procedure. The award is final and binding and the parties undertake to carry it out without delay. The award is to state reasons and may be made public only with the consent of the parties "*or as required by law*". The Tribunal is authorised to make interim, interlocutory or partial orders and awards.

Provisions are made in Article 34 for correction and interpretation of the award.

Applicable laws and punitive damages

Applicable laws and remedies are dealt with in Article 28. The Tribunal is to apply the substantive law or rules of law designated by the parties, failing which it will apply the law or rules of law that it determines to be appropriate. In arbitrations involving the application of contracts "*the tribunal shall decide in accordance with the terms of the contract and shall take into account usages of the trade applicable to the contract*". Unless the parties expressly authorise it, the Tribunal "*shall not decide as amiable compositeur or ex aequo et bono*".

Article 28 (5) contains provisions specifically dealing with the award of damages:

“Unless the parties agree otherwise, the parties expressly waive and forego any right to punitive, exemplary or similar damages unless a statute requires that compensatory damages be increased in a specified manner. This provision shall not apply to any award of arbitration costs to a party to compensate for dilatory or bad faith conduct in the arbitration.”

That provision may be peculiar to US arbitration. The courts in the United States may award punitive damages. In relation to arbitration, however, the New York Court of Appeals in *Garrity v Lyle Stuart*⁸⁴ held that the award of such damages is a means of punishment and deterrence and has no place in private arbitration.

Settlement or other reasons for termination

Article 29 deals with settlement or other reasons for termination of the arbitral process.

Costs and compensation

Articles 31 to 33 cover costs and arbitrators' compensation.

Confidentiality

Confidentiality is dealt with in Article 34, which provides that: *“Confidential information disclosed during the proceedings by the parties or by witnesses shall not be divulged by an arbitrator or by the administrator. Except as provided in Article 27, unless otherwise agreed by the parties, or required by applicable law, the members of the tribunal and the administrator shall keep confidential all matters relating to the arbitration or the award.”*

Exclusion of liability and interpretation of the rules

Article 35 covers exclusion of liability in relation to the members of the Tribunal and the administrator. Article 36 gives power to the Tribunal to interpret the rules in so far as they relate to the powers and duties of Tribunal. The administrator is to interpret and apply all other rules. As mentioned earlier, Article 37 contains the provisions dealing with emergency measures of protection.

The average time frame from commencement of an arbitration to the issue of an award in an ICDR-administered arbitration in 2005 was 357 days.

iii) Other AAA dispute resolution processes at the ICDR

Among the various dispute resolution processes provided by the AAA is a comprehensive set of international mediation rules.

iv) Dublin

One of the four AAA international centres is based in Dublin. Ireland has adopted the UNCITRAL Model Law and in 1998 enacted the Arbitration (International Commercial) Act. Ireland ratified the New York Convention in 1981.

Further details of the AAA and of its International Centre for Dispute Resolution in Dublin can be found on the AAA's website.⁸⁵

5) The China International Economic and Trade Arbitration Commission

i) Introduction

The China International Economic and Trade Arbitration Commission (CIETAC) was established in 1954 within the China Council for the Promotion of International Trade (CCPIT). The objective of CIETAC is to settle – by means of arbitration – disputes arising from economic and trade transactions, particularly disputes between foreign companies and Chinese companies.

The headquarters of CIETAC is in Beijing. Because of CIETAC's increasing caseload, Sub-Commissions have been set up in Shenzhen and Shanghai. In fact, on a caseload basis, CIETAC is probably the busiest international arbitral institution in the world. Facilities for holding arbitrations are available at all three premises.

The scope of CIETAC's jurisdiction is extensive and includes international or foreign-related disputes. It has a multi-national panel of arbitrators. CIETAC has entered into co-operation agreements with various institutions in a number of countries including Belgium, France, Germany, Ghana, India, Italy, Korea, Sweden, Switzerland and the United Kingdom.

CIETAC arbitration has its distinctive features, perhaps the most notable being the combination of arbitration with conciliation. The tribunal may conciliate the case before or after the commencement of the arbitration proceedings, provided the parties agree. If the conciliation fails, the tribunal will continue the arbitration proceedings in accordance with the Arbitration Rules.

The CIETAC Arbitration Rules have been revised from time to time, the most recent being the 2005 revision, effective as from 1 May 2005.

ii) Significant changes in the 2005 Rules

The following changes are of particular significance, and bring the CIETAC Rules more into line with other major international commercial arbitral rules.

Choice / nationality of arbitrators

Perhaps one of the most significant changes is that parties can, by agreement, choose arbitrators from outside of the CIETAC Panel. However, any arbitrator chosen outside of the panel must be approved by the Chairman of CIETAC. Additionally, if the parties cannot agree on the choice of the presiding arbitrator, CIETAC will make the appointment from its own panel.

This provision is not unusual. The LCIA Rules, for example, permit party *nomination* (Article 7.1), but state that only the LCIA Court may actually *appoint* an arbitrator (Article 5.5). In the case of a three-member Tribunal, the LCIA Court alone may make the appointment of the chairman “*who will not be a party-nominated arbitrator*” (Article 5.6).

Seat of arbitration

The 2005 Rules permit CIETAC arbitrations to be held outside China.

Procedure

Arbitrators are now permitted to conduct ‘adversarial’ or ‘inquisitorial’ proceedings, and provision is made for pre-hearing conferences, the issuing of directions and the establishment of terms of reference.

iii) The 2005 CIETAC Arbitration Rules

There are 71 Articles in the new Rules, which are divided into Chapters.

Chapter I

Chapter I contains general provisions, including the Article 3 provisions relating to the jurisdiction of CIETAC: Cases accepted by CIETAC include those involving international or foreign-related disputes. Article 6 contains the *competence / competence* provisions: if CIETAC is satisfied on prima facie evidence that an arbitration agreement exists, then the arbitration may proceed.

Article 8 contains the usual waiver provisions.

Chapter II

This chapter deals with the arbitral proceedings. Section 1 covers the request for arbitration, defence and counterclaim, and amendment of pleadings. Provision is made for applications relating to the preservation of property and the protection of evidence.

Section 2 contains the rules dealing with the arbitral Tribunal. Article 19 states that an arbitrator “*shall not represent either party and shall remain independent of the parties and treat them equally*”.

The panel is to consist of either one or three arbitrators. Article 21 (2) contains the new provision that “*where the parties have agreed to appoint arbitrators from outside of CIETAC’s Panel of Arbitrators, the arbitrators so appointed by the parties or nominated according to the agreement of the parties may act as co-arbitrator, presiding arbitrator or sole arbitrator after the appointment has been confirmed by the Chairman of the CIETAC in accordance with the law*”.

In the case of a three-person panel, each party may appoint one arbitrator. Article 22 (3) contains a ‘listing provision’ whereby the parties may put forward a list of three candidates as presiding arbitrator, such presiding arbitrator to be approved by the

Chairman of CIETAC. Article 24 contains provisions dealing with the appointment of the Tribunal in the case of a multi-party arbitration.

Article 25 deals with the impartiality of arbitrators, and Articles 26 and 27 with the challenge and replacement of arbitrators.

Article 29 contains significant new provisions relating to the conduct of the hearing. The Tribunal shall *“examine the case in any way that it deems appropriate, unless otherwise agreed by the parties”*. Further, *“the arbitral tribunal may adopt an inquisitorial or adversarial approach when examining the case, having regard to the circumstances of the case”*. The tribunal *“may hold deliberation at any place or in any manner that it considers appropriate”* and, if it considers it necessary, may *“issue procedural directions and lists of questions, hold pre-hearing meetings and preliminary hearings, and produce terms of reference, etc, unless otherwise agreed by the parties”*.

Further new and significant provisions are contained in Articles 31 and 32, which deal with place of arbitration and the place of the oral hearing. Where the parties have agreed on the place of arbitration in writing, *“the parties’ agreement shall prevail”*. Otherwise, the place of arbitration is the domicile of CIETAC (or its Sub-Commission). The award is deemed to have been made at the place of arbitration. The parties can agree on the place where the oral hearings are to be held; failing such agreement, the place is Beijing (or the location of the relevant Sub-Commission).

Articles 36 and 37 deal with evidence. Each party has the burden of *“proving the facts relied on to support its claim, defense or counterclaim”*. The Tribunal *“may, on its own initiative, undertake investigations and collect evidence, as it considers necessary”*.

Article 40 contains the classic CIETAC provision dealing with the combination of conciliation and arbitration: *“where both parties have the desire for conciliation... the arbitral tribunal may conciliate the case during the course of the arbitration proceedings... where the conciliation fails, the arbitral tribunal shall proceed with the arbitration and render an arbitral award”*.

Chapter III

Chapter III contains provisions dealing with the arbitral award. This is to be made within six months from the date of the formation of the Tribunal. The Tribunal shall *“independently and impartially make its arbitral award on the basis of the facts, in accordance with the law and terms of the contract, with reference to international practices, and in compliance with the principle of fairness and reasonableness”*.

Article 44 authorises the making of interlocutory and partial awards, and Article 45 states that the Tribunal shall submit its draft award to CIETAC *“for scrutiny before signing the award. The CIETAC may remind the arbitral tribunal of issues in the award on condition that the arbitral tribunal’s independence in rendering the award is not affected.”* This provision is similar to that found in the ICC Rules.

Articles 47 and 48 deal with the correction of the award and the making of additional awards.

Chapter IV

Articles 50-66 contain provisions for summary procedure where the amounts in disputes do not exceed 500,000 yuan. Pleadings are to be served within 20 days, and 15 days' notice is to be given in relation to any oral hearing. The award is to be made within three months from the date on which the Tribunal was formed – half the time limit of the main CIETAC Arbitration Rules.

The remaining provisions of the Rules deal with language, the service of documents, fees and expenses, interpretation and the date of their coming into force: 1 May 2005.

iii) Other CIETAC dispute resolution processes

CIETAC operates a specific arbitration system relating to financial disputes.

As mentioned above, contained within the main arbitration procedure is provision for the arbitral tribunal to act as conciliators: the “*arbitration with conciliation*” process.

Information on CIETAC can be found on its website.⁸⁶ The conciliation procedures operated by CCPIT are considered in Chapter 19 of the Manual.

6) The Arbitration Institute of the Stockholm Chamber of Commerce

i) Introduction

The Stockholm Chamber of Commerce (SCC) is a voluntary business organisation with 2,000 member companies, ranging from world giants to small entrepreneurs. An important part of its work is to facilitate international trade and to establish contacts between companies in the Stockholm region and companies all over the world.

The Arbitration Institute, established in 1917, is an independent entity within the SCC. It was recognised in the 1970s by the United States and the former Soviet Union as a neutral centre for the resolution of East-West trade disputes. The Institute has extended its activities to over 40 countries worldwide and is recognised as one of the world's leading international arbitral institutions. Its current Rules entered into force in April 1999.

ii) The Arbitration Rules of the SCC

The SCC Rules contain 42 Articles.

Part I (Articles 1-4) deals with the organisation of the SCC Institute.

Part 2 contains the Arbitration Rules. Articles 5-15 cover the initiation of proceedings, including the Request for Arbitration (to contain a summary of the dispute); the Respondent's Reply; the place of arbitration; and the appointment of the Tribunal.

Articles 16-19 set out the provisions relating to the Tribunal: the number of arbitrators and the method of their appointment; impartiality and independence of arbitrators; and challenge and removal of arbitrators.

Proceedings before the Tribunal are dealt with in Articles 20-31: procedures of the Tribunal; statement of claim and defence; amendments of pleadings; language; applicable law; oral hearings; evidence; experts; default of the parties; waiver / failure to object to procedural irregularities; majority vote / vote of the Chairman; and interim measures.

Articles 32-38 set out the provisions relating to the award: place and date of the award; settlement recorded as award; time for rendering award (six months); separate awards; finality of award; correction and interpretation of award; and additional awards.

Costs are dealt with in Articles 39-41: arbitration and party costs; and allocation of costs between the parties.

Finally, Article 42 makes provision for the exclusion of liability of the SCC Institute and arbitrators, save in the case of wilful misconduct or gross negligence.

iii) Other dispute resolution processes of the SCC Arbitration Institute

The SCC Institute also has available Rules for Expedited Arbitration; separate Rules for Insurance Arbitration; Mediation Rules; and procedures for arbitration under the UNCITRAL Rules.

Further information on the SCC and the Arbitration Institute, and the Arbitration Rules, can be found on the SCC website.⁸⁷

7) The Netherlands Arbitration Institute

i) Introduction

The Netherlands Arbitration Institute (NAI) was founded in 1949. One of the founders was Professor Pieter Sanders, the doyen of international commercial arbitration, who participated in the drafting of the New York Convention.

The NAI is an independent, non-profit-making organisation whose objective is to facilitate the resolution of disputes by providing arbitral services, guidelines and information. It has no connection with government and receives no subsidies. Arbitration is administered by the NAI Secretariat, based in Rotterdam.

ii) The NAI Arbitration Rules

The Rules consist of seven Sections comprising 67 Articles.

Section One

This Section deals with General Provisions, including definitions, notices and periods of time.

Section Two

Section Two contains the provisions concerning the Commencement of the Arbitration.

Section Three

This Section deals with the Appointment of Arbitrators, and includes provisions relating to the impartiality and independence of arbitrators; the number of arbitrators and methods of appointment; nationality of arbitrators; and the challenge and replacement of arbitrators.

Section Four

Section Four contains provisions dealing with Procedure:

- place of arbitration;
- memorials: statement of claim, statement of defence and – at the discretion of the Tribunal – reply and rejoinder;
- amendment;
- hearing;
- evidence: documents, witnesses and experts (party-appointed and Tribunal-appointed experts);
- default;
- summary arbitral proceedings: including detailed provisions for emergency applications where the place of arbitration is the Netherlands (but a hearing will not necessarily be held, even if the place of arbitration is the Netherlands);
- provisional measures;
- costs and deposits;
- language;
- third parties: a third-party who has an interest in the outcome of the arbitral proceedings may apply to the Tribunal for permission to be joined or to intervene;
- non-compliance by a party.

Section Four A contains 15 Articles dealing with a Summary Arbitral process:

“A request can be made for such summary process where an immediate provisional measure is required. The Request for the summary process is to set out the basis of claim and the reasons for the urgency of the matter. The request is made under Section Four A where the arbitrators have not yet been appointed. However, where the arbitrators have already been appointed, an application for an order in summary arbitral proceedings is made under Article 37 in Section 4.”

Section Five

Section Five deals with the Award and Applicable Law:

- period of time for rendering the award: “*all due dispatch*”;
- types of award: partial, interim and final;
- Rules of Law / Applicable Law / trade usages: the Tribunal is to decide the dispute on the basis of Rules of Law, unless the parties have authorised it to decide as *amiable compositeur* – the Rules of Law are those chosen by the parties, and failing such choice, such Rules as the Tribunal considers appropriate; the Tribunal is also to take into account any applicable trade usages (the reverse is the case in a national, as opposed to an international, arbitration, where the Tribunal *must* decide as *amiable compositeur*, unless the parties have otherwise authorised);
- majority vote: a dissenting opinion is to be set out in a separate document and is not considered part of the award (again, this applies only in the case of an international arbitration);
- the award: to be in writing, give reasons and be signed by the Tribunal – a copy of an award rendered in the Netherlands is deposited with the registry of the district court within whose district the place of arbitration is located;
- a copy of the award to be retained by the NAI Secretariat for 10 years;
- *res judicata*: the award is binding and the parties are deemed to have undertaken to carry out the award without delay;
- rectification or correction of the award;
- additional award;
- award on agreed terms: any settlement may be recorded in an award – however, the Tribunal may refuse to make an award on agreed terms and need not give reasons for refusing to do so – any such award must be signed by all the parties.
- publication of the award: unless the parties serve notice objecting, the NAI may publish the award, but without names and deleting any details that might disclose the identity of the parties.

Section Six

This Section deals with various aspects of Costs, including:

- administration costs of the NAI;
- fees and disbursements of arbitrators;
- deposits for costs;
- allocation of costs against the losing party.

Section Seven

Section Seven contains the Final Provisions:

- waiver: “*the violation of the Rules*”;
- powers of the Court where the arbitration takes place within the Netherlands: the President of the District Court of Rotterdam has jurisdiction to deal with certain matters such as the appointment of arbitrators;

- unforeseen matters: any matter not covered by the Rules will be dealt with in accordance with the spirit of the Rules;
- exclusion of liability in relation to the NAI and arbitrators and others;
- amendment of Rules: power is vested in the Governing Body of the NAI to make amendments.

iii) Other dispute resolution processes of the NAI

The Netherlands Arbitration Institute operates a Minitrial process, which is a form of alternative dispute resolution (ADR) (see Chapter 19).

Further information on the NAI can be found on its website.⁸⁸

8) The World Intellectual Property Organization

i) Introduction

Based in Geneva, Switzerland, the World Intellectual Property Organization (WIPO) Arbitration and Mediation Center was established in 1994 to offer ADR options including *“arbitration and mediation services for the resolution of international commercial disputes between private parties”*.

“Developed by leading experts in cross-border dispute settlement, the arbitration and mediation procedures offered by the Center are widely recognized as particularly appropriate for technology, entertainment and other disputes involving intellectual property.”

An increasing number of arbitrations and mediations are being filed with the Center under the WIPO Arbitration, Expedited Arbitration and Mediation Rules. The subject matter of these proceedings *“includes both contractual disputes (e.g. patent and software licenses, trademark coexistence agreements, distribution agreements for pharmaceutical products and research and development agreements) and non-contractual disputes (e.g. patent infringement). WIPO disputes have involved parties based in different jurisdictions including Austria, China, France, Germany, Hungary, Ireland, Israel, Italy, Japan, the Netherlands, Panama, Spain, Switzerland, the United Kingdom and the United States of America.”*

In addition to appointing arbitrators and mediators in WIPO cases *“the Center is also frequently asked to recommend neutrals or to act as appointing authority, by parties to disputes that are not subject to the WIPO Rules but that require experience in arbitration or mediation and specialized knowledge of the intellectual property rights in dispute”*.

The Center has also focused significant resources *“on establishing an operational and legal framework for the administration of disputes relating to the Internet and electronic commerce. For example, today the Center is recognized as the leading dispute resolution*

service provider for disputes arising out of the abusive registration and use of Internet domain names. In addition, the Center is frequently consulted on other specialised dispute resolution services. An independent and impartial body, the Center administratively is part of the International Bureau of the World Intellectual Property Organization.”

WIPO's online dispute resolution service is considered in Chapter 23 of the Manual.

ii) The WIPO Arbitration Rules

The WIPO Arbitration Rules are divided into eight Sections.

Section I

This Section contains General Provisions – including the documents to be submitted to the Center.

Section II

Section II deals with the Commencement of the Arbitration (Request and Answer).

Section III

Section III covers the Composition and Establishment of the Tribunal:

- Number of Arbitrators (Article 14)
- Appointment Pursuant to Procedure Agreed Upon by the Parties (Article 15)
- Appointment of a Sole Arbitrator (Article 16)
- Appointment of Three Arbitrators (Article 17)
- Appointment of Three Arbitrators in Case of Multiple Claimants or Respondents (Article 18)
- Default Appointment (Article 19)
- Nationality of Arbitrators (Article 20)
- Communication Between Parties and Candidates for Appointment as Arbitrator (Article 21)
- Impartiality and Independence (Article 22)
- Availability, Acceptance and Notification (Article 23)
- Challenge of Arbitrators (Articles 24 to 29)
- Release from Appointment (Articles 30 to 32)
- Replacement of an Arbitrator (Articles 33 and 34)
- Truncated Tribunal (Article 35)
- Pleas as to the Jurisdiction of the Tribunal (Article 36)

Section IV

Articles 37 to 58 contain the provisions dealing with the Conduct of the Arbitration:

- Transmission of the File to the Tribunal (Article 37)
- General Powers of the Tribunal (Article 38)
- Place of Arbitration (Article 39)
- Language of Arbitration (Article 40)
- Statement of Claim (Article 41)
- Statement of Defense (Article 42)
- Further Written Statements (Article 43)
- Amendments to Claims or Defense (Article 44)
- Communication Between Parties and Tribunal (Article 45)
- Interim Measures of Protection and Security for Claims and Costs (Article 46)
- Preparatory Conference (Article 47)
- Evidence (Article 48)
- Experiments (Article 49)
- Site Visits (Article 50)
- Agreed Primers and Models (Article 51)
- Disclosure of Trade Secrets and Other Confidential Information (Article 52)
- Hearings (Article 53)
- Witnesses (Article 54)
- Experts Appointed by the Tribunal (Article 55)
- Default (Article 56)
- Closure of Proceedings (Article 57)
- Waiver (Article 58)

Section V

Articles 59 to 66 deal with the Award and Other Decisions:

- Laws Applicable to the Substance of the Dispute, the Arbitration and the Arbitration Agreement (Article 59)
- Currency and Interest (Article 60)
- Decision-Making (Article 61)
- Form and Notification of Awards (Article 62)
- Time Period for Delivery of the Final Award (Article 63)
- Effect of Award (Article 64)
- Settlement or Other Grounds for Termination (Article 65)
- Correction of the Award and Additional Award (Article 66)

Sections VI, VII and VIII

iii) Other WIPO dispute resolution processes

As mentioned earlier, WIPO operates a number of dispute resolution systems including a Domain Name Dispute Resolution system (considered in Chapter 23) and mediation procedures (referred to in Chapter 19).

Information on the WIPO Center's work in conventional arbitration and mediation may be found on its website.⁸⁹

B The UNCITRAL Arbitration Rules

i) Introduction

The United Nations Commission on International Trade Law (UNCITRAL) was established by the General Assembly of the United Nations in 1966 and was given a general mandate to *"further the progressive harmonization and unification of the law of international trade"*. UNCITRAL and its Model Arbitration Law were considered in the earlier chapter dealing with international commercial arbitration.

The Model Law was adopted by UNCITRAL in 1985 with the intention of assisting States in *"reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration"*.

The UNCITRAL Arbitration Rules predate the Model Law, having been adopted in 1976. Resolution 31/98 adopted by the UN General Assembly in December of that year stated that the General Assembly recognised the value of arbitration as a method of settling disputes arising in the context of international commercial relations and was convinced *"that the establishment of rules for ad hoc arbitration that are acceptable in countries with different legal, social and economic systems would significantly contribute to the development of harmonious international economic relations..."*. The Resolution noted that the Arbitration Rules had been prepared by UNCITRAL *"after extensive consultation with arbitral institutions and centres of international commercial arbitration..."*.

The UNCITRAL Rules were thus intended for use in arbitrations that are not conducted under the Rules of one of the international commercial arbitral bodies such as those considered earlier in this chapter. Arbitrations conducted by, for example, the LCIA or NAI have a framework of rules that will carry the arbitration from its commencement through to the making of the final award. An ad hoc arbitration has no such procedural framework. The object of the UNCITRAL Model Rules was to provide a framework of rules that would be acceptable globally, by civil law and common law countries, by countries in the East and the West, by developed and developing countries and by countries of varying political systems.

The success of the UNCITRAL Arbitration Rules is shown by the fact that they have additionally been used as a model for institutional rules – in much the same way as the UNCITRAL Model Law has been used as a guide for national arbitration legislation (one example considered earlier in the Manual is the English Arbitration Act of 1996).

89 <http://arbiter.wipo.int/>.

Some of the international arbitral institutions, in addition to offering arbitration under their own Rules, also offer to supervise international arbitrations under the UNCITRAL Arbitration Rules. Two examples are the LCIA and the Arbitration Institute of the SCC.

ii) The UNCITRAL Arbitration Rules

The Rules are divided into four Sections.

Section 1: Introductory Rules

Articles 1 to 4 cover:

- The scope of the Rules: agreement in writing to arbitration under the Rules (a model arbitration clause is provided);
- Notices and calculation of periods of time;
- Commencement of the arbitration by service of a Notice of Arbitration;
- Representation and assistance.

Section II: Composition of the Arbitral Tribunal

Articles 5 to 14 deal with:

- Number of arbitrators (one or three);
- Appointment of arbitrators (provision is made for the Secretary-General of the Permanent Court of Arbitration to designate an appointing authority where necessary);
- Challenge and replacement of arbitrators;
- Repetition of the hearings on replacement of an arbitrator.

Section III: Arbitral proceedings

Articles 15 to 30 contain:

- General provisions: *“Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case”* (Article 15 (1));
- Place of arbitration;
- Language of arbitration;
- Pleadings: statement of claim; statement of defence; amendment of claim or defence;
- Pleas as to the jurisdiction of the tribunal (*competence / competence*): *“The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.”* In general, the tribunal should rule on a plea concerning its jurisdiction as a preliminary question; however, it may deal with such a plea in the final award;

- Further written statements;
- Periods of time (including periods for service of the statement of claim and statement of defence);
- Evidence: *"The arbitral tribunal may, if it considers it appropriate, require a party to deliver to the tribunal and to the other party, within such a period of time as the arbitral tribunal shall decide, a summary of the documents and other evidence which that party intends to present in support of the facts in issue set out in his statement of claim or statement of defence"*;
- Hearings: *"Hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses. The arbitral tribunal is free to determine the manner in which witnesses are examined."* Evidence of witnesses may also be presented in the form of written statements;
- Interim measures of protection: including measures for the conservation of goods. The interim measures may be dealt with in the form of an interim award: *"A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement"*;
- Tribunal-appointed experts;
- Default by the parties in relation to service of pleadings, appearance at hearings and failure to produce evidence;
- Closure of hearings: *"The arbitral tribunal may inquire of the parties if they have any further proof to offer or witnesses to be heard or submissions to make and, if there are none, it may declare the hearings closed."* The tribunal may reopen the hearings at any time before the award is made;
- Waiver of rules: a party who proceeds with the arbitration, knowing that a provision or requirement of the Rules has not been complied with, is deemed to have waived the right to object.

Section IV: The award

A number of significant provisions are contained in this part of the UNCITRAL Rules (Articles 31-41).

- Decisions: by majority where there are three arbitrators;
- The form and the effect of the award:
 - The tribunal may make interim, interlocutory and partial awards in addition to the final award;
 - The award is to be in writing and is final and binding on the parties;
 - The award is to state reasons (unless the parties agree otherwise);
 - The award is to be signed by the arbitrators, stating the date on which and the place where the award was made: *"where there are three arbitrators and one of them fails to sign, the award shall state the reason for the absence of the signature"*;
 - The award may be made public only with the consent of both parties;

- Applicable law and *amiable compositeur*:
 - The tribunal is to apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation, the tribunal is to apply the law determined *"by the conflict of law rules which it considers applicable"*;
 - In all cases the tribunal is to decide *"in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction"*;
- Settlement or other grounds of termination:
 - if the parties agree on a settlement before the award is made, the tribunal shall issue an order for the termination of the proceedings. Alternatively, if requested by both parties and provided the tribunal agrees, the settlement may be recorded in the form of an arbitral award;
 - if the continuation of the arbitral proceedings *"becomes unnecessary or impossible for any reason not mentioned in paragraph 1 the arbitral tribunal shall inform the parties of its intention to issue an order for the termination of the proceedings. The arbitral tribunal shall have the power to issue such an award unless a party raises justifiable grounds for objection"*;
- Interpretation of the award;
- Correction of the award;
- Additional award;
- Costs:
 - The costs of the arbitration *"shall in principle be borne by the unsuccessful party"*; the tribunal is free to determine which party shall bear the costs of legal representation or may apportion such costs between the parties;
 - Deposit of costs: on establishment of the tribunal, each party may be requested to pay an equal amount as an advance on costs. During the course of the proceedings the tribunal may request supplementary deposits. If the required deposits are not paid within 30 days *"the arbitral tribunal shall so inform the parties in order that one or another of them may make the required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings"*.

iii) Other UNCITRAL dispute resolution procedures

The UNCITRAL Conciliation Rules are considered in the following chapter on ADR.

C The Chartered Institute of Arbitrators

i) Introduction

The Chartered Institute of Arbitrators was founded in 1915. Its purpose was to provide a membership organisation for arbitrators, and it says it is *"now the world's leading centre of excellence for the promotion and facilitation of dispute resolution"*.

The Institute goes on to say that it is

“a registered charity with 10,500 members from more than 90 countries and an international network of 30 Branches. Recognised as the professional home for all dispute resolvers, the Institute provides the highest educational standards and is an international resource centre for practitioners, policy makers, academics and those in business concerned with the cost effective and early settlement of disputes.

“In facilitating the determination of disputes, the Institute operates in a wide variety of business and commercial sectors including: financial services, insurance, shipping, commodities, the media, medicine, sport, travel, telecommunications and technology industries, construction, engineering and the automobile industry. The Institute’s sphere of interest is constantly being widened to encompass other sectors. For example, we are developing the use of ADR to resolve personal injury, media, foreign investment and IT disputes.

“The Institute offers education and training throughout the world, providing assured global standards – giving confidence to arbitration and ADR users that the very best practitioner is helping to resolve their dispute. Chartered status for Arbitrators was introduced in 1999 as a ‘gold standard’ for practitioners. A similar programme is in development towards Chartered status for mediators. We are currently working with partners in China, the Middle East and Russia to raise standards.

“In addition to its educational activities, the Institute conducts ‘Dispute Resolution Services’ – administering more than 100 bespoke schemes for consumer and commercial markets, providing cost-effective and timely resolution of disputes. The Institute also offers nominating and appointing services for ad-hoc arbitration, adjudication and mediation.”

ii) The Arbitration Rules of the Chartered Institute of Arbitrators

The Chartered Institute is not an international arbitral institution like those considered in Section A of this Chapter. In contrast to, for example, the NAI, the primary purpose of the Institute is not the administration of international commercial arbitrations. Rather, one of its main roles is as an educational body.

However, the Institute has published Arbitration Rules (and various other dispute resolution procedures). These Rules may be used without reference to the Institute, although the Institute is prepared to administer arbitrations.

The Institute will also act as an Appointing Authority:

“The Institute publishes Rules to help parties and arbitrators take maximum advantage of the flexible procedures available in arbitration for the resolution of disputes quickly and economically. The Rules incorporate relevant provisions of the Arbitration Act 1996 and have also taken cognisance of the new Civil Procedure Rules effective from 26 April 1999. The Rules provide that the wishes of parties regarding procedure will be respected so far as possible, but they also seek to ensure that the arbitrator will have sufficient powers to direct the proceedings if the parties cannot

agree on procedure or will not co-operate. The Rules may be used without reference to the Institute unless the Institute is required to act as Appointing Authority in accordance with Article 3."

Article 1 of the Rules makes it clear that they are intended to cover arbitrations under the English Arbitration Act 1996.

Information concerning the Chartered Institute and its various dispute resolution processes and services can be found on the Institute's website.⁹⁰