The 2012 ICC Rule Changes: Efficiency and Flexibility

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After over two years of study, the ICC Commission on Arbitration approved a revised set of rules for ICC Arbitrations. The revised rules include major changes for multiparty and multi-contract arbitrations, emergency arbitration procedures, case management guidelines and appointment of the arbitrators.

The ICC is well known for its high quality, high cost, time-consuming arbitration process, including its hallmark "scrutiny" of arbitration awards. ICC arbitrations also have been known in the past for their general lack of flexibility in dealing with third party claims and multiple contracts, lack of transparency in the arbitrator disqualification process, and inability to deal with emergency requests prior to the formal appointment of the arbitral tribunal. The revised arbitration rules attempt to keep those things that have made ICC arbitrations successful in the marketplace of international arbitration while attempting to fix those areas where ICC arbitrations have been properly criticized.

The long deliberative process to consider and adopt changes to the ICC Rules of Arbitration resulted in a well-considered set of rules that should solve some of the problems in the old rules without making fundamental changes to what the international arbitration community has come to expect from ICC arbitrations. That is, while there is an increased push for efficiency, practitioners should expect to see the same high-quality arbitration process. Notwithstanding the push for more efficiency, practitioners should not expect to see a fundamentally speedier or less expensive process in the near future. This is not because the rule changes do not foster greater efficiency; rather, it is because it will take a while for tribunals and practitioners to create a new "normal." The tribunals' ability to penalize inefficiency when allocating costs should help overcome the existing inertia.

The rationale for the disqualification decisions of the ICC Court will remain secret and the formation of tribunals will likely remain a relatively slow process, albeit with some of the worst kinks ironed out. Unless otherwise agreed, the emergency arbitration procedures will be available only where the arbitration agreement was entered into after January 1, and the award scrutiny process will continue to delay delivery of arbitration awards to the parties (though making the final product of higher quality). That being said, the revised rules do provide increased flexibility that makes them competitive with other international arbitration rules sets.

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[1] *Disclaimer: The opinions expressed in this paper are those of the authors alone and do not represent the views of the ICC Court, the ICC Commission on Arbitration or the ICC Secretariat.*

1. The New Emergency Arbitrator Rules

One of the most important innovations in the new ICC Rules of Arbitration is the provision for Emergency Arbitrators in new Article 29. The 1998 ICC Rules did not contain a provision that afforded a party the opportunity to seek emergency relief in arbitration. The only way to obtain such relief was through the court system (See Article 23(2) old; Article 28(2) new).

Of course, it was always possible to obtain conservatory and interim measures, first pursuant to the inherent powers of the ICC Arbitrator, and since 1998 pursuant to Article 23(1) of the 1998 Rules, once the arbitral tribunal had been constituted. This provision has been preserved unchanged, renumbered as Article 28(1). However, it is customary for it to take months to constitute an ICC arbitral tribunal.

The significance of new Article 29 is that it is now possible to obtain "urgent interim or conservatory measures" from an Emergency Arbitrator before the arbitral tribunal has been constituted. Article 29 basically follows similar procedures under the rules of such institutions as the Stockholm Chamber of Commerce, the Singapore International Arbitration Centre, and the Netherlands Arbitration Institute.

The procedure for seeking "Emergency Measures" is set forth in Article 29 and Appendix V. Article 29(1) defines Emergency Measures as "urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal." For example, the claimant may need a preliminary injunction to prevent a respondent from doing something or to require it to do something to maintain the status quo under the agreement.

Appendix V provides that a party seeking Emergency Measures file a detailed application with the ICC Secretariat. The application must be filed before the file is transmitted to the arbitral tribunal in accordance with Article 16 of the New Rules. On the other hand, the application may be filed even before the claimant has filed a Request for Arbitration. But a party must file the Request for Arbitration within 10 days of the application for Emergency Measures

If and to the extent that the President of the ICC Court decides that the application meets the requirements of Art. 29(5) and (6), he appoints an emergency arbitrator, usually within 2 days. The Secretariat sends a copy of the application to the responding party.

Normally, the Emergency Arbitrator has 15 days to issue an order. Although Article 29(2) provides that the parties "undertake to comply with any order made by the emergency arbitrator," the order is not an award, unlike for example the comparable provisions of the NAI Rules, which provide that the emergency arbitrator issues an award. As a result, there are potential enforceability issues under the New York Convention. In practice, this may not be a serious shortcoming, as it is generally not recommended that a party disobeys an order issued by an arbitrator, as the tribunal once constituted may be expected to look unfavorably on such a default.

Generally, the combined administrative and arbitrator fee for an application for Emergency Measures is $40,000 irrespective of the amount of the claim, so that a party should not take the decision to file such an application lightly.

It has been noted that the new ICC Rules do not import the requirements of Article 17F of the UNCITRAL Model Law, which require the applicant on a continuing basis to make full disclosure of all circumstances likely to be relevant to the request for urgent relief, as well as to disclose any material change in such circumstances.

It is important to note that, unlike the rest of the New Rules, Article 29 and Appendix V apply only to arbitrations commenced under an arbitration agreement entered into after January 1, 2012. Additionally, such arbitration agreement must not include the application of another pre-arbitral procedure relating to interim measures. Finally, the parties may expressly agree to opt out of the Emergency Measures provisions.

It is prudent to not opt out of the Emergency Measures provisions, in spite of the high cost associated with the procedure. As interim relief procedures remain available from any national court under Article 28(2), the ICC Emergency Measures procedure can function as a back up, - for example when interim relief is not available from a specific jurisdiction, or when the applicant doubts the neutrality of the court in that jurisdiction.

2. Multiple Parties, Multiple Contracts and Consolidation

Under the 1998 ICC Rules of Arbitration, absent the agreement of the parties, it was difficult, if not impossible, to deal with the relatively common situation where there are multiple parties, multiple contracts, and multiple claims arising out of the same set of facts even when the various parties are bound to nearly identical arbitration agreements. The 1998 ICC Rules simply had no provisions that could be used to consolidate related claims or to bring in third parties in a cross-claim. Even when arbitration agreements were nearly identical and the disputes arose out of the same set of operative facts, the ICC Rules did not provide for consolidation of the claims. For example, when dealing with a chain of contracts on a construction project, there could be multiple arbitrations arising out of the same set of facts involving the project owner, the prime contractor and various subcontractors leading to possibly inconsistent results from different arbitral tribunals.

The 2012 ICC Rules of Arbitration have removed the procedural impediments to dealing with multiple parties, multiple contracts, and consolidation of claims. Articles 6 through 10 comprise the procedural innovations that permit ICC arbitrations among multiple parties involving multiple claims to be conducted efficiently.

Article 6 - Effect of the Arbitration Agreement

Article 6 of the ICC Rules is the mechanism used by the ICC administrative body to determine whether to proceed with the composition of an arbitral tribunal and the

administration of an arbitration. In the past, this section was limited to the determination of whether there existed a prima facie arbitration agreement between the parties. The revisions to Article 6 now provide for the ICC administrative body to make a prima facie determination whether to combine claims and parties under the new provisions for multiple parties and multiple contracts. The new language of Article 6(4) provides as follows:

> In all cases referred to the Court under Article 6(3), the Court shall decide whether and to what extent the arbitration shall proceed. The arbitration shall proceed if and to the extent that the Court is *prima facie* satisfied that an arbitration agreement under the Rules may exist. In particular:
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> (i) where there are more than two parties to the arbitration, the arbitration shall proceed between those of the parties, including any additional parties joined pursuant to Article 7, with respect to which the Court is *prima facie* satisfied that an arbitration agreement under the Rules that binds them all may exist; and
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> (ii) where claims pursuant to Article 9 are made under more than one arbitration agreement, the arbitration shall proceed as to those claims with respect to which the Court is *prima facie* satisfied (a) that the arbitration agreements under which those claims are made may be compatible, and (b) that all parties to the arbitration may have agreed that those claims can be determined together in a single arbitration.
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> The Court's decision pursuant to Article 6(4) is without prejudice to the admissibility or merits of any party's plea or pleas.

The standard of "prima facie satisfied" used in the new Section 6(4) is identical to the standard under the 1998 Rules in former Section 6(2) under which the ICC Court determined whether to send a claim of lack of jurisdiction to the arbitral tribunal for determination. In the event the ICC Court did not find a prima facie arbitration agreement, the party urging arbitration was left to plead its case in an appropriate domestic court. In practice, the prima facie standard was a very low hurdle to overcome, which was not surprising given the ICC's pro arbitration views of competence-competence.

Article 7 – Joinder of Additional Parties (New)

Former Article 7 (regarding arbitrator independence) was renumbered as new Article 11. In its place is an entirely new article concerning joinder of additional parties. Under the former rules, it was not readily possible to join additional parties to a preexisting arbitration. This created unnecessary procedural complications where, for example, a respondent wished to name another party to a contract or a third party by means of extension. Under these circumstances, without the cooperation of the claimant, the

respondent was forced to start a new arbitration proceeding to run concurrently with the preexisting arbitration.

New Section 7(1) provides the basic rule permitting joinder of additional parties as follows:

> A party wishing to join an additional party to the arbitration shall submit its request for arbitration against the additional party (the "Request for Joinder") to the Secretariat. The date on which the Request for Joinder is received by the Secretariat shall, for all purposes, be deemed to be the date of the commencement of arbitration against the additional party. Any such joinder shall be subject to the provisions of Articles 6(3)–6(7) and 9. No additional party may be joined after the confirmation or appointment of any arbitrator, unless all parties, including the additional party, otherwise agree. The Secretariat may fix a time limit for the submission of a Request for Joinder.

Note that Section 7(1) refers back to Article 6 for purposes of permitting the ICC Court to determine whether there is a prima facie agreement to arbitrate with the party to be joined. Section 7(1) also refers to the requirements of Article 9 (discussed below), which concerns whether multiple arbitration agreements are "compatible" for the purposes of joinder and consolidation.

The benefit of new Article 7 is that there is now a mechanism under the ICC Rules to join additional parties when the dispute arises out of compatible arbitration agreements and a single set of operative facts. For example, after an owner brings a claim against a prime contractor, the prime contractor may now bring in a sub contractor so that issues of liability and damages can be consistently resolved among the parties without resort to multiple arbitrations.

Article 8 – Claims Between Multiple Parties (New)

New Article 8 concerns claims between multiple parties. Former Article 8 has been renumbered as new Article 12. The idea with new Article 8 is to allow for all claims among all parties to be resolved in a single proceeding. As with Article 7, the right to bring any claim against any party is subject to (1) Article 6 for purposes of determining the prima facie existence of an arbitration agreement between the parties to that particular dispute and (2) Article 9 for purposes of determining compatibility of such an arbitration agreement with the arbitration agreement under which the original claim was brought. The operative section of Article 8 is Section 1, which provides:

> In an arbitration with multiple parties, claims may be made by any party against any other party, subject to the provisions of Articles 6(3)–6(7) and 9 and provided that no new claims may be made after the Terms of Reference are signed or approved by the Court without the authorization of the arbitral tribunal pursuant to Article 23(4).

The obvious benefit of new Article 8 is to permit parties to resolve as many of their claims and cross-claims as permitted under compatible agreements to arbitrate. Article 8, however, makes clear that parties are not permitted to file claims against other parties in a single arbitration proceeding where there has been no agreement to arbitrate such a claim or the arbitration agreements are not compatible.

Article 9 – Multiple Contracts (New)

New Article 9 addresses the often-controversial issue of when it is possible for claims raised under different arbitration agreements to be made in a single arbitration. Article 9 provides as follows:

> Subject to the provisions of Articles 6(3)–6(7) and 23(4), claims arising out of or in connection with more than one contract may be made in a single arbitration, irrespective of whether such claims are made under one or more than one arbitration agreement under the Rules.

The key limitation imposed on multiple contracts in a single arbitration is found in Article 6(4) (quoted above) which requires that the contracts (i) may be "compatible" and (ii) that the parties to the various agreements may have agreed that the claims could be tried together. If there is a prima facie case for these elements, then it is up to the arbitral tribunal to make the final determination regarding this aspect of jurisdiction.

The Rules do not say what is meant by different arbitration agreements being "compatible." At a minimum, they should be arbitration agreements calling for resolution of disputes under the ICC Rules of Arbitration because it is hard to see how the ICC Court would have jurisdiction to administer a dispute under other rule sets. There may be other requirements for compatibility. For example, what if one arbitration agreement calls for a single arbitrator and the other calls for a three-person tribunal? What if the seat of one arbitration agreement is in England and the other is in Paris? It will take time for the ICC Court and arbitral tribunals to show by example what the term "compatible" means in this context.

Article 10 – Consolidation of Arbitrations (New)

New Article 10 concerns consolidation of proceedings. Under the former rules, there was no formal mechanism for the ICC Court or the Secretariat (the administrative body of the ICC Court) to order or accomplish consolidation of proceedings. The parties, if they agreed, could accomplish consolidation by agreeing to appoint the same arbitrators and agree to hold the hearings at the same time and in the same location. New Article 10 provides a mechanism to formally consolidate proceedings whether by agreement of the parties or under circumstances where the ICC Court can order consolidation. Note that for consolidation, the ultimate decision is made by the ICC Court and not the arbitral tribunals affected by the consolidation request.

New Article 10 provides as follows:

The Court may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration, where:

a) the parties have agreed to consolidation; or

b) all of the claims in the arbitrations are made under the same arbitration agreement; or

c) where the claims in the arbitrations are made under more than one arbitration agreement, the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible.

In deciding whether to consolidate, the Court may take into account any circumstances it considers to be relevant, including whether one or more arbitrators have been confirmed or appointed in more than one of the arbitrations and, if so, whether the same or different persons have been confirmed or appointed.

When arbitrations are consolidated, they shall be consolidated into the arbitration that commenced first, unless otherwise agreed by all parties.

New clause 10(a) is an affirmation of party autonomy and merely removes the former procedural obstacles to consolidation where all parties have agreed. Clauses 10(b) and (c) give the ICC Court the power to consolidate proceedings at the request of one of the parties even if all other parties disagree. As with Article 9, where there are multiple arbitration agreements, the arbitration agreements must be "compatible."

3. A More Efficient and Cost-Effective Process

New Article 22 (Conduct of the Proceedings) encourages the parties and the arbitral tribunal to conduct proceedings in an efficient and expeditious manner. It works with Article 24 (Case Management), Appendix IV (Case Management Techniques) and the tribunal's ability to allocate costs based on the parties' conduct to change the culture of ICC arbitrations to make them more efficient and less time consuming.

The changes made in the 2012 Rules that deal with case management and the procedural timetable, reflect both the experience of the thirteen years that have passed since the adoption of the 1998 Rules and the sense of urgency to make international commercial arbitration a more cost-effective and efficient process. As a result, the 2012 Rules now place upon the arbitral tribunal and the parties the express duty to use their best efforts to conduct the arbitration process in an expeditious and cost-effective manner (Article 22(1)).

Other changes focusing on a more efficient, cost effective process include the following:

(a) Consistent with existing practice, Article 3(2) now makes explicit reference to the use of email by the Secretariat and the arbitral tribunals in connection with notifications or communications to the parties. References to facsimile transmissions, telex and telegram were deleted.

(b) Articles 4(3) and 5(5) require claimant and respondent to include more information in their respective Request for Arbitration and any counterclaim submitted with the Answer. For example, they now need to include the (legal) basis for the claim or counterclaim. In addition, rather than requiring "to the extent possible, an indication of any amount(s) claimed" (Article 4(3)(c) 1998 Rules), Article 4(3)(d) of the 2012 Rules now requires that the Request for Arbitration specify "the amounts of any quantified claims and, to the extent possible, an estimate of the monetary value of any other claims."

(c) Article 6(3) allows a party to make objections to the existence, validity or scope of the arbitration agreement to be referred directly to the arbitral tribunal rather than first to the ICC Court as the 1998 Rules provided. This should result in a significant timesaving.

(d) The method of arbitrator appointment is unique to the structure of the ICC Commission on Arbitration and the ICC Court. The ICC Commission on Arbitration is comprised of National Committees whose members are appointed by affiliates of the International Chamber of Commerce. In the United States, the USCIB (United States Council for International Business) is the appointing authority for members of the U.S. National Committee to the ICC Commission on Arbitration. When the parties fail to agree on the selection of an arbitrator or there otherwise is a need to appoint an arbitrator, the Secretariat of the ICC Court typically looks to the National Committee at the seat of the arbitration to nominate an arbitrator for consideration by the ICC Court of Arbitration.

Problems occur when there is no functioning National Committee at the seat of the arbitration, the appropriate National Committee may have a flawed mechanism for nominating proposed arbitrators (e.g., undue delay, favoritism or bribes), or using a National Committee may have the appearance of bias (e.g., in cases involving state entities). Under those circumstances, the ICC Rules now provide for direct appointment by the ICC Court. (See Article 13(3))

In addition, partially in view of the increasing number of arbitrations involving states, a new Article 13(4) provides that the Court can directly appoint as arbitrator a person it regards as suitable (a) where one or more of the parties is a state or claims to be a state entity, or (b) where the Court wants to appoint an arbitrator from a country where there is no National Committee, or, more generally, (c) whenever the President of the Court certifies to the Court that circumstances exist which, in the President's opinion, make a direct appointment necessary and appropriate.

Finally, Article 13(5) retains the existing ICC rule that "[t]he sole arbitrator or the president of the arbitral tribunal shall be of a nationality other than those of the parties." This rule is based on the idea that there may be an appearance of bias if the sole arbitrator or chair of a tribunal is of the same nationality as any one of the parties even though party appointed arbitrators (who are required to be "impartial and independent" under the ICC Rules) may be of the same nationality as any of the parties. The ICC policy regarding nationality of the sole arbitrator or chair had a brief scare when the English appellate case of *Jivraj v. Hashwami* declared that European Union employment law banned discrimination in the appointment of arbitrators based on religious affiliation. The English Supreme Court reversed on the basis that arbitrators are independent contractors and not employees subject to the European Union employment laws. In any event, the English Supreme Court, in dicta, found that the restriction on religious affiliation in the arbitration agreement in the *Jivraj v. Hashwami* matter was a justified occupational qualification. It is unclear how this policy will fare in jurisdictions where laws banning discrimination apply to the selection and appointment of arbitrators.

(e) Consistent with standard ICC practice, Article 24(1) provides explicitly that arbitral tribunals convene as soon as possible after drawing up the Terms of Reference a case management conference to consult the parties on procedural measures in accordance with Article 22(2) to ensure effective case management. Article 24(3) encourages the tribunal to hold further case management conferences and adopt further procedural measures or to modify the procedural timetable in order to ensure continued effective case management.

(f) Article 27 reworded the language dealing with the closing of the proceedings of Article 22 of the 1998 Rules, by emphasizing that the tribunal shall declare the proceedings closed as soon as possible after the last hearing or the filing of the last submissions. Article 27 also deleted the reference to the "approximate" date as well as any postponement of the date, by which the tribunal expects to submit its draft award to the Court for approval.

An addition no doubt welcomed by the parties and their counsel is that the tribunal's notification as to when it expects to submit its draft award to the Court is to be made not only to the Secretariat, but also to the parties.

(g) New Article 37(5) is an important addition to consideration of allocation of costs. In the past, the general rule has been that costs follow the event so that the loser generally pays. Because arbitral tribunals have the general authority to allocate costs among the parties, some tribunals considered how the proceedings were conducted by the parties in addition to who won or lost the merits of the dispute. New Article 37(5) makes explicit that the arbitral tribunal may consider in the allocation of costs how efficiently each party conducted the proceedings:

> In making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner.

This provision adds teeth to the other provisions of the ICC Rules discussed in this Section that are intended to increase the efficiency and lower the cost of arbitration.

(h) Article 2(2) of Appendix III was reworded so that the Court when setting the fees of the arbitrators, shall take into consideration not only the diligence of the arbitrators and the time spent, but also their "efficiency" and the "timeliness of the submission of the draft award".

4. Other Rule Changes

In addition to the major rule changes discussed above, there were minor changes, explanations and clarifications made to most of the other rules.

Article 1 – International Court of Arbitration

Article 1 was modified to make clear that the International Court of Arbitration does not itself make decisions, but instead, together with the Secretariat, is charged with administering arbitrations under the ICC Rules. Article 1(2) added language to make the ICC Court the only body that may administer the ICC Rules of Arbitration. This attempt at exclusivity is designed to prevent parties from using a hybrid form of the Rules and not paying the administrative costs associated with ICC arbitration or submitting to the administrative jurisdiction of the ICC Court for the conduct of the proceedings, including selection of arbitrators and scrutiny of awards.

Article 1 also was modified to allow Vice Presidents of the Court to make urgent decisions in the absence of the President of the Court.

Article 2 – Definitions

The only changes made to this Article were technical changes to include multiple parties within the definition of "party" and cross-claims and counterclaims within the definition of claims.

Article 5 – Answer and Counterclaims

No major changes have been made to Article 5. As with Article 4 there are modest clarifications to what kinds of information are expected to be included in the answer and counterclaims. As with Article 4, the only substantive additions are made to accommodate multiple parties, multiple contracts and the possibility of consolidation.

Article 11 – Arbitrator Selection (Former Article 7)

One of the problems with international arbitration is that the top arbitrators are very busy and it is difficult to schedule timely hearings. This has increased the time it takes to complete arbitrations. To help mitigate this problem, the ICC Secretariat has engaged in the practice of requiring prospective arbitrators to execute a statement of availability as

an assurance that required hearings can be scheduled in a timely manner. This practice has now been enshrined in the Rules.

In addition, under new Article 11, arbitrators are required not only to be independent from the parties, as the 1998 Rules provided, but also to be and to remain impartial, and the prospective arbitrator must make disclosures relative to both standards.

Article 11(3) imposes a duty on the arbitrator to report to the Secretariat and the parties any change of circumstances relative to his continued availability, impartiality and independence.

Another hot issue in the world of international and domestic arbitration is the disqualification of arbitrators. The London Court of International Arbitration recently raised the ante by announcing that it would make public its rationale for disqualification. The question was whether the ICC would match the LCIA's move and begin announcing its reasons for disqualification. After considerable debate, the ICC Commission on Arbitration determined not to make any changes to its existing language and policy in Article 11(4):

> The decisions of the Court as to the appointment, confirmation, challenge or replacement of an arbitrator shall be final, and the reasons for such decisions shall not be communicated.

The ICC Court is the administrative body charged with making disqualification decisions and, due to the nature of group deliberations, the rationale for a particular decision might be difficult to express in a manner that would be of any use to practitioners or arbitrators.

Article 12 – Constitution of the Arbitral Tribunal (Former Articles 8 and 10)

The ICC Commission on Arbitration made only minor changes to the material in newly consolidated Article 12. There is a new Article 12(7) to account for the selection of arbitrators when a new party is joined to the proceedings (e.g., per new Article 7).

Article 17 – Proof of Authority (New)

New Article 17 provides: "At any time after the commencement of the arbitration, the arbitral tribunal or the Secretariat may require proof of the authority of any party representatives." This new Article simply confirms existing practice.

Article 30 – Time Limit for the Final Award (Former Article 24)

The ICC Rules provide that the arbitral tribunal must issue its final award within six months from the date the Terms of Reference are signed. That rule has been honored in the breach. As a nod to the real world, the ICC Rules have added the following sentence in Article 30(1): "The Court may fix a different time limit based upon the procedural timetable established pursuant to Article 24(2)."

Article 35 – Correction and Interpretation of the Award; Remission of Awards (Former Article 29)

The ICC Commission on Arbitration added a new section (4) to Article 35 to take into account the possibility that a "court" (lower case "c", as opposed to "Court" with an uppercase "C", which refers to the International Court of Arbitration) of appropriate jurisdiction might remit an award to an arbitral tribunal for interpretation or correction. In the absence of this rule, the jurisdiction of the tribunal to make such corrections after issuance of the final award was questionable. The ICC Court (upper case "C") already had the power to seek corrections as part of the scrutiny process.

Article 36 – Advance to Cover Costs of Arbitration (Former Article 30)

This Article has been modified to take into account the possibility of joinder of additional parties and claims between multiple parties that may not apply to all parties. As always, costs are assessed early in the proceedings and fixed by the ICC Court.

Article 37 – Decision as to Costs of Arbitration (Former Article 31)

In addition to the changes in Article 37(5) described above under "A More Efficient and Cost-Effective Process", new Article 37(6) covers the situation where the arbitration is terminated before final award and, therefore, before a final allocation of costs. This new provision allows the ICC Court, the existing arbitral tribunal, or, if necessary, a specially constituted arbitral tribunal to allocate costs and expenses among the parties under those circumstances.