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The 2012 ICC Rules: two years on

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Het nieuwe ICC Arbitragereglement trad op 1 januari 2012 in werking. Het Reglement voorziet in verschillende wijzigingen, zoals bepalingen aangaande arbitrage tussen meerdere partijen en op basis van meerdere contracten, toevoeging van additionele partijen, samenvoeging van arbitrageprocedures, de urgentiearbiter en efficiënt zaakmanagement.

In dit artikel bespreken we hoe het ICC Arbitrage Hof en het Secretariaat een aantal van deze nieuw geïntroduceerde artikelen heeft toegepast sinds 1 januari 2012, in het bijzonder met betrekking tot meerdere partijen en meerdere contracten, samenvoeging van arbitrageprocedures en de urgentiearbiter. We bespreken ook enkele van onze eigen ervaringen, bijvoorbeeld met betrekking tot de verdeling van de arbitragekosten bij het intrekken van alle vorderingen alsook met betrekking tot het vaststellen van afzonderlijke kostenvoorschotten.

I. INTRODUCTION

1. The new ICC Rules took effect on 1 January 2012 (the '2012 ICC Rules'). They provide for various changes, including among others, provisions on multi-party and multi-contract arbitration (Articles 6, 8 and 9 of the 2012 ICC Rules), joinder of a party (Article 7 of the 2012 ICC Rules), consolidation (Article 10 of the 2012 ICC Rules), the emergency arbitrator (Article 29 of the 2012 ICC Rules and Appendix No. V), and efficient case management (various articles including Articles 22, 24 and Appendix IV of the 2012 ICC Rules).

2. In this article, we will discuss how the ICC Court and Secretariat have applied certain of those newly introduced articles since 1 January 2012, in particular with respect to multiple parties and multiple contracts, joinder, and the emergency arbitrator. We will also address some of our own experiences, e.g., with respect to withdrawal of matters and allocation of costs (Article 37(6) of the 2012 ICC Rules) as well as the fixing of separate advances on costs (Article 36(3) of the 2012 ICC Rules).

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II. MULTIPLE PARTIES / MULTIPLE CONTRACTS

3. The 2012 ICC Rules include a whole new section on multi-party and/or multi-contract disputes. Under the previous version of the Rules (the '1998 ICC Rules') this type of disputes were very sparingly regulated. Article 10 of the 1998 ICC Rules, dealt with solely one specific aspect of multiple party disputes, i.e., constitution of the arbitral tribunal in cases where there are more than two parties and the dispute is to be referred to three arbitrators – now addressed in Article 12(6) of the 2012 ICC Rules.[2] Furthermore, consolidation of arbitrations used to be briefly touched upon in former Article 4(6).

4. As a result of the modern ways of structuring corporations and business transactions, the ICC has witnessed a dramatic increase in the number of this type of disputes being submitted to it in the last decades.[3] Yet the consensual nature of arbitration which conditions the tribunal's jurisdiction upon a valid agreement to arbitrate with each and all parties to the dispute may constitute an obstacle to the global resolution of a dispute involving multiple parties and/or multiple contracts. The rising number of this kind of cases had therefore led to the suitability of arbitration being questioned, in respect of disputes involving procedural complexities due to the 'multiple factor.'

5. While the ICC Court, over time, developed its own policy to deal with the 'multiple factor'[4] many users of the ICC Rules appeared to be unaware of this policy. To address this lack of transparency, the 2012 ICC Rules now explicitly deal with multiple parties and multiple contracts. By adopting this approach, the ICC appears to have contributed to a more generalized trend amongst other arbitration institutions to make available to their users comprehensive procedures for complex disputes both in terms of parties and con-

2 The introduction of this Article was the direct consequence of the well-known Dutco case in which the French Supreme Court held that, as a matter of public policy, the principle of the equality of the parties in appointing arbitrators can be waived only after the dispute has arisen (*Siemens and others v Dutco*, 7 January 1992, Revue de l'arbitrage (1992) (Cour de Cassation 1ère civ) at pages 470-472).

3 In 2012, 233 cases out of 759 involved more than two parties. Although the average numbers of parties in these 233 cases was four, eight cases involved more than ten parties and one case involved twenty five parties (2012 Statistical Report, ICC International Court of Arbitration Bulletin Vol. 24 No. 1, p. 10). Since over a decade, nearly a third of the cases submitted to the ICC involved more than two parties (Simon Greenberg, Jose Ricardo Feris and Christian Albanesi, *Consolidation, Joinder, Cross-claims, Multiparty and Multicontract Arbitrations: Recent ICC Experience*, Dossier of the ICC Institute of World Business Law: Multiparty Arbitration, 2010, 161). Looking back to 20 years ago, multiparty arbitrations only represented a fifth of the overall ICC caseload (Anne Marie Whitesell and Eduardo Silva Romero, *Multiparty and Multicontract Arbitration: Recent ICC Experience*D, Special Supplement 2003: Complex Arbitrations: Perspectives on their Procedural Implications, 2003, p. 7).

4 Bernardo M. Cremades, *Multi-Party Arbitration in the New ICC Rules*, Spain Arbitration Review, 2012, Volume 2012, Issue 14, p. 26.; Anne Marie Whitesell and Eduardo Silva Romero, op. cit., p. 10-11.

tracts involved. For example, the Hong Kong International Arbitration Centre ('HKIAC') has recently released a revised version of its Administered Arbitration Rules which include provisions analogous to these of the 2012 ICC Rules in relation to the joinder of additional parties (Article 27 of the 2013 HKIAC Rules), consolidation of arbitrations (Article 28 of the 2013 HKIAC Rules) and arbitration under multiple contracts (Article 29 of the 2013 HKIAC Rules). In the same vein, the most recent amendments to the Swiss Rules of International Arbitration, the CEPANI Rules of Arbitration, and the WIPO Arbitration Rules included expansions and/or revisions of their provisions on multi-party disputes (including joinder and consolidation).

6. The following articles of the 2012 ICC Rules attempt to fully tackle difficulties inherent in multi-party/multi-contract disputes. Articles 7, 8, 9 and 10 respectively deal with joinder of additional parties, claims between multiple parties, multiple contracts, and consolidation of arbitrations. These new rules do not remove the need for consent to arbitrate. Rather, their aim is to procedurally facilitate mechanisms which parties can take into account when considering contractual arrangements involving multiple parties and/or multiple contracts, and to make the practice of the ICC Court generally accessible. By consenting to ICC arbitration, parties now agree to these mechanisms to apply. Whether these mechanisms work in practice is examined below.

7. **Joinder of Additional Parties and Claims between Multiple Parties (Articles 7 and 8).** Under the previous versions of the ICC Rules, claimants had the monopoly on the question of who would be party to an arbitration. The inability to join a party not initially listed by the claimant had been subject to criticisms on the basis of both the alleged disadvantage to the respondent(s), and the lack of efficiency and certainty resulting from the need of having more than one set of proceedings to resolve one single dispute.

8. Although the ICC Court had shown flexibility in allowing requests from Respondents that certain signatories are joined to freshly started arbitrations under the 1998 ICC Rules, there were no formal provisions in the Rules dealing with this situation and as a result many users were not aware that the possibility existed.[5] The above-identified issues coupled with the rise of multi-polar disputes lead to the current Article 7 being inserted in the 2012 ICC Rules. Article 7 provides that an existing party to an arbitration may request that 'an additional party' be joined to the arbitration after a Request for Arbitration has been filed. Given that the request needs to be made by an existing party, an 'additional party' may not join an existing arbitration on its own initiative. Further, as the wording of Article 7 indicates, joinder is not available in respect of *third parties* but only in respect of parties to an arbitration agreement. This follows from the reference in Article 7 to Article 6; the article that provides for a *prima facie* review by the ICC Court of jurisdictional objections raised by a party.

9. Indeed, pursuant to Article 6(4)(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 ICC Court is *prima facie* satisfied that '*an arbitration agreement under the Rules that binds them all may exist.*'

10. In addition, a joinder is conditioned upon the stage at which the request is made and the existence of a claim against the additional party. Accordingly, the party requesting the joinder needs to set out in its request the claim(s) that is (are) being made against the additional party (Article 7(2)(c)). The request is to be made early enough so the additional party's rights in relation to the constitution of the tribunal are preserved. More specifically, Article 7 provides that '*[n]o additional party may be joined after the confirmation or appointment of any arbitrator, unless all parties, including the additional party, otherwise agree.*' This approach is consistent with the policy that the ICC Court had developed under its previous Rules, although Article 6(4)(i) no longer explicitly requires that the party to be joined is a signatory to the arbitration agreement.[6] If joined, the additional party has in turn the right to make claims against any other party in accordance with Article 8.

11. Article 8 confirms that in an arbitration with multiple parties – whether as a result of the joinder of an additional party or not – '*claims may be made by any party against any other party.*' Like Article 7, Article 8 further makes any claim made pursuant to it, including claims between claimants and claims between respondents, subject to the rules regarding the ICC Court's *prima facie* review and multiple contract disputes, as well as general conditions relating to claims or counterclaims (e.g., information to be provided in the Request or in the Answer).

12. When Article 7 of the 2012 ICC Rules was being drafted, certain practitioners expressed the fear that parties who wanted to delay the proceedings would abuse the new provision. During the first year, however, the number of requests for joinder remained limited and actually decreased compared to 2011. Thus, the inclusion of a provision on joinder has not led to a significant number of unmerited attempts to join an additional party solely to delay or obstruct proceedings. To the contrary, the clear text of Article 7 may in fact have helped parties in taking an informed decision on whether or not to file a request for joinder.

13. **Multiple contracts (Article 9).** Article 9 of the 2012 ICC Rules covers what has become a very common si-

5 Bernardo M. Cremades, *Multi-Party Arbitration in the New ICC Rules*, Spain Arbitration Review, 2012, Volume 2012, Issue 14, p. 26.; Anne Marie Whitesell and Eduardo Silva Romero, op. cit., p. 10-11.

6 Anne Marie Whitesell and Eduardo Silva Romero, op. cit., p. 12.

tuation, i.e., claims arising out of more than one contract: '*[s]ubject to the provisions of Article 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.*' Article 9 therefore applies both in circumstances where there are separate contracts but a single arbitration clause; and where there are separate contracts and separate arbitration clauses. A claimant seeking to commence arbitral proceedings pursuant to two separate arbitration clauses is required to indicate which claim is made under which arbitration agreement in accordance with 4(3)(f) of the 2012 ICC Rules. If a party contests that all claims can be arbitrated in one proceeding, this question will be subject to the *prima facie* review procedure of Article 6. The criteria relevant to the ICC Court's decision include the requirement that the arbitration agreements under which the claims are made are compatible and the requirement that '*all parties to the arbitration may have agreed that those claims can be determined in a single arbitration*' (Article 6(4)(ii) of the 2012 ICC Rules).

14. Under the 1998 ICC Rules, the ICC Court would allow multiple contract arbitrations to proceed if the arbitration agreements were compatible; the contracts had been signed by the same parties; and related to the same economic transaction. Whereas the first criterion is explicitly mentioned in Article 6(4)(ii), the last two criteria are not included in the wording. It is, however, safe to assume that the ICC Court has not altered its policy overnight, and that arbitrations between multiple parties on the basis of multiple contracts that have not all been signed by the same parties, will only go forward in specific circumstances.

15. In respect of the first requirement, compatibility, whilst all the elements of the arbitration clauses are relevant to this question, the seat of the arbitration, the number of arbitrators and the method of appointing arbitrators are of particular importance. In cases where there is a discrepancy relating to any of these elements, the parties will need to arbitrate the claims under each contract separately unless there is subsequent agreement by the parties to rectify the discrepancy between the arbitration clauses.[7] The ICC Court is generally less stringent in its *prima facie* review if the incompatibility relates to the language of the proceedings or the applicable law.[8] Secondly, in relation to the question as to whether the parties agreed that the entirety of the claims can be arbitrated in a single reference, for the purpose of the *prima facie* review, it is generally sufficient to make a credible assertion that an implied agreement to this effect exists. It will generally not be sufficient though to assert that the arbitration clauses are identical; generally other elements will have to be invoked to support the parties' intention to arbitrate under more than one contract in a single arbitration.[9] If the ICC Court is satisfied that there may be a *prima facie* case for all the claims to be resolved in one single reference, the case will proceed as such, although as this question is a question of jurisdiction, the arbitral tribunal will take the final decision, in accordance with Article 6(5). This rule is in line with the principle of Kompetenz-Kompetenz enshrined in Article 6(3) and recognized by many national arbitration laws.

16. In 2012, the ICC Court took significantly less Article 6 decisions than under the 1998 Rules: only 25% of the cases in which there was a jurisdictional objection were subjected to a *prima facie* review by the ICC Court pursuant to Article 6(4) of the 2012 ICC Rules.[10] The vast majority of jurisdictional objections were thus directly transmitted to the Arbitral Tribunal for a decision, thereby saving a significant amount of time at the outset of the arbitral proceedings.

17. There appear to have been several cases where multiple contracts presented the ICC Court with particular issues, such as cases where the clauses included in the various contracts were incompatible for example because one of the contracts invoked referred to ICC arbitration, whereas the other contracts referred to other institutions and/or national jurisdictions. Other cases involved claims based on multiple contracts between identical parties, with claims relating to entirely different business transactions or construction projects.

18. In those cases, where there was serious doubt that '*all parties to the arbitration may have agreed that those claims can be determined together in a single arbitration,*' pursuant to its new policy, the ICC Secretariat would get back to the parties before submitting the matter to the ICC Court, asking them to indicate with respect to which contract they would want to continue the arbitration, should the ICC Court fail to accept that all contracts be dealt with in one single arbitration.

19. Although the ICC Court and Secretariat used to effectively handle multiple contract issues through the *prima facie* powers of the ICC Court under the old Article 6(2), the

7 See for example *Société Empresa de Telecomunicaciones de Cuba SA v. SA Telefonica Antillana et SNC Banco Nacional de Commercio Exterior*), where the Paris Court of Appeal annulled an award in which the arbitral tribunal had held it had jurisdiction to decide on two related contracts, one of which contained an arbitration clause having Paris as the place of arbitration, the other referring to Madrid. Mathieu de Boisséson, Note 16 November, 2006, Cour d'Appel de Paris (1re Ch. C) (Revue de l'Arbitrage, Volume 2008, p. 112-115.

8 Indeed, it may be possible for the Arbitral Tribunal to apply different laws to different contracts. As regards language, in practice, the Arbitral Tribunal and the parties often find a practical solution to work around these issues.

9 This was among others a concern of FIDIC where the contracts between the employer and the contractor on the one hand, and the subcontractor and contractor on the other hand, often include identical clauses. Nevertheless, it is rare that employers intend to arbitrate their claims against the contractor with both contractor and sub-contractor.

10 There are no reasons to assume that this percentage would have been higher in 2013. Indeed, following established internal proceedings, Counsel at the ICC Secretariat only refer potentially problematic cases to the Secretary-General, who, in turn, only refers those cases to the ICC Court where there are serious reasons to doubt that an ICC arbitration clause exists, that a party is bound by the clause, or that all claims can be decided together in a single arbitration.

rules now codified in Article 9 no doubt add clarity and certainty to the parties. They also attenuate the risk of costs being incurred in relation to procedural issues.

20. Indeed, under other sets of Rules, which do not contain a provision akin to Article 9, a party may try to take advantage of the lack of rule pertaining to multiple contract disputes for tactical purposes. In a recent matter we were confronted with respondents who raised jurisdictional objections on the basis of the absence of an express agreement in writing that claims made pursuant to five separate contracts could be arbitrated together in a single arbitration. According to the respondents, the claims arising out of each contract would have to be arbitrated in five separate sets of proceedings, notwithstanding the fact that there were multiple technical and commercial circumstances that suggested that the parties had agreed to a single arbitration for the resolution of claims arising out of the five contracts. The contracts not only included identical arbitration clauses, but the causes of actions were identical and all based on a single set of facts arising out of a single business transaction. Had Article 9 applied to this arbitration, the respondents would probably not have taken this position, and the parties could have saved significant costs.

21. **Consolidation of Arbitrations (Article 10).** As part of the 2011 review, former Article 4(6) has been substantially revisited and turned into a whole new provision. Article 10 of the 2012 ICC Rules expressly allows a party to make a request to the ICC Court for the consolidation of two or more arbitrations pending under the Rules into a single arbitration (i.e., the arbitration that commenced first, unless otherwise agreed by the parties). The applicant needs to demonstrate that one of the following conditions applies:

'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'

22. The above pre-requisites are in line with international arbitration principles deriving from the consensual nature of arbitration and the spirit of the 2012 ICC Rules. With respect to a) above, an agreement to consolidate is logically one of the circumstances where consolidation may be appropriate, whether or not the applicable arbitration clauses provide for this or not. As for sub-Article b) above, its wording mirrors the requirement of Article 6(4)(i) that there is '*an arbitration agreement under the Rules that binds [all the parties].*' Finally, the pre-requisite described at c) reflects the conditions provided in Article 6(4)(ii).

23. The requirement that the claims in the arbitrations arise out of the same legal relationship already existed under old Article 4(6), which is why it was maintained. Although the criterion is not mentioned as such in the current Article 6(4)(ii), it is in fact a criterion that was used by the ICC Court under the 1998 Rules (the 'same economic transaction' requirement) and is continued to be used to determine whether the parties have indeed agreed that claims arising from multiple contracts '*can be determined together in a single arbitration.*' The detailed wording of Article 10 thus intentionally matches the jurisdictional requirements of Article 6; the rationale being that parties may not achieve through consolidation what they may not be able to achieve in any other multiple party and/or multiple contract situation.

24. It is important to note that if the ICC Court proceeds with consolidation there is no further decision by the Arbitral Tribunal. In light of the finality of the ICC Court's consolidation decisions, as opposed to its *prima facie* decisions on jurisdiction, it is to be expected that the threshold for obtaining consolidation will be higher.

25. If it is established that one of the above prerequisites is met, the ICC Court may proceed with the consolidation of the arbitrations if it finds it appropriate in light of any circumstances it considers to be relevant.

26. Amongst these, the respective stage of the arbitrations sought to be consolidated are likely to carry significant weight. Former Article 4(6) provided that after the Terms of Reference had been signed or approved by the ICC Court, claims set out in the request for arbitration submitted in the second proceeding could not be included in a pending arbitration unless the tribunal in the existing arbitration had authorized it pursuant to Article 19 of the 1998 ICC Rules (currently Article 23(4) of the 2012 ICC Rules). However, in the ICC Court's general practice under the 1998 ICC Rules, the finalization of the Terms of Reference was deemed as a cut-off point rather than the sole criterion for consolidating arbitrations.

27. The 2012 ICC Rules more accurately reflect the criteria that were in fact used by the ICC Court and which included, '*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 may be.*' Whilst reference to the Terms of Reference is no longer expressly included, whether these have been finalized would appear to remain relevant, not least as a result of the application of Article 23(4). Nevertheless, in the spirit of Article 12(6), which covers the constitution of a three-arbitrator tribunal in multi-party disputes, particular emphasis is made in the rules on the parties' rights in relation to arbitrator appointment and the constitution of the tribunal more generally. This particular juncture in the proceedings is to be kept in mind by parties who consider making a request for consolidation; if possible a request

should be made before the co-arbitrators have been confirmed or appointed to enhance the prospects of the request being granted.

28. It appears that the clarifications brought about by the 2012 ICC Rules have helped the users in better understanding how to obtain consolidation since although the overall number of requests for consolidation did not change much between 2011 and 2012, the number of requests that was approved in 2012 did increase substantially.

III. EMERGENCY ARBITRATOR

29. Article 29 introduces the possibility for a party that needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal to make an application for such measures in accordance with the Emergency Arbitrator Rules contained in Appendix 5 of the Rules ('EA Application'). The Emergency Arbitrator procedure is however only available in relation to agreements signed after 1 January 2012.

30. Provided that the emergency threshold is met and that – if not yet received at the time the application was made – a Request for Arbitration is received by the ICC Secretariat from the applicant within 10 days of the receipt of the application, an Emergency Arbitrator will be appointed within '*a short a time as possible, normally within two days*' from the receipt of the Application by the Secretariat (Article 2 of Appendix 5). From the date the file was transmitted to him/her, the Emergency Arbitrator has then 15 days to issue his/her decision which takes the form of an order (as opposed to an award) and which is not binding on the arbitral tribunal.

31. As much as its introduction in the 2012 ICC Rules prompted much discussion amongst the international arbitration community, the Emergency Arbitrator procedure was not a novel idea at that time. A similar mechanism was already available from the ICC in the form of the Pre-Arbitral Referee. Furthermore, at the time the 2012 ICC Rules came into force, emergency arbitrator procedures had been introduced in and tested under the Arbitration Rules of the Stockholm Chamber of Commerce (in force on 1 January 2010) and the Arbitration Rules of the Singapore International Arbitration Centre (in force on 1 July 2010). Following the entry into force of the 2012 ICC Rules, a procedure analogous to the one contained in Appendix 5 has been included in other arbitration rules. These include the most recent versions of the Swiss Rules of International Arbitration, the Administered Arbitration Rules of the Hong Kong International Arbitration Centre, and the WIPO Arbitration Rules, which were launched after the entry into force of the 2012 ICC Rules.[11]

32. In 2012 there were two applications for the appointment of an emergency arbitrator, followed by six further appointments in 2013.[12] Amongst the first two EA Applications, one was accepted by the ICC Court, with the Emergency Arbitrator being appointed the day after the application was received by the ICC Secretariat, and an order rendered within 12 days of the transmission of the file to the Emergency Arbitrator. The Emergency Arbitrator however refused to grant the relief sought which was an order for payment of the amount in dispute into an escrow account. The other case involved an application for an anti-suit injunction and the EA Application was rejected by the ICC Court on the basis that the agreement containing the arbitration clause had not been entered into after 1 January 2012, which is a condition under Article 29(6) of the 2012 ICC Rules.

33. The relatively low number of applications submitted to the ICC Court in 2012 and 2013 appears to be in line with statistics of the SCC and SIAC for the few years following the introduction of an Emergency Arbitrator procedure in their respective rules in 2010.[13] After three years of having made this procedure available, SIAC is currently experiencing a clear increase in the use of the Emergency Arbitrator procedure. SIAC has recorded no less than 19 applications in 2013. The rapidly increasing use of the Emergency Arbitrator provision under the SIAC Rules may relate to users' satisfaction of the process or the nature and availability of interim relief within the court systems in the region. Whether the ICC will experience a similar trend is unclear at this stage. It is still early days and only future statistics will demonstrate whether ICC users will make further use of Article 29 going forward.

34. The current relatively limited number of applications for an ICC emergency arbitrator is possibly caused by the requirement that the arbitration agreement was entered into after 1 January 2012. It may also find an explanation in the uncertainty (justified or not) surrounding the enforcement of an Emergency Arbitrator order and the significant fee payable upfront by an applicant (Art. 7 of Appendix 5). In addition, the introduction of this facility does not impact other routes to seek interim or urgent relief, notably the option to request interim relief from any court of competent jurisdiction or from the arbitral tribunal. These alternatives might be satisfactory in the majority of cases hence the relatively limited use of the Emergency Arbitrator provisions.

11 The recently released New LCIA Rules 2014 which are due to come into force on 1 October 2014 also contemplate the possibility of having an emergency arbitrator in Article 9B.

12 Statistical Report, ICC International Court of Arbitration Bulletin Vol. 24 No. 1, p. 15; Statistical Report, ICC International Court of Arbitration Bulletin Vol. 25 No.1, p.15.

13 SCC has reported four applications in 2010, two in 2011 two in 2012, and one in 2013. As for SIAC, the Centre has recorded two applications in 2010, two in 2011, seven in 2012, 19 in 2013, and 4 as at 6 March 2014 with all these 34 applications having been accepted and 34 emergency arbitrators having being appointed so far.

IV. MISCELLANEOUS

1. *Withdrawal*

35. Unlike under the 1998 ICC Rules, the 2012 ICC Rules now address withdrawal of claims, albeit sparingly. Although the possibility of regulating claim withdrawal more fully has been explored by the ICC Rules Task Force, the 2012 ICC Rules do not set out the legal consequences of the withdrawal of all claims except from a costs point of view. The only reference to claim withdrawal in the 2012 ICC Rules appears in Article 37(6), where it is now explicitly provided that in such case, the ICC Court shall fix the fees and expenses of the arbitrators as well as the ICC's administrative costs. Article 37(6) also addresses the situation that the parties have not agreed on the allocation of the costs of the arbitration.

36. It may be that the parties, although they achieved a settlement of their main dispute, have not been able or have forgotten to address this issue in the terms recording such settlement. The question of the allocation of the arbitration costs may also be undecided if only one party (usually the claimant) wishes to withdraw in a case where the respondent has no counterclaims and does not object to the withdrawal as such.

37. For those situations, Article 37(6) explicitly provides that *'if the parties have not agreed upon the allocation of the costs of the arbitration or other relevant issues with respect to costs, such matters shall be decided by the arbitral tribunal. If the arbitral tribunal has not been constituted at the time of such withdrawal or termination, any party may request the Court to proceed with the constitution of the arbitral tribunal in accordance with the Rules so that the arbitral tribunal may make decisions as to costs.'*

38. In a recent matter, a claimant decided to withdraw its claims after attempts to conduct a preliminary seizure on its debtor's assets failed for lack of assets. The proceedings were advanced to the stage where a sole arbitrator had been appointed and the claimant had paid the provisional advance on costs sufficient to cover the costs of the proceedings until the drawing up of the Terms of Reference. The respondent had no counterclaim and had refused to pay its share of the advance on costs.

39. The claimant informed the ICC Secretariat of its intention to withdraw its claims, to which the respondent had no objections. The letter of the ICC Secretariat in which it took note of the claimant's intention to withdraw the matter indicated that in case the parties would agree on the withdrawal but not on the allocation of the costs of the arbitration or other relevant issues of costs, such issues could be decided by the Sole Arbitrator. The respondent subsequently agreed to the withdrawal yet requested that the Sole Arbitrator awarded it its legal costs, for which its counsel provided a rather elevated estimate, allegedly in accordance with the practice of the local courts in the respondent's country. The claimant objected to the respondent's claim being dealt with out of the advance payment for the establishment of the Terms of Reference and insisted that before deciding on the costs, the Sole Arbitrator would have to prepare Terms of Reference. It also indicated that it did not wish to pay any additional advances so the Sole Arbitrator could decide the respondent's claim for costs.

40. The ICC Court subsequently decided to reconsider the advance on costs and base it on the amount of legal costs now claimed by the respondent. It invited both parties to pay their share, or to substitute for the other side. As both parties refused to pay the advance, the ICC Court ultimately considered the respondent's claim for costs withdrawn pursuant to Article 36 (6) of the 2012 ICC Rules. It then fixed the fees of the arbitrator and the administrative fees and returned the remainder of the advance to the claimant.

2. *Fixing of separate advances*

41. Article 36 of the 2012 ICC Rules effectively consists of an update of the old Article 30 on 'Advance to Cover the Costs of the Arbitration'. The structure of the revised version of the Article adds clarity and its content reflects changes to other parts in the Rules, including these concerning multi-party disputes. Article 36(4) specifically deals with the advance on costs in relation to claims made under Article 7 ('Joinder of Additional Parties') and Article 8 ('Claims Between Multiple Parties').

42. In substance, the rule on the possibility for the ICC Court to fix separate advances on costs for claims and counterclaims remains unchanged, and if separate advances on costs have been fixed, each party is under the obligation to pay the advance on costs corresponding to its claims, failing which the Secretary General may direct the tribunal to suspend its work and – if the failure is not cured within a set time limit – its claims are considered withdrawn.

43. With respect to the possibility to fix separate advances on costs, the ICC Court has generally followed a restrictive policy and has been reluctant to fix separate advances on costs at a too early stage of the proceedings, for example before a party had actually refused to pay its share of the global advance on costs, or where a claimant appeared to be requesting the fixing of separate advances solely for tactical reasons. Because of the regressive nature of the scales on the basis of which the advance on costs is calculated, the fixing of separate advances tends to lead to higher aggregate arbitration costs, something that the ICC Court tried to avoid.

44. The ICC's practice regarding the fixing of separate advances on costs recently came under scrutiny, when the Paris Court of Appeal annulled an ICC award in a case where the respondent, which had been put into liquidation by a Spanish Court, saw its counterclaim withdrawn when it

failed to pay the separate advance on costs that had been fixed in relation thereto.[14]

45. The Paris Court of Appeal considered that the ICC Court's decision to consider the claims of the respondent withdrawn when it failed to pay the separate advance on costs, was excessive, and in reality deprived the respondent of the possibility to have its claims heard, given that the company was placed in liquidation. It considered this a violation of Article 6 ECHR.

46. The French Supreme Court annulled the decision of the Paris Court of Appeal and has now remanded it to the Court of Appeal in Versailles. According to the Supreme Court, the Paris Court of Appeal should have considered whether or not the claims of the respondent were 'indissociable' of the principal claims, something that it failed to do.[15] The French Supreme Court thus appeared to agree with the main conclusion of the Paris Court of Appeal that the withdrawal deprived the respondent of the possibility to have its claim heard.

47. In another recent matter, a claimant requested the fixing of separate advances on cost when the respondent failed to pay its share of the advance on costs, allegedly for lack of funds. The respondent invoked the recent French Supreme Court decision and submitted evidence to support the lack of funds. The claimant insisted on the fixing of separate advances and pointed out that the respondent was not officially in liquidation or a similar situation.

48. The ICC Court decided to fix separate advances on costs. Although the Court never provides reasons for its decisions, it appears from the above that the ICC Court has not changed its practice regarding the fixing of separate advances, at least not with respect to those parties that are not formally in liquidation.

V. CONCLUSION

The transition from the 1998 ICC Rules to the 2012 ICC Rules appears to take place without any major hick-ups. To date no major issues have been identified, and plenty of other arbitral institutions have copied the ICC's revisions, in particular with respect to multi-party and multi-contract arbitrations. This is not surprising given that the 2012 ICC Rules are a balanced and well thought out set of rules.

It is thus to be expected that, with the assistance of the ICC Secretariat and ICC Court, the 2012 ICC Rules and the manner in which they will be applied, will permit the ICC to remain one of the major players in international commercial arbitration.

14 Cour d'appel de Paris, 17 November 2011, Pôle 1, Ch. 1. RG n° 09/24158. Société LICENSING PROJECTS c/ Société PIRELLI & C. SPA.

15 Cour de Cassation, 28 March 2013, Civ., Ch. 1, RG n° 11/27770. Société PIRELLI & C. SPA. c/ Société LICENSING PROJECTS.