INTERNATIONAL CHAMBER OF COMMERCE COURT OF ARBITRATION

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This paper outlines the procedure for arbitration under the rules of the International Chamber of Commerce Court of Arbitration and includes the author's comments thereon.

I. INTRODUCTION

The International Chamber of Commerce Court of Arbitration (ICC Court of Arbitration), as a forum for arbitrating international disputes, was created in 1923. Historically, the types of disputes which were submitted for ICC arbitration related to such matters as the supply of industrial plant and public works, sales contracts, agency distribution contracts, licence agreements, the formation and winding-up of companies, share transactions and maritime disputes. In recent years, a large number of cases relating to oil and gas operations have been referred to the Court. In 1982, approximately 11% of the cases fell within this category, and, by 1983, that number had increased to approximately 15%.[1] It is important, therefore, that lawyers whose practice includes international oil and gas transactions be familiar with ICC arbitration, because they may wish to recommend that an ICC arbitration clause be incorporated into the agreement.

II. THE STRUCTURE OF ICC ARBITRATION

A. THE COURT

The ICC Court of Arbitration, located in Paris, is composed of a Chairman, five Vice-Presidents, the Secretary General, one or more technical advisers and one representative from each of the ICC's fifty-three National Committees.[2] The Court meets monthly. The Court's general responsibility is to assure the smooth functioning of all arbitrations; it does not itself settle disputes. In addition to its general responsibility, the Court is charged with the performance of several specific responsibilities. A brief discussion of these will serve as an introduction to the ICC arbitration procedure.

The Court's most important role is to appoint the single arbitrator, or where there are three arbitrators, to appoint the third arbitrator, who serves as Chairman of the Tribunal.[3] In the latter case, each party nominates its own arbitrator, and these nominations are confirmed by the Court.[4] The Court also hears and decides, as sole judge, any challenges to the arbitration, whether made by a party or by the Court on its own motion. These challenges are usually confined to the existence or

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1. Discussions with Roberto Powers, Official of the Office of the Secretariat, ICC Court of Arbitration.
2. Statutes of the ICC Court of Arbitration, Art. 2, reprinted in Appendix I of Rules for the ICC Court of Arbitration, March, 1980.
3. *Id.* at Art. 2(1).
4. *Id.* at Art. 2(4).

validity of an agreement to arbitrate. In addition, the Court has jurisdiction to remove an arbitrator who is not fulfilling his functions in accordance with the Rules or within the prescribed time limits.[5]

If a party pleads that there is no binding agreement to arbitrate, the Court will make a *prima facie* determination respecting the validity of the agreement, and may, without prejudice to the admissibility or merits of the plea, order that the arbitration shall proceed. In such a case, the final determination of the question is left to the arbitrators.[6]

The place of arbitration is fixed by the Court, unless agreed upon by the parties.[7] The Court also fixes the amount of the deposit the parties must make to cover the costs of the arbitration, which is generally paid in equal shares by the Claimant and the Defendant,[8] and the amount of the arbitrators' fees and expenses.[9] The Court rules on requests for extensions of time for the filing of the Terms of Reference[10] and the time within which an award by the arbitrators must be made.[11] In practice, the Court will also entertain requests for extensions of time for nominations of arbitrators and for the filing of the defence.

Another important function of the Court is to examine a draft of an award before it is signed by the arbitrators. The Court may require modifications as to the form of the award and, without affecting the arbitrators' liberty of decision, may also draw their attention to points of substance.[12] This scrutiny has a dual purpose. First, it is designed to identify errors of form that may create obstacles to the enforcement of the award. Secondly, it permits the Court to participate in the formulation of an award, thereby providing the Court with an opportunity to make a substantial contribution to the orderly development of a stable body of private international jurisprudence.

In accordance with the provisions of Article 1(4) of the ICC Rules of Arbitration, the Court has established a Committee of three of its members, which is chaired by the Chairman of the Court. The Committee, which meets twice monthly, is empowered to make any decision within the jurisdiction of the Court except decisions respecting challenges of arbitrators, allegations that an arbitrator is not fulfilling his functions, and approval of non-consensual awards.

B. THE SECRETARIAT

Attached to the Court is the Office of the Secretariat, consisting of the Secretary General and his staff. The Secretariat not only serves as "Clerk of the Court" during the course of the arbitral proceedings, receiving and filing documents submitted by the parties, but also provides staff

5. *Id.* at Art. 2(7).
6. *Id.* at Art. 8(3).
7. *Id.* at Art. 12.
8. *Id.* at Art. 9(1) and (2).
9. *Id.* at Art. 20(3).
10. *Id.* at Art. 13(2).
11. *Id.* at Art. 18(2).
12. *Id.* at Art. 21.

assistance to the Court in making its decisions. It provides technical assistance to the parties and the arbitrators by furnishing advice on procedural and substantive questions. The staff also attempts to follow the development of the proceedings and makes an effort to expedite matters if there are unusual delays. In practice, arbitrators will find that the Secretariat is continually reminding them of deadlines under the Court's Rules. These reminders should be taken seriously and extensions should be applied for well in advance, since the Committee which grants extensions meets only twice a month.

III. THE ARBITRATION PROCEDURE

A. THE REQUEST FOR ARBITRATION

A party initiates an arbitration proceeding before the ICC Court of Arbitration by lodging with the Secretariat a "Request For Arbitration", which must include the names and addresses of the parties, a statement of the Claimant's case, copies of the relevant agreements (including the agreement to arbitrate), the number of arbitrators desired, and the name of the arbitrator nominated by the Claimant.[13]

The Secretariat forwards these documents to the Defendant, who has thirty days in which to file an answer setting forth his Statement of Defence, his comments on the Claimant's proposals respecting the number of arbitrators, and, where appropriate, the name of the arbitrator nominated by him.[14] A copy of the Defendant's answer is then communicated to the Claimant.[15] Where the Defendant's answer is accompanied by a counterclaim, the Claimant has thirty days from the date of receipt of the counterclaim to file a reply.[16]

The most important part of the Request For Arbitration is the statement of the Claimant's case. This statement should contain a detailed recital of facts, as well as a summary discussion of the contractual and legal bases for the claim. Since it appears that the equities are of paramount importance in arbitration, it is important that the Tribunal not only fully understand the claim being advanced by the Claimant, but also be made aware of the "rightness" of the Claimant's case at the earliest possible time. The first opportunity to do so is through the Request For Arbitration. Furthermore, the arbitrators will, of necessity, rely on the statement of the Claimant's case in preparing the summary of the parties' respective claims for inclusion in the Terms of Reference.

The same strategy should be employed by the Defendant in preparing his defence and any counterclaim. He has the opportunity not only to undermine the initial impressions created by the Claimant's case, but also to create a clear understanding of his case and the merits of his defence and counterclaim.

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13. *Id.* at Art. 3(1) and (2).
14. *Id.* at Art. 4(1).
15. *Id.* at Art. 4(2).
16. *Id.* at Art. 5(1) and (2).

B. APPOINTMENT OF ARBITRATORS

The arbitrator, or arbitrators, are appointed by the Court in the following cases: the agreement between the parties is silent as to the appointment of an arbitrator; the parties have agreed that the Court shall appoint the arbitrator or arbitrators; a party fails to nominate an arbitrator; the arbitrators nominated by the parties fail to nominate the third arbitrator to act as Chairman of the Arbitral Tribunal.

Where the Court is required to appoint a sole arbitrator or the Chairman of an Arbitral Tribunal, it chooses a National Committee representing a country which is not involved in the dispute to propose the sole or third arbitrator. If the appointment is on behalf of a party which has failed to nominate an arbitrator, the Court requests a proposal from the National Committee of that party's country. If that party's country has no National Committee, the Court is at liberty to choose any person whom it regards as suitable.[17]

The selection of the sole or third arbitrator is crucial, and can have consequences which go beyond the competence of the individual chosen. The individual will have a substantial influence on the rules of procedure to be used during the proceedings. While the parties are at liberty to agree upon procedure in advance, in the arbitration clause, they very seldom do so in practice, and procedural matters are usually left to the arbitrators.[18] Article 11 of the ICC Rules provides that the proceedings shall be governed by the ICC Rules, or where the Rules are silent, by any rules which the parties (or, failing them, the arbitrator) may settle. The parties and the arbitrators may agree to adopt the rules of a particular jurisdiction. The ICC Rules are silent as to the matter of examinations for discovery and production of documents. Since the procedure in common law jurisdictions and civil jurisdictions differ in this regard, the background of the arbitrators will have a strong influence on the rules which are ultimately adopted. Each arbitrator will tend to favour the procedure with which he is most familiar. Consequently, it is important to a Canadian party that the third or sole arbitrator be either from a common law jurisdiction, or at least have some familiarity with the discovery processes and evidentiary requirements used in Canadian jurisdictions.

The parties are free to stipulate in the arbitration clause the substantive law to be applied in the event of a dispute. In the absence of contractual agreement by the parties as to the substantive law to be applied, the arbitrators are required to apply the law designated as the proper law of the contract by the rule of conflict which they deem appropriate.[19] Notwithstanding that the parties may have selected the applicable law, the background of the arbitrators, particularly that of the Chairman of the Arbitral Tribunal, will likely have a significant impact on the application of the substantive legal principles to the dispute. The arbitrators also fix the costs of the arbitration and determine which of the parties shall bear the costs, or in what proportions the costs shall be borne by the parties.[20]

17. *Id.* at Art. 2(6).
18. *Supra* n. 1.
19. *Supra* n. 2 at Art. 13(3).
20. *Id.* at Art. 20(2).

C. FIXING THE DEPOSIT AND TRANSMISSION OF THE FILE

When the Secretariat has received the Defendant's answer to the Request For Arbitration and the Claimant's response to any counterclaim, and when the Court has fixed the initial deposit, the file is transmitted to the arbitrators.[21] The arbitrators have two months from the receipt of the file to prepare and transmit the Terms of Reference to the Court.

D. ESTABLISHING THE TERMS OF REFERENCE

The Terms of Reference are drawn up by the arbitrators either on the basis of the documents on file or in the presence of the parties following oral submissions. The Terms of Reference must be signed by the parties and the arbitrators and must include: the names and addresses of the parties and the arbitrators; a summary of the parties respective claims; the issues to be decided; the place of arbitration; the procedural rules to be applied; and such other particulars as may be required to make the award enforceable in law or as may be considered necessary by the Court or the arbitrators.[22] It is also customary to include a statement as to the applicable substantive law, the language in which the proceedings will be conducted, the applicable rules of procedure, and the schedule and content of the proceedings.

In some cases, the parties have been requested to draft, either jointly or separately, Terms of Reference for submission to the arbitrators. Disagreement between the parties on any particular aspect of the Terms of Reference is determined by the arbitrators after the parties have submitted written briefs, oral argument, or both. When the Terms of Reference are prepared in this manner, all of the key procedural issues can be resolved at the earliest possible stage in the proceedings. Such matters as the discovery and production of documents, the presentation of testimony (including expert witnesses), the nature of the briefs to be submitted and the schedule for their submission, the order of presentation, and the length of oral arguments, can all be settled in the Terms of Reference.

Detailed Terms of Reference offer several benefits. First, because a majority of the procedural matters will have been addressed in preparing the Terms of Reference, the number of interlocutory motions during the course of the proceedings is reduced. Secondly, the establishment of the schedule and contents of the proceedings at the outset avoids uncertainty, so that the parties can proceed to develop their respective cases and the arbitrators can concentrate on evaluating those cases. Thirdly, Terms of Reference which clearly define the issues tend to discourage a party from attempting to introduce new issues without the consent of the other party.[23]

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21. *Id.* at Art. 10.
22. *Id.* at Art. 13(1) and (2).
23. *Id.* at Art. 16.

E. PROCEEDINGS PRIOR TO AND AT THE HEARING

Once the Terms of Reference have been filed with the Court, the arbitrators proceed, as quickly as possible and by all appropriate means, to establish the facts of the case.[24] In fulfilling this function, the arbitrators' role is conceptually closer to that of a civil law judge than to his common law counterpart. Arbitrators have an affirmative obligation to seek the truth, rather than to rely passively on the evidence put before them by counsel.[25] With the agreement of the parties, they may dispense with a hearing and decide the case solely on the basis of the filed documents.[26] Although the arbitrators may appoint experts on their own initiative,[27] they usually do so only with the consent of the parties who ultimately pay the experts' fees. At the request of one of the parties or upon their own initiative, the arbitrators may hold hearings,[28] which must be held *in camera* unless the parties consent to a public hearing.[29] The parties themselves are entitled to be present in person or through duly accredited agents, and they may be assisted by advisers.[30]

Since the ICC Rules offer little guidance on the subject of witnesses' testimony, it is imperative that the Terms of Reference deal with this matter specifically. The normal practice is to have witnesses testify orally before the Tribunal. However, the parties may agree to have the testimony submitted in writing. It is also the practice to permit cross-examination of witnesses by counsel for the opposing party. When the testimony of a witness is submitted in written form, it is common practice to permit the opposing party to call the witness before the Tribunal for cross-examination. To save time and money, the Terms of Reference may provide that the examination and cross-examination of a witness shall occur outside the presence of the Arbitral Tribunal. The record of that evidence is later filed with the Tribunal.

The ICC Rules are silent on the questions of discovery and the subpoena of witnesses who are under the opposing party's control. It is customary to deal with these matters in the Terms of Reference. If the Terms of Reference give the arbitrators the right to subpoena witnesses, it may be possible to have the subpoena enforced by the appropriate Court of the place of the arbitration. In the situation where the witness resides outside the place of arbitration, it may be necessary to take the further step of having the Order enforced in the jurisdiction where the witness resides.

With respect to the production of documents, the Tribunal may, upon the request of a party, order the other party to produce them if it is evident that the documents exist and are relevant to the issues under consideration. As in the case of a subpoena, there is a possibility that the

24. *Id.* at Art. 14(1).

25. Remarks of Yves Derains, Secretary General of the ICC Court of Arbitration, ICC Forum, International Commercial Arbitration, 4 April 1978.

26. *Supra* n. 2 at Art. 14(3).

27. *Id.* at Art. 14(2).

28. *Id.* at Art. 15(2).

29. *Id.* at Art. 15(4).

30. *Id.* at Art. 15(3).

Order of the Tribunal could be enforced by an appropriate Court Order if the discovery of documents is dealt with in the Terms of Reference. However, it is unlikely that this step would have to be taken, since the party who refuses to produce a document on order of the Tribunal runs the risk that the Tribunal may draw adverse conclusions from the refusal.

Although not required by the ICC Rules, it is customary for parties to request a stenographic record of the proceedings. The Tribunal can, on its own initiative, call for a record, particularly where it expects that extensive oral evidence will be presented.

Since the ICC Rules do not address the question of oral or written submissions by the parties, these matters should be addressed in the Terms of Reference. The nature and complexity of the issues involved, and the extent of the evidence expected to be given, will determine whether the Tribunal will require written briefs to be filed before the main evidence is heard and whether the Tribunal will require written briefs, oral argument, or both, after the evidence is received.[31] On matters of law, parties normally call expert witnesses and may also file special briefs.

Unlike Court proceedings, ICC arbitration hearings are intended to be conducted on an informal basis. Strict adherence to the rules of evidence is generally not required, unless the rules of procedure set forth in the Terms of Reference dictate otherwise.

Article 13(5) of the ICC Rules provides that, in all cases, the arbitrators shall take account of the provisions of the contract and the relevant trade usage. The reference to "relevant trade usage" may raise interesting legal questions. For example, if the common law rules of evidence apply, it could be argued that the Tribunal cannot consider trade usage or industry practice unless it finds that a clause in the contract is ambiguous.[32]

Awards of the Tribunal must be in writing, signed by a majority of the arbitrators, or by the Chairman if no majority can be obtained.[33] Although not specifically required by the ICC Rules, the reasons for the award should also be stated by the Tribunal. Before signing an award, the arbitrators must submit it to the Court in draft form. As noted above, the Court may require modifications as to the form of the award and, without affecting the arbitrators' liberty of decision, may also draw their attention to points of substance.[34] This review is intended to ensure that the form of the award meets the requirements for enforcement under the laws of the place of arbitration and of the parties' countries. It is not intended that the Court act as a Court of Appeal or that it substitute its own judgment for that of the Tribunal.[35]

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31. In the case in which the author was involved, the Terms of Reference called for pre-hearing briefs, post-hearing briefs and oral arguments. In that case, five days were set aside for oral arguments.

32. This situation arose in the case in which the author was involved, and it was decided, in the interest of saving time, to hear evidence on industry practice so that the evidence would be before the Tribunal in the event that it found that the contract was ambiguous.

33. *Supra* n. 2 at Art. 19.

34. *Supra* n. 12 and accompanying text.

35. *Supra* n. 1.

Once approved by the Court, the award is signed by the arbitrators and deposited with the Secretariat. As soon as the arbitration costs are paid, the Secretariat forwards certified copies of the award to the parties. The award becomes effective when signed and is deemed to have been issued at the place of arbitration, regardless of where the signing actually occurred.[38]

The arbitrators' award fixes the costs of the arbitration and provides which of the parties shall bear the costs, or in what proportion the costs shall be borne by the parties.[37] The costs of the arbitration include the arbitrators' fees and the ICC administrative costs. The latter are fixed by the Court and are based on the amount in dispute in accordance with the scale of administrative expenses and fees set forth in the Schedule attached to the ICC Rules.[38] Appendix A to this paper contains an extract from the Schedule of ICC Arbitration Costs which came into force on March 1, 1980.

If the parties reach a settlement during the course of the proceedings, the settlement is recorded in the form of an arbitral award made with the consent of the parties. A consensual award is signed by the parties and the arbitrators.

In practice, the parties usually comply with the ICC award without judicial challenge. According to the Office of the Secretariat, less than 10% of the awards are the subject of further judicial proceedings. The ICC is anxious to maintain this record and, as a result, willingly provides the successful party with every possible assistance in enforcing the award.[39]

IV. DRAFTING THE ARBITRATION CLAUSE

The minimum requirement of an ICC arbitration clause is a provision stating that disputes will be settled in accordance with the Rules of the International Chamber of Commerce. The standard clause suggested by the ICC reads simply:[40]

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

While this clause obliges the parties to settle disputes through ICC arbitration, it leaves for later resolution a number of matters which counsel should seek to negotiate before the agreement is executed. These matters are discussed below.

A. PLACE OF ARBITRATION

It is desirable to select the place of arbitration in advance since, in cases where the third or sole arbitrator is to be selected by the ICC Court, it will often appoint an individual who resides in the forum country.

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36. *Supra* n. 2 at Art. 22.
37. *Id.* at Art. 20(1).
38. *Supra* n. 20.
39. *Supra* n. 2 at Art. 25.
40. Standard ICC Arbitration Clause, *supra* n. 2.

Another consideration involved in the selection of an arbitration site is the availability of support facilities, interpreters, court reporters and the like.[41] The availability of judicial appeals under the law of the forum should also be taken into consideration in selecting a site for the arbitration, because a party may wish to appeal to the Courts on a question of law or from a Tribunal's interlocutory ruling.

B. THE TRIBUNAL

Should the tribunal be composed of one or three arbitrators? Both sizes have advantages. The single arbitrator involves lower costs, and the proceedings may be shorter, because hearings may be scheduled more easily. On the other hand, a three-arbitrator tribunal permits each party to nominate an arbitrator, who, in turn, nominates the third arbitrator to act as Chairman of the Arbitral Tribunal. Contrary to the popular belief that an arbitrator selected by a party will support his case, the ICC Rules require that an arbitrator must be, and must remain, independent of the parties to the dispute.[42] However, there are advantages in being able to appoint an arbitrator to a three-member tribunal. If a party appoints an arbitrator with experience, intellectual training and background similar to his own, that arbitrator will be more likely to understand the issues and arguments which support his case. Furthermore, that arbitrator may be extremely helpful in explaining the party's position to his fellow arbitrators during their deliberations.

C. APPLICABLE SUBSTANTIVE LAW

One of the most difficult aspects of negotiating an arbitration clause is to achieve a consensus on the substantive law which the tribunal is to apply. Generally, each party will insist on the law of his own country. As a compromise, the law of a third country is often chosen; in many instances, the law of the place of arbitration. In selecting a third country, care should be taken to ensure that that country has a body of law relating to those issues which are likely to arise in an arbitration under the contract. For example, in a contract relating to an oil and gas operation, it would make little sense to select a country which does not have a well-established oil and gas industry.

The parties may choose to have the tribunal decide what substantive law applies. As indicated earlier, in the absence of agreement by the parties as to the applicable law, the arbitrators are required to apply the law designated as the proper law of the contract by the rule of conflict which they deem appropriate.[43]

Of these alternatives, selecting the substantive law of a third country (which could be the law of the place of arbitration) is preferable. This alternative presupposes that the parties are reasonably familiar with the law of the country selected.[44]

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41. In the case in which the author was involved, Court reporters were flown in from the United States.

42. *Supra* n. 4; and Internal Rules of the Court of Arbitration, Sec. 14, reprinted in Appendix II of Rules for the ICC Court of Arbitration, March, 1980.

43. *Supra* n. 19.

44. In one instance with which the author is familiar, the parties, who were from common law jurisdictions, selected the substantive law of a third common law jurisdiction.

D. OTHER CONSIDERATIONS

1. The Language of The Arbitration

The language in which the arbitration is to be conducted should not be overlooked. No language problem should arise if the agreement is in English and the place of arbitration is an English-speaking country. However, if one of the parties does not communicate in English, or if the place of arbitration is a non-English-speaking country, difficulties may arise.

2. Procedural Rules to be Applied

As in the case of the applicable substantive law, each party will want the proceedings before the Tribunal to be conducted in accordance with the rules of procedure with which he is most familiar. A party in a common law jurisdiction will probably wish to ensure full discovery and production of documents. These procedures may be unknown in civil jurisdictions. If agreement can be reached in advance with respect to a compromise set of procedural rules with which both parties are reasonably familiar, time-consuming procedural wrangles may be avoided.

V. CONCLUSION

As evidenced by the growing number of cases submitted each year, particularly in oil and gas matters, the ICC Court of Arbitration is one of the most experienced and accepted international arbitration institutions available. It is constantly seeking to improve the existing arbitral mechanism and has initiated programs to make businessmen and lawyers more aware of the virtues of the ICC system and the procedures involved. The Court is also available to offer advice to anyone contemplating ICC arbitration, including assistance in the drafting of arbitration clauses.

APPENDIX A
SCHEDULE OF ARBITRATION COSTS
EFFECTIVE MARCH 1, 1980
SCALE OF ADMINISTRATIVE EXPENSES AND FEES

To calculate the administrative expenses and the fee, the amounts obtained by applying the relevant percentage to each successive portion of the sum in dispute are added together.

(a) Administrative expenses

Sum in Dispute			Administrative Expenses
Under	50,000 (in US dollars)		4.00% (min. $1,000)
From	50,001 to	100,000	3.00%
From	100,001 to	500,000	1.50%
From	500,001 to	1,000,000	1.00%
From	1,100,001 to	2,000,000	0.50%
From	2,000,001 to	5,000,000	0.20%
From	5,000,001 to	10,000,000	0.10%
From	10,000,001 to	50,000,000	0.05%
From	50,000,001 to	100,000,000	0.02%
Over	100,000,000		0.01%

(b) Arbitrator's fees

Sum in Dispute			Fees	
			Minimum	Maximum
Under	50,000 (in US dollars)			1,000
From	50,001 to	100,000	1.50%	6.00%
From	100,001 to	500,000	0.80%	3.00%
From	500,001 to	1,000,000	0.50%	2.00%
From	1,000,001 to	2,000,000	0.30%	1.50%
From	2,000,001 to	5,000,000	0.20%	0.60%
From	5,000,001 to	10,000,000	0.10%	0.30%
From	10,000,001 to	50,000,000	0.05%	0.15%
From	50,000,001 to	100,000,000	0.02%	0.10%
Over	100,000,000		0.01%	0.05%