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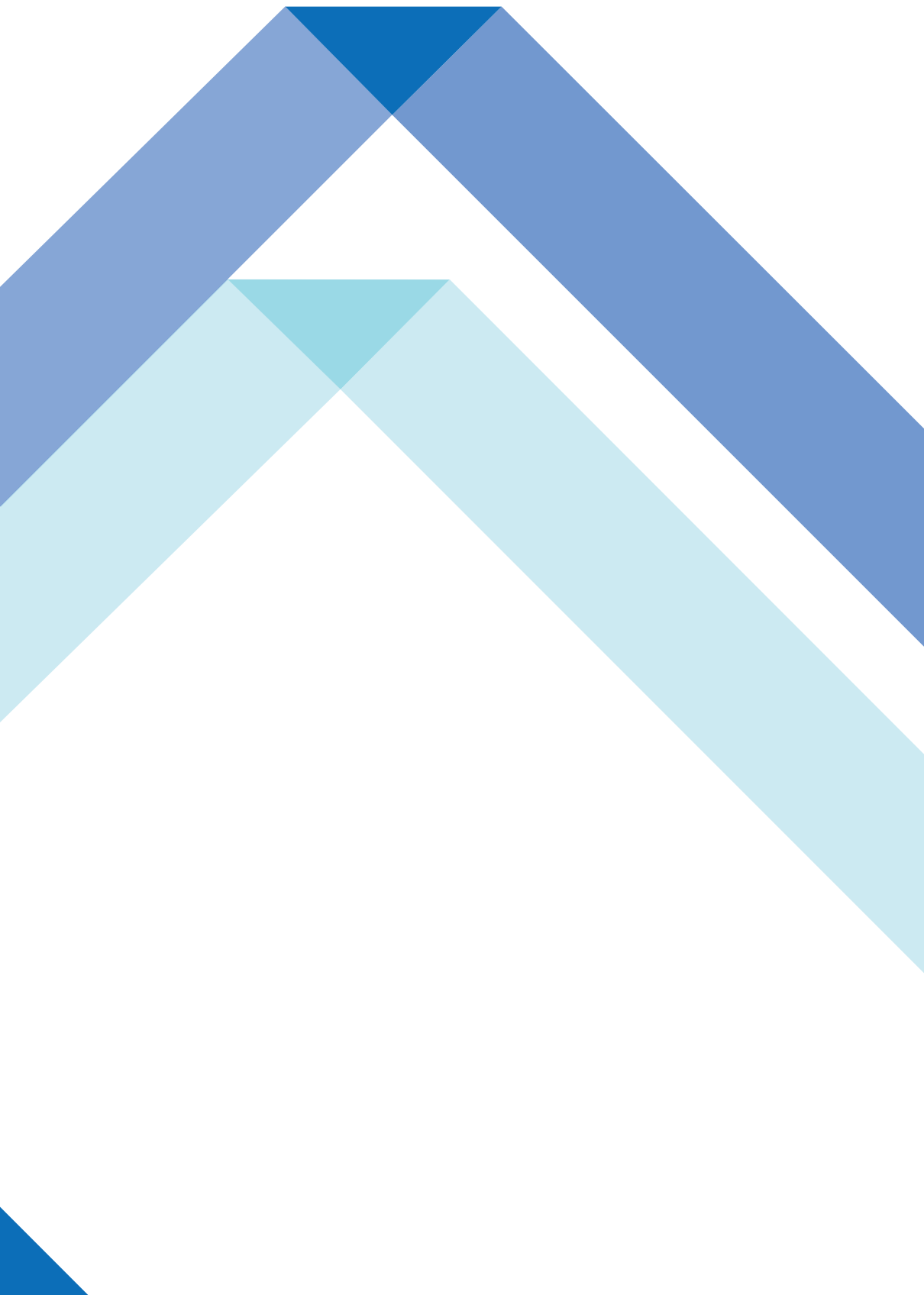
THE SECRETARIAT'S GUIDE TO ICC ARBITRATION

A Practical Commentary on the 2012 ICC Rules of Arbitration
from the Secretariat of the ICC International Court of Arbitration

With the assistance of Benjamin Moss

Foreword by John Beechey
Preface by Peter Wolrich

ICC INTERNATIONAL CHAMBER OF COMMERCE



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Foreword

The latest iteration of the ICC Rules of Arbitration—the 2012 Rules—is the result of one of the most extensive, consultative exercises ever undertaken by the ICC. A decision to review and revise the highly regarded 1998 Rules was taken by the ICC Commission on Arbitration in October 2008. In the months that followed, members of the Commission and of the Task Force set up by the Commission, together with members of the international arbitration community at large, submitted a very considerable number of comments and proposals for changes to the Drafting Sub-Committee tasked with the production of a draft of the new Rules.

Commission Chairman Peter Wolrich, who, with Michael Bühler and Laurie Craig, chaired the Drafting Sub-Committee, explains the genesis of the new Rules in some detail in his preface to this book. It is right, however, that I, too, acknowledge the contribution to the successful conclusion of this exercise of so many individuals, including in-house counsel, whose views were widely canvassed, and the members of the parallel Task Force considering the new Rules from the point of view of state parties under the able chairmanship of Eduardo Silva Romero and Peter Goldsmith. Such comprehensive consultations and the changes resulting from them reflected in the new Rules demonstrate the extent to which the ICC has taken account of the views of users of its Rules.

The 2012 Rules remain true to the drafting ethos of previous editions of the Rules. Nothing has been changed for the sake of change. Such changes and innovations as have been made reflect the dramatic evolution in the nature and scope of the Court's user base and practice in the fourteen years since the promulgation of the 1998 Rules, not least the explosion in the numbers of multiparty disputes (particularly from Latin America), the all-pervasive use of electronic media and means of communication, and increasing pressure on arbitrators and institutions alike to ensure that time and cost constraints are respected.

User demands included assurances as to the availability of arbitrators; early clarification of the nature and basis of claims; the ability to call upon an emergency arbitrator procedure; and more certainty as to when an award might be expected after the conclusion of a hearing and the filing of post-hearing briefs. In large part, these demands have been met in the new Articles 4(3), subparagraphs (c) and (d); 11(2); 29; and 27, subparagraph (b). Multi-party disputes are the subject of Articles 7–10 of the 2012 Rules, a group of provisions that constitute one of the principal innovations of the new Rules.

Traditionally the ICC has laid, and continues to lay, great store upon the ability of the parties to ICC arbitration to agree upon substantial elements of the procedure applicable to "their" arbitration and their expectation that such agreements will be respected. In turn, it is to be hoped that parties will take full advantage of the opportunity to play an active part in the shaping of the arbitral procedure as Article 24 and, specifically, Article 24(4), of the new Rules invites them to do. The importance of this element of direct party involvement cannot be overstated.

The Guide, which takes the reader through the 2012 Rules from start to finish, will be an indispensable work of reference for all involved in ICC arbitration, whether they come new to such proceedings or are "old hands", and whether they do so as a party, counsel or arbitrator. While the 2012 Rules have already been the subject of numerous commentaries, none could be as authoritative a Guide as that which Jason Fry, Simon Greenberg and Francesca Mazza have compiled.

Not only were all three authors intimately involved in the drafting of the new Rules, but as three of the then most senior members of the Secretariat, their knowledge of the practices of the Court and Secretariat is unrivalled. All three authors have also overseen the revision of all of the Secretariat's standard form letters and other administrative documentation to ensure their compatibility with the provisions of the new Rules—a daunting task in itself. There is simply no one better qualified to provide a detailed overview of the new Rules and their operation. At the time of publication, all three of the authors will have taken up new posts outside the ICC or be on the point of doing so. This final contribution on their part to the work of the Court and Secretariat is consistent with the qualities of excellence and commitment that have been the hallmark of their work while at the ICC and for which, on behalf of the ICC Court, I offer my thanks and sincere appreciation.

John Beechey
President
ICC International Court of Arbitration

Preface

The Guide you have before you is designed to provide you with an in-depth presentation and analysis of the new ICC Rules of Arbitration in force as of 1 January 2012. This Guide has the great advantage of providing insights into the Rules from the perspective of the Secretariat of the ICC International Court of Arbitration, and its authors were active participants in the preparation of the new Rules. By way of introduction to this invaluable resource, I would like to give you, from my own perspective as Chairman of the ICC Commission on Arbitration and as one of the principal draftsmen of the new Rules, an inside view into exactly how the Commission went about revising the Rules and what the goals of the revision process were.

In accordance with the Constitution of the ICC, ICC technical documents with regard to dispute resolution, including ICC Rules, are normally prepared by the ICC Commission on Arbitration. Our Commission was thus entrusted with the task of proposing revisions to the ICC Rules of Arbitration to the ICC governing bodies. The previous revision of the Rules dated from 1998, and while the Rules were functioning effectively and there was no urgent reason for change, it was felt that after so many years it would be useful to take a fresh look at them in order to bring them up-to-date and ensure that they will continue to be useful to arbitration users worldwide for many years to come.

The revision of the Rules was accomplished in accordance with a step-by-step process. First, we held three consultations to ensure that we would benefit from a wide range of ideas and suggestions concerning desirable changes or additions to the Rules. The first consultation took the form of a conference that we organized for the arbitration community at large to solicit and discuss ideas. Next, we consulted and obtained a large number of suggestions and proposals from the ICC National Committees. Suggestions and proposals were also provided by the ICC International Court of Arbitration and its Secretariat. Finally, we consulted the ICC Commission Task Force on Arbitration Involving States or State Entities. That Task Force, which included representatives of states and persons with significant experience working with states, provided us with useful suggestions for making the Rules more obviously applicable to arbitrations involving states.

With this input in hand, we set up an organizational structure to carry out the actual work of revising the Rules. A Task Force on the Revision of the ICC Rules of Arbitration was created, and I was asked to serve as Chairman of this Task Force along with two Co-Chairs, Michael Bühler and Laurie Craig. Francesca Mazza, the Secretary of the Commission, was asked to serve as Secretary to the Task Force.

In order to have a wide input into the process of reviewing and revising the Rules, it was decided not to limit the number of members of the Task Force. The Task Force was then constituted with over 180 members. This guaranteed a thorough review of the Rules. However, given that number, it was necessary to set up a much smaller Drafting Sub-Committee, which we referred to as the DSC. The role of the DSC was to go through the Rules article by article and draft proposals for amendments or new provisions to be submitted to the Task Force.

The DSC was constituted with twenty members who represented diverse geographical locations and diverse legal systems. DSC members came from five different continents and fourteen different countries. In addition, they represented all categories of players in ICC arbitration. Some DSC members were mainly counsel, others were mainly arbitrators. The Court was represented by Andrew Foyle and the Secretariat was represented by Jason Fry. John Beechey, the President of the Court, and the Vice-Chairs of the Commission were ex-officio members.

Most importantly, it was decided to have two representatives from the user community as DSC members. These were Anke Sessler from a major German company and John Sander from a major US company. We considered this to be an extremely important step because, of course, the Rules exist to serve the international user community, and we felt it to be very important to ensure that their views were taken into account in the revision process. In fact, the user representatives consulted with a much larger group of users worldwide and were able to provide us with key insights into the needs and concerns of the user community.

With the above organizational structure in place, this is how we proceeded. The first DSC meeting was held in March 2009. Over the next two years, the DSC met once a month in one or two-day sessions. It went through the existing Rules article by article and drafted proposed amendments or new articles. Its proposals were then presented in groups to the Task Force which debated and approved them during a number of plenary Task Force meetings held over the two-year period.

All of the proposals that were approved by the Task Force were then submitted to ICC National Committees and Groups and to the Commission as a whole. The proposals were then fully debated and discussed by the Commission which also approved the amended articles by groups during four plenary Commission meetings.

This process illustrates the extent to which the Rules revision benefited from the hard work and careful consideration of a large number of very talented people, and, while it is not possible to name them all, I wish to take this opportunity to thank them most sincerely for their excellent cooperation and work.

With respect to the substance of the Rules revision process, we decided to adopt a few basic guiding principles to focus the choices to be made in revising the Rules.

The first guiding principle was that only changes that are genuinely useful or genuinely necessary should be made. This follows from the old adage that "if it isn't broken, don't fix it". The existing Rules have worked well, and we considered that making too many minor "clean-up" improvements could actually result in more confusion than benefit. We often reminded ourselves of this principle when we were tempted to make language improvements.

The second guiding principle was to retain, to the greatest extent possible, the key and distinguishing features of ICC arbitration, such as the Request, the Answer, the Terms of Reference and the scrutiny of the award by the Court.

A third basic guiding principle was to be economical in the drafting, to avoid being overly prescriptive and to retain the universality and flexibility of ICC arbitration. This told us not to over-legislate in the Rules but rather to continue to draft in terms of basic principles rather than trying to spell everything out. This allowed us to retain the cross-cultural character of the Rules as well as their flexibility and openness to party autonomy.

While following these guiding principles, we also brought a number of innovations into the Rules. These new features were inspired by the desire to provide additional transparency with respect to practices of the Court and the Secretariat, the desire to develop explicit provisions for improving the time and cost efficiency of arbitration, and the desire to respond to requests from the user community. In particular, we included three entirely new sets of provisions in the Rules, which are discussed in great detail in this Guide. These provisions concern efficient case management, multiparty disputes and emergency arbitrator proceedings.

The case management provisions set forth means to establish a tailor-made procedure for the arbitration that is time and cost effective. Under the new provisions, as enunciated in Articles 22–24 and Appendix IV, the tailor-making process has now become a formal requirement. Various other changes, also discussed in this Guide, improve the time and cost efficiency of ICC arbitration.

The new section on multiparty and multicontract arbitration deals with the joinder of an additional party, cross-claims between claimants or between respondents, claims arising out of more than one contract, and the consolidation of separate arbitrations pending under the Rules. These provisions, as set forth in Articles 7–10, are entirely new and make explicit various aspects of multiparty disputes that were not previously dealt with in the Rules.

Finally, the emergency arbitrator provisions provide the parties with an opportunity, under certain conditions, to obtain urgent interim or conservatory measures from an emergency arbitrator when those measures cannot await the constitution of an arbitral tribunal.

In conclusion, I have no doubt that this Guide will provide you with valuable explanations and inside information regarding the 2012 ICC Rules of Arbitration. On behalf of all of the members of the ICC Commission on Arbitration, I would like to express the sincere hope that the new Rules will serve you well for many years to come.

Peter Wolrich
Chairman
ICC Commission on Arbitration