

The Conduct of an International Arbitration: Do the Rules Make a Difference?

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I. OVERVIEW

This article provides an analysis and comparison of the rules that govern the conduct of international arbitrations.¹ Each section of this article is structured as follows: (1) a brief summary of the topic that the section covers; and (2) the text of the applicable rules, with commentary. The research focused on six specific organizations and their international arbitration rules:

- (1) American Arbitration Association Arbitration Rules ("AAA Rules"), effective as of July 1, 2003;
- (2) Center for Public Resources Rules for Non-Administered Arbitration of International Disputes ("CPR Rules"), effective as of September 15, 2000;
- (3) International Chamber of Commerce Rules of Arbitration ("ICC Rules"), effective as of January 1, 1998;
- (4) London Court of International Arbitration Rules ("LCIA Rules"), effective as of January 1, 1998;
- (5) United Nations Commission on International Trade Law Arbitration Rules ("UNCITRAL Rules"), effective as of December 15, 1976; and
- (6) World Intellectual Property Organization Arbitration Rules ("WIPO Rules").

II. CONDUCT OF THE ARBITRAL PROCEEDING

A. PLACE AND TIME OF THE ARBITRATION

The parties themselves most often control the place and time of the arbitration. Every set of rules designates that if the parties agree on a place of arbitration, the parties' agreement is Binding. If the parties, however, have not agreed on a location, all of the rules leave the ultimate power to choose a location up to the tribunal.

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¹ See also Kathleen Paisley, *Commencement of the Arbitration and Conduct of the Arbitration: Articles 6-13, 37, 38, 41-45, 47-51, and 53-58*, 9 AM. REV. INT'L ARB. 107 (1998); Robert H. Smit & Nicholas J. Shaw, *The Center for Public Resources, Rules for Non-Administered Arbitration of International Disputes: A Critical and Comparative Commentary (Part II)*, 8 AM. REV. INT'L ARB. 275 (1997); W. LAURENCE CRAIG, WILLIAM W. PARK, & JAN PAULSSON, ANNOTATED GUIDE TO 1998 ICC ARBITRATION RULES (1998).

Although the tribunal has the final say, only the CPR and UNCITRAL Rules do not designate the place of the arbitration prior to the tribunal being formed. The LCIA Rules set London as the default location for the arbitration, but this location can be overridden by the arbitral tribunal. The AAA, ICC, and WIPO Rules allow for decisions to be made before the arbitral tribunal is actually selected; the AAA allows for the administrator to pick a location, the ICC allows for the ICC Court to pick the location of the arbitration, and the WIPO allows for the center to pick a location. Setting the arbitration location as early as possible is a convenient and preferable option in arbitration proceedings. This step of picking the seat before the tribunal is formed will speed up the arbitration.

1. *AAA Rules Article 13*

1. If the parties disagree as to the place of arbitration, the administrator may initially determine the place of arbitration, subject to the power of the tribunal to determine finally the place of arbitration within sixty days after its constitution. All such determinations shall be made having regard for the contentions of the parties and the circumstances of the arbitration.
2. The tribunal may hold conferences or hear witnesses or inspect property or documents at any place it deems appropriate. The parties shall be given sufficient written notice to enable them to be present at any such proceedings.

2. *CPR Rule 9.5*

Unless the parties have agreed upon the seat of arbitration, the tribunal shall fix the seat of arbitration based upon the contentions of the parties and the circumstances of the arbitration. The award shall be deemed made at such place. The tribunal may schedule meetings and hold hearings wherever it deems appropriate.

3. *ICC Rules Article 14*

1. The place of the arbitration shall be fixed by the ICC Court unless agreed upon by the parties.
2. The arbitral tribunal may, after consultation with the parties, conduct hearings and meetings at any location it considers appropriate unless otherwise agreed by the parties.
3. The arbitral tribunal may deliberate at any location it considers appropriate.

4. *LCIA Rules Article 16*

- 16.1 The parties may agree in writing the seat (or legal place) of their arbitration. Failing such a choice, the seat of arbitration shall be London, unless and until the

LCIA Court determines in view of all the circumstances, and after having given the parties an opportunity to make written comment, that another seat is more appropriate.

16.2 The arbitral tribunal may hold hearings, meetings, and deliberations at any convenient geographical place in its discretion; and if elsewhere than the seat of the arbitration, the arbitration shall be treated as an arbitration conducted at the seat of the arbitration and any award as an award made at the seat of the arbitration for all purposes.

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

5. *UNCITRAL Rules Article 16*

1. Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration.
2. The arbitral tribunal may determine the locale of the arbitration within the country agreed upon by the parties. It may hear witnesses and hold meetings for consultation among its members at any place it deems appropriate, having regard to the circumstances of the arbitration.
3. The arbitral tribunal may meet at any place it deems appropriate for the inspection of goods, other property, or documents. The parties shall be given sufficient notice to enable them to be present at such inspection.

6. *WIPO Rules Article 39*

- (a) Unless otherwise agreed by the parties, the place of arbitration shall be decided by the Center, taking into consideration any observations of the parties and the circumstances of the arbitration.
- (b) The tribunal may, after consultation with the parties, conduct hearings at any place that it considers appropriate. It may deliberate wherever it deems appropriate.
- (c) The award shall be deemed to have been made at the place of arbitration.

B. THE LANGUAGE OF THE ARBITRATION

If the parties have not designated in the contract the language to be used for the arbitration, most international arbitration rules have a method for determining the language. The ICC and UNCITRAL Rules provide for the arbitrator to choose the language, while the AAA and LCIA Rules state that the language of the arbitration

agreement will be used in the proceedings. Article 14 of the AAA Rules also contemplates the situation of using more than one language in the arbitration proceeding by reference to the word "language(s)" in the text. The LCIA Rules specifically allow the tribunal to narrow the languages to be used down to one unless the terms of the agreement explicitly call for more than one language. CPR Rule 9.6 initially favors the language of the documents containing the arbitration agreement, but gives the tribunal power to decide otherwise. CPR Rule 9.6 also allows for the parties to be heard, if the language was not agreed upon, because this has many practical implications (i.e., who can be an arbitrator and which lawyers can be used).

UNCITRAL Rule 17.1 is similar to CPR Rule 9.6 except it (1) does not have a presumption favoring the language of the documents containing the arbitration agreement like 9.7; (2) does not expressly provide for the parties to be heard in the language of the arbitration; and (3) does not specifically require the tribunal to focus on the circumstances of the arbitration when selecting a language.

Article 40(a) of the WIPO Rules provides that the language of the arbitration shall be that agreed upon by the parties or, in the absence of such agreement, that of the arbitration agreement, with the proviso that the tribunal may select another language. It is commonly thought that even though the tribunal may select another, they cannot overrule the parties agreed upon choice of language. Further, Article 40(a) provides that unless the parties agree otherwise, the language of the arbitration shall be that of the arbitration agreement. The WIPO Rules also only contemplate the use of one language in the arbitration proceeding. This seems preferable to the AAA's practice of allowing more than one language.

1. *AAA Rules Article 14*

If the parties have not agreed otherwise, the language(s) of the arbitration shall be that of the documents containing the arbitration agreement, subject to the power of the tribunal to determine otherwise based upon the contentions of the parties and the circumstances of the arbitration. The tribunal may order that any documents delivered in another language shall be accompanied by a translation into the language(s) of the arbitration.

2. *CPR Rule 9.6*

If the parties have not agreed otherwise, the language(s) of the arbitration shall be that of the documents containing the arbitration agreement, subject to the power of the tribunal to determine otherwise based upon the contentions of the parties and the circumstances of the arbitration. The tribunal may order that any documents submitted in other languages shall be accompanied by a translation into such language or languages.

3. *ICC Rules Article 16*

In the absence of an agreement by the parties, the arbitral tribunal shall determine the language or languages of the arbitration, due regard being given to all relevant circumstances, including the language of the contract.

4. *LCIA Rules Article 17*

17.1 The initial language of the arbitration shall be the language of the arbitration agreement, unless the parties have agreed in writing otherwise and provided always that a non-participating or defaulting party shall have no cause for complaint if communications to and from the Registrar and the arbitration proceedings are conducted in English.

17.2 In the event that the arbitration agreement is written in more than one language, the LCIA Court may, unless the arbitration agreement provides that the arbitration proceedings shall be conducted in more than one language, decide which of those languages shall be the initial language of the arbitration.

17.3 Upon the formation of the arbitral tribunal and unless the parties have agreed upon the language or languages of the arbitration, the arbitral tribunal shall decide upon the language(s) of the arbitration, after giving the parties an opportunity to make written comment and taking into account the initial language of the arbitration and any other matter it may consider appropriate in all the circumstances of the case.²

5. *UNCITRAL Rules Article 17.1*

Subject to agreement by the parties, the arbitral tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings. This determination shall apply to the statement of claim, the statement of defense, and any further written statements and, if oral hearings take place, to the language or languages to be used in such hearings.

6. *WIPO Rules Article 40*

Unless otherwise agreed by the parties, the language of the arbitration shall be the language of the arbitration agreement, subject to the power of the tribunal to determine otherwise, having regard to any observations of the parties and the circumstances of the arbitration.

²Like CPR Rule 9.6, art. 17.3 allows the parties to be heard.

C. CHALLENGING JURISDICTION OF AN ARBITRATOR ONCE ARBITRATION HAS COMMENCED

Most international arbitration rules allow for the arbitral tribunal to decide what jurisdiction they do or do not have. That is, the rules allow the tribunals not only to decide what is or is not an arbitrable matter, but also if an arbitration clause is valid. Further, the rules give broad discretion to the tribunal to strike down the contract containing the arbitration agreement while still being able to sever the arbitration clause and hold it valid. The WIPO Rules are the only rules that do not expressly state that the arbitration clause will be treated as an independent agreement, separate and apart from the contract. The ICC Rules are the only rules that explicitly contemplate court intervention in the rules as they allow a party to go to any court which has jurisdiction, to determine if there is a binding arbitration agreement.

In general, the tribunal may adjudicate its own jurisdiction as long as the parties to the arbitration have agreed to it, either by incorporating a set of particular arbitration rules or explicitly putting it in the arbitration agreement itself.³ However, if the parties have not explicitly stated that they agree to be bound by the determination of the arbitrator, the courts have been willing to determine jurisdiction.

1. *AAA Rules Article 15*

1. The tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement.
2. The tribunal shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the tribunal that the contract is null and void shall not for that reason alone render invalid the arbitration clause.
3. A party must object to the jurisdiction of the tribunal or to the arbitrability of a claim or counterclaim no later than the filing of the statement of defense, as provided in Article 3, to the claim or counterclaim that gives rise to the objection. The tribunal may rule on such objections as a preliminary matter or as part of the final award.

³ See *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (stating "courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable' evidence that they do so"); *AT&T Tech's, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 649 (1986) (finding "the rule 'which follows inexorably' from the principle that arbitration is a matter of contract 'is that the question of arbitrability ... is undeniably an issue for judicial determination'"); *Paine Webber, Inc. v. Hofmann*, 984 F.2d 1372, 1376-77 (3d Cir. 1993) (holding that "whether or not [a party is] bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties"). See also IAN R. MACNEIL ET AL., *IV FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT* § 44.15.1 (Supp. 1996) ("[I]nternational arbitration rules normally provide explicitly that the arbitrators have the power to determine their own jurisdiction," which falls into "the agreement of the parties exception of [*First Options of Chi., Inc. v. Kaplan*]").

2. *CPR Rule 8*

8.1 The tribunal shall have the power to hear and determine challenges to its jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement.

8.2 The tribunal shall have the power to determine the existence, validity, or scope of the contract of which an arbitration clause forms a part. For the purposes of challenges to the jurisdiction of the tribunal, the arbitration clause shall be considered as separable from any contract of which it forms a part.

8.3 Any challenges to the jurisdiction of the tribunal, except challenges based on the award itself, shall be made not later than the notice of defense or, with respect to a counterclaim, the reply to the counterclaim; provided, however, that if a claim or counterclaim is later added or amended such a challenge may be made not later than the response to such claim or counterclaim.

3. *ICC Rules Article 6.2*

If the respondent does not file an answer, as provided by Article 5, or if any party raises one or more pleas concerning the existence, validity, or scope of the arbitration agreement, the ICC Court may decide, without prejudice to the admissibility or merits of the plea or pleas, that the arbitration shall proceed if it is prima facie satisfied that an arbitration agreement under the Rules may exist. In such a case, any decision as to the jurisdiction of the arbitral tribunal shall be taken by the arbitral tribunal itself. If the ICC Court is not so satisfied, the parties shall be notified that the arbitration cannot proceed. In such a case, any party retains the right to ask any court having jurisdiction whether or not there is a binding arbitration agreement.

4. *LCIA Rules Article 23*

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

23.2 A plea by a respondent that the arbitral tribunal does not have jurisdiction shall be treated as having been irrevocably waived unless it is raised not later than the statement of defense; and a like plea by a respondent to counterclaim shall be similarly treated unless it is raised no later than the statement of defense to counterclaim. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised promptly after the arbitral tribunal has indicated its

intention to decide on the matter alleged by any party to be beyond the scope of its authority, failing which such plea shall also be treated as having been waived irrevocably. In any case, the arbitral tribunal may nevertheless admit an untimely plea if it considers the delay justified in the particular circumstances.

23.3 The arbitral tribunal may determine the plea to its jurisdiction or authority in an award as to jurisdiction or later in an award on the merits, as it considers appropriate in the circumstances.

23.4 By agreeing to arbitration under these Rules, the parties shall be treated as having agreed not to apply to any state court or other judicial authority for any relief regarding the arbitral tribunal's jurisdiction or authority, except with the agreement in writing of all parties to the arbitration or the prior authorization of the arbitral tribunal or following the latter's award ruling on the objection to its jurisdiction or authority.

5. *UNCITRAL Rules Article 21*

1. The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.
2. The arbitral tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of Article 21, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.
3. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defense or, with respect to a counterclaim, in the reply to the counterclaim.
4. In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in its final award.

6. *WIPO Rules Article 36*

- (a) The tribunal shall have the power to hear and determine objections to its own jurisdiction, including any objections with respect to form, existence, validity, or scope of the arbitration agreement examined pursuant to Article 59(b).
- (b) The tribunal shall have the power to determine the existence or validity of any contract of which the arbitration agreement forms part or to which it relates.
- (c) A plea that the tribunal does not have jurisdiction shall be raised not later than in the statement of defense or, with respect to a counterclaim or a setoff, the

statement of defense thereto, failing which any such plea shall be barred in the subsequent arbitral proceedings or before any court. A plea that the tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The tribunal may, in either case, admit a later plea if it considers the delay justified.

- (d) The tribunal may rule on a plea referred to in paragraph (c) as a preliminary question or, in its sole discretion, decide on such a plea in the final award.
- (e) A plea that the tribunal lacks jurisdiction shall not preclude the Center from administering the arbitration.

D. ABILITY TO ISSUE SUBPOENAS AND SUBPOENAS

Although tribunals do not have the powers that courts have over subpoenas, they may find sufficient authority to compel disclosure under the provisions governing the tribunal's general authority over the proceedings. This may include things such as entering a default judgment and shifting costs of the arbitration to parties that did not comply with orders from the tribunal. Further, if local law allows, tribunals can go to judicial courts to enforce the tribunal's orders. The one similarity between all the Rules is that the tribunal has the power partly to affix the costs of the arbitration based on compliance with the tribunal's orders.

The CPR Rules seem to give the greatest attention to the production of documents and to giving the tribunal power to enforce the production of documents. The tribunal has been expressly given the power to enter a default ruling if the failure to comply with the court's orders is "material." This seems to be the most draconian remedy that any rules grant to the tribunal. The LCIA Rules are unique in that, if the party does not comply with certain orders (producing a witness), the rules explicitly state that the tribunal can totally disregard any written evidence from that witness if there is no explanation for the non-appearance. This is a stiff penalty to the side that fails to produce a witness. The ICC Rules, in contrast, give the tribunal the least amount of latitude to enforce subpoenas and require the production of documents in comparison with other arbitration rules.

1. *AAA Rules Article 19.3 and Article 31*

Article 19.3 At any time during the proceedings, the tribunal may order parties to produce other documents, exhibits, or other evidence it deems necessary or appropriate.

Article 31 The tribunal shall fix the costs of arbitration in its award. The tribunal may apportion such costs among the parties if it determines that such apportionment is reasonable, taking into account the circumstances of the case.

2. *CPR Rule 11, Rule 15 and Rule 16.2*

Rule 11 The tribunal may require and facilitate such disclosure as it shall determine is appropriate in the circumstances, taking into account the needs of the parties and the desirability of making disclosure expeditious and cost-effective. The tribunal may issue orders to protect the confidentiality of proprietary information, trade secrets, and other sensitive information disclosed.

Rule 15 Whenever a party fails to comply with these International Rules, or any order of the tribunal pursuant to these International Rules, in a manner deemed material by the tribunal, the tribunal shall fix a reasonable period of time for compliance and, if the party does not comply within said period, the tribunal may impose a remedy it deems just, including an award on default. Prior to entering an award on default, the tribunal shall require the non-defaulting party to produce such evidence and legal argument in support of its contentions as the tribunal may deem appropriate. The tribunal may receive such evidence and argument without the defaulting party's presence or participation.

Rule 16. Subject to any agreement between the parties to the contrary, the tribunal may apportion the costs of arbitration between or among the parties in such manner as it deems reasonable, taking into account the circumstances of the case, the conduct of the parties during the proceeding, and the result of the arbitration.

3. *ICC Rules Article 31.3*

The final award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.

4. *LCIA Rules Article 20.4 and Article 22*

20.4 Subject to Article 14.1 and 14.2, any party may request that a witness, on whose testimony another party seeks to rely, should attend for oral questioning at a hearing before the arbitral tribunal. If the arbitral tribunal orders that other party to produce the witness and the witness fails to attend the oral hearing without good cause, the arbitral tribunal may place such weight on the written testimony (or exclude the same altogether) as it considers appropriate in the circumstances of the case.

22.1(d) to order any party to make any property, site, or thing under its control and relating to the subject matter of the arbitration available for inspection by the arbitral tribunal, any other party, its expert, or any expert to the arbitral tribunal;

22.1(e) to order any party to produce to the arbitral tribunal, and to the other parties for inspection, and to supply copies of, any documents or classes of documents in their possession, custody, or power which the arbitral tribunal determines to be relevant.

5. *UNCITRAL Rules Article 24.3, Article 28.3 and Article 40.1*

24.3 At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits, or other evidence within such a period of time as the tribunal shall determine.

28.3 If one of the parties, duly invited to produce documentary evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.

40.1 Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

6. *WIPO Rules Article 56(d) and Article 71(c)*

56(d) If a party, without showing good cause, fails to comply with any provision of, or requirement under, these Rules or any direction given by the tribunal, the tribunal may draw the inferences therefrom that it considers appropriate.

71(c) The tribunal shall, subject to any agreement of the parties, apportion the costs of arbitration and the registration and administration fees of the Center between the parties in the light of all the circumstances and the outcome of the arbitration.

E. ISSUES TO BE DECIDED

Most of the arbitration rules generally do not call for one standard document to define the terms of reference once all the written submissions have been entered. Only the ICC explicitly calls for the “terms of reference” to be listed after submission of the documents.⁴ However, some of the other rules, such as the LCIA Rules, allow the tribunal to clarify the “terms of reference” on the tribunal’s own initiative. In addition, the CPR Rules require a pre-hearing memorandum, which seems to provide the terms of reference for the proceedings.

1. *CPR Rule 12.1*

The tribunal shall determine the manner in which the parties shall present their cases. Unless otherwise determined by the tribunal or agreed by the parties, the presentation of a party’s case shall include the submission of a pre-hearing memorandum including the following elements:

- (a) a statement of facts;

⁴ See *M & C Corp. v. Erwin Behr GMBH & Co., KG*, 87 F.3d 844 (1996) (detailing the scope of the terms of reference, what can be implied, and what should be included).

- (b) a statement of each claim being asserted;
- (c) a statement of the applicable law and authorities upon which the party relies;
- (d) a statement of the relief requested, including the basis for any damages claimed; and
- (e) the evidence to be presented, including documents relied upon and the name, capacity, and subject of testimony of any witnesses to be called, the language in which each witness will testify, and an estimate of the amount of time required for the party's examination of the witness.

2. ICC Rules Article 18

1. As soon as it has received the file from the Secretariat, the arbitral tribunal shall draw up, on the basis of documents or in the presence of the parties and in the light of their most recent submissions, a document defining its terms of reference. This document shall include the following particulars:
 - (a) the full names and descriptions of the parties;
 - (b) the addresses of the parties to which notifications and communications arising in the course of the arbitration may be made;
 - (c) a summary of the parties' respective claims and of the relief sought by each party, with an indication to the extent possible of the amounts claimed or counterclaimed;
 - (d) unless the arbitral tribunal considers it inappropriate, a list of issues to be determined;
 - (e) the full names, descriptions, and addresses of the arbitrators;
 - (f) the place of the arbitration; and
 - (g) particulars of the applicable procedural rules and, if such is the case, reference to the power conferred upon the arbitral tribunal to act as *amiable compositeur* or to decide *ex aequo et bono*.
2. The terms of reference shall be signed by the parties and the arbitral tribunal. Within two months of the date on which the file has been transmitted to it, the arbitral tribunal shall transmit to the ICC Court the terms of reference signed by it and by the parties. The ICC Court may extend this time limit pursuant to a reasoned request from the arbitral tribunal or on its own initiative if it decides it is necessary to do so.
3. If any of the parties refuses to take part in the drawing up of the terms of reference or to sign the same, they shall be submitted to the ICC Court for approval. When the terms of reference have been signed in accordance with Article 18(2) or approved by the Court, the arbitration shall proceed.
4. When drawing up the terms of reference, or as soon as possible thereafter, the arbitral tribunal, after having consulted the parties, shall establish in a separate document a provisional timetable that it intends to follow for the conduct of the arbitration and shall communicate it to the ICC Court and the parties. Any

subsequent modifications of the provisional timetable shall be communicated to the Court and the parties.

3. *LCIA Rules Article 15 and Article 22.1(c)*

Article 15 and, more specifically, Article 22.1(c) may give the tribunal extra powers to decide the “terms of reference.”

Article 22.1(c): to conduct such enquiries as may appear to the arbitral tribunal to be necessary or expedient, including whether and to what extent the arbitral tribunal should itself take the initiative in identifying the issues and ascertaining the relevant facts and the law(s) or rules of law applicable to the arbitration, the merits of the parties’ dispute and the arbitration agreement.

F. BURDEN OF PROOF/PERSUASION

Although such maxims as *ei qui affirmat non ei qui negat incumbit probatio*⁵ and *actori incumbit probatio*⁶ are still relevant in international arbitration, most of the rules governing the burden of proof allow the tribunal great latitude in adopting the standard necessary for a convenient and fair trial. With no specific reference to the burden of proof, the ICC Rules give the tribunal a great amount of leeway in deciding the burden of proof. In contrast, the UNCITRAL and AAA Rules specifically set forth who has the burden of proof. However, the UNCITRAL and AAA Rules fail to define what the burden of proof is: matters normally determined by the applicable law of the case have been stripped of their burden of proof standard, which takes away the power of the tribunal to shift the burden of proof when necessary under particular circumstances or when it would help compliance with the tribunal’s orders (i.e., discovery).⁷

1. *AAA Rules Article 19.1*

Each party shall have the burden of proving the facts relied on to support its claim or defense.

⁵The onus of proof is on he who affirms, and not on he who denies.

⁶The claimant carries the burden of proof.

⁷Jamison M. Selby, *Fact-Finding Before the Iran-United States Claims Tribunal: The View from the Trenches*, in *FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS: 11TH SOKOL COLLOQUIUM 135* (Richard B. Lillich ed., 1992) (perhaps the most realistic formulation of the burden of proof in international arbitration was espoused by a former president of the Iran-United States Claims Tribunal who said that “the burden of proof is that you have to convince me”); ALAN REDEFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 225–26 (1991) (suggesting that the burden of proof is close to the balance of probability); Robert B. von Mehren, *Burden of Proof in International Arbitration*, in *PLANNING EFFICIENT ARBITRATION PROCEEDINGS* (Albert J. van den Berg ed., 1996).

2. *CPR Rule 12.2*

If either party so requests or the tribunal so directs, a hearing shall be held for the presentation of evidence and oral argument. Testimony may be presented in written and/or oral form as the tribunal may determine is appropriate. The tribunal is not required to apply the rules of evidence used in judicial proceedings. The tribunal shall determine the applicability of any privilege or immunity and the admissibility, relevance, materiality, and weight of the evidence offered.

3. *ICC Rules Article 20.1*

The arbitral tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means.

4. *UNCITRAL Rules Article 24(1)*

Each party shall have the burden of proving the facts relied on to support his claim or defense.

5. *WIPO Rule Article 48(a)*

The tribunal shall determine the admissibility, relevance, materiality, and weight of evidence.

G. EVIDENTIARY RULES

In most cases, the clause that determines the burden of proof in an arbitral proceeding will also govern the admissibility of the evidence.⁸ These clauses give the tribunal wide discretion in what evidence may or may not be permitted. Only the LCIA Rules have an explicit reference to what principles should be applied to determine the weight and admissibility of evidence. However, the International Bar Association (“IBA”) has adopted general evidentiary rules in an effort to standardize the evidentiary rules in all arbitral

⁸ See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, n. 14 (1985) (finding that “the fact-finding process in arbitration usually is not equivalent to judicial fact-finding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable”); *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 203 (1956); *Wilko v. Swan*, 346 U.S. 435, 437 (1953). As the U.S. Supreme Court has recognized, “[arbitrators] have no obligation to the court to give their reasons for an award.” *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 598 (1960). “Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution. This same characteristic, however, makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts.” *Alexander v. Gardner-Denver*, 415 U.S. 36, 57–58 (1974) (footnote omitted); Charles N. Brower, *Evidence Before International Tribunals: The Need for Some Standard Rules*, 28 INT’L LAW 47 (1994); Paisley, *supra* note 1.

proceedings. The IBA has advised that all international arbitration agreements incorporate these evidentiary rules and refer to them as “The IBA Rules of Evidence.”

H. PRE-TRIAL ISSUES/DISCOVERY

1. *Pre-trial Conferences*

Some arbitral rules explicitly set forth that tribunals may have a pre-trial conference, but in reality all the above-mentioned Rules give the tribunal the power and discretion to have a pre-trial conference. The AAA, CPR, and WIPO Rules expressly mention a preparatory conference but give no detail regarding what should be addressed. In contrast, the ICC Rules do not mention a preparatory conference, but the information that is exchanged during the drawing up of the terms of reference and the related scheduling order perform a similar function to a pre-trial conference. Neither the LCIA nor the UNCITRAL Rules make any express mention of a pre-trial conference, however, under the LCIA Rules, it is within the discretion of the tribunal whether or not to hold one.⁹

(a) *AAA Rules Article 16(2)*

The tribunal, exercising its discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute. It may conduct a preparatory conference with the parties for the purpose of organizing, scheduling, and agreeing to procedures to expedite the subsequent proceedings.

(b) *CPR Rule 9.1*

Subject to these International Rules, the tribunal may conduct the arbitration in such manner as it shall deem appropriate. The chair shall be responsible for the organization of arbitral conferences and hearings and arrangements with respect to the functioning of the tribunal.

(c) *WIPO Rules Article 47*

The tribunal may, in general following the submission of the statement of defense, conduct a preparatory conference with the parties for the purpose of organizing and scheduling the subsequent proceedings.

⁹UNCITRAL Draft Notes on Organizing Arbitral Proceedings, A/CN.9/423, April 10, 1996.

2. *Discovery*

In most arbitration proceedings, discovery is limited. The tribunal, however, may insist on discovery procedures, such as requiring parties to provide a list of prospective witnesses.

(a) *AAA Rules Article 19.2 and 19.3*

2. The tribunal may order a party to deliver to the tribunal and to the other parties a summary of the documents and other evidence which that party intends to present in support of its claim, counterclaim, or defense.
3. At any time during the proceedings, the tribunal may order parties to produce other documents, exhibits, or other evidence it deems necessary or appropriate.

(b) *CPR Rule 11*

The tribunal may require and facilitate such disclosure as it shall determine is appropriate in the circumstances, taking into account the needs of the parties and the desirability of making disclosure expeditious and cost-effective. The tribunal may issue orders to protect the confidentiality of proprietary information, trade secrets, and other sensitive information disclosed.

(c) *ICC Rules*

In practice, the ICC gives parties opportunity to address discovery issues in the terms of reference.

(d) *LCIA Rules Article 22.1(d), (e)*

- 22.1(d) to order any party to make any property, site, or thing under its control and relating to the subject matter of the arbitration available for inspection by the arbitral tribunal, any other party, its expert, or any expert to the arbitral tribunal.
- 22.1(e) to order any party to produce to the arbitral tribunal, and to the other parties for inspection, and to supply copies of, any documents or classes of documents in their possession, custody, or power which the arbitral tribunal determines to be relevant.

(e) *UNCITRAL Rules Article 24.2, 24.3*

- 24.2 The arbitral tribunal may, if it considers it appropriate, require a party to deliver to the tribunal and to the other party, within such a period of time as the arbitral tribunal shall decide, a summary of the documents and other evidence which

that party intends to present in support of the facts in issue set out in his statement of claim or statement of defense.

24.3 At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits, or other evidence within such a period of time as the tribunal shall determine.

(f) *WIPO Rules Article 48(b)*

At any time during the arbitration, the tribunal may, at the request of a party or on its own motion, order a party to produce such documents or other evidence as it considers necessary or appropriate and may order a party to make available to the tribunal or to an expert appointed by it or to the other party any property in its possession or control for inspection or testing.

I. ORAL TESTIMONY VS AFFIDAVITS/DECLARATIONS

1. *Oral Hearings*

Only the AAA Rules expressly provide that an oral hearing shall occur while the other Rules grant discretionary authority to the tribunal. As a practical matter, most tribunals will conduct an oral hearing unless the tribunal is confident that a hearing is unnecessary and the parties agree.

(a) *AAA Rules Article 20.1*

The tribunal shall give the parties at least 30 days' advance notice of the date, time, and place of the initial oral hearing. The tribunal shall give reasonable notice of subsequent hearings.

(b) *CPR Rule 12.2*

If either party so requests or the tribunal so directs, a hearing shall be held for the presentation of evidence and oral argument. Testimony may be presented in written and/or oral form as the tribunal may determine is appropriate. The tribunal is not required to apply the rules of evidence used in judicial proceedings. The tribunal shall determine the applicability of any privilege or immunity and the admissibility, relevance, materiality, and weight of the evidence offered.

(c) *ICC Rules Article 20.2*

After studying the written submissions of the parties and all documents relied upon, the arbitral tribunal shall hear the parties together in person if any of them so requests or, failing such a request, it may of its own motion decide to hear them.

(d) *LCIA Rules Article 19.1*

Any party which expresses a desire to that effect has the right to be heard orally before the arbitral tribunal on the merits of the dispute, unless the parties have agreed in writing on documents-only arbitration.

(e) *UNCITRAL Rules Article 15.2*

If either party so requests at any stage of the proceedings, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.

(f) *WIPO Rules Article 53(a)*

If either party so requests, the tribunal shall hold a hearing for the presentation of evidence by witnesses, including expert witnesses, or for oral argument or for both. In the absence of a request, the tribunal shall decide whether to hold such a hearing or hearings. If no hearings are held, the proceedings shall be conducted on the basis of documents and other materials alone.

2. *Witnesses*

All the Rules allow the parties to call witnesses. The tribunal, however, has great latitude in deciding how to handle the witness and whether procedural activities such as cross-examination will occur. Only the LCIA and WIPO Rules expressly allow for the cross-examination of a witness who is giving oral testimony.

(a) *AAA Rules Article 20.4*

Hearings are private unless the parties agree otherwise or the law provides to the contrary. The tribunal may require any witness or witnesses to retire during the testimony of other witnesses. The tribunal may determine the manner in which witnesses are examined.

(b) *CPR Rule Article 12.4*

The tribunal shall determine the manner in which witnesses are to be examined, including the need and arrangements for translation of any witness testimony in a language other than the language of the arbitration. The tribunal shall have the right to exclude witnesses from hearings during the testimony of other witnesses.

(c) *ICC Rules Article 20.3*

The arbitral tribunal may decide to hear witnesses, experts appointed by the parties, or any other person, in the presence of the parties, or in their absence provided they have been duly summoned.

(d) *LCIA Rules Article 20.1, 20.2*

20.1 Before any hearing, the arbitral tribunal may require any party to give notice of the identity of each witness that party wishes to call (including rebuttal witnesses), as well as the subject matter of that witness's testimony, its content, and its relevance to the issues in the arbitration.

20.2 The arbitral tribunal may also determine the time, manner, and form in which such materials should be exchanged between the parties and presented to the arbitral tribunal; and it has a discretion to allow, refuse, or limit the appearance of witnesses (whether witness of fact or expert witness).

3. *Written Testimony*

The AAA, LCIA, and UNCITRAL Rules expressly provide that evidence from a witness may be submitted in written form. Although the other Rules have no express corollary, the tribunals typically allow such testimony. Under all the Rules, though, the tribunal may not place any weight on the written testimony if there is no opportunity to examine the witnesses.

Allowing written testimony is an important feature in international arbitration for several reasons. First, it cuts down the time needed for an oral hearing, which speeds up the tribunal's ability to render a decision. Secondly, it cuts down on the expenses of both parties if they do not have to pay for witnesses to attend the hearing. Finally, allowing written testimony may allow for more information from the tribunal since witnesses who are unable to attend the hearing can submit evidence. The worry, however, is that without cross-examination, the written testimony will receive little or no weight since there has not been a chance to confront the witness.

(a) *AAA Rules Article 20.5*

Evidence of witnesses may also be presented in the form of written statements signed by them.

(b) *CPR Rule 12.2*

If either party so requests or the tribunal so directs, a hearing shall be held for the presentation of evidence and oral argument. Testimony may be presented in written and/or oral form as the tribunal may determine is appropriate. The tribunal is not required to apply the rules of evidence used in judicial proceedings. The tribunal shall determine the applicability of any privilege or immunity and the admissibility, relevance, materiality, and weight of the evidence offered.

(c) *ICC Rules Article 20.1, 20.2*

20.1 The arbitral tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means.

20.2 After studying the written submissions of the parties and all documents relied upon, the arbitral tribunal shall hear the parties together in person if any of them so requests or, failing such a request, it may of its own motion decide to hear them.

(d) *LCIA Rules Article 20.3*

Subject to any order otherwise by the arbitral tribunal, the testimony of a witness may be presented by a party in written form, either as a signed statement or as a sworn affidavit.

(e) *UNCITRAL Rules Article 25.5*

Evidence of witnesses may also be presented in the form of written statements signed by them.

(f) *WIPO Rules Article 54(d)*

The testimony of witnesses may, either at the choice of a party or as directed by the tribunal, be submitted in written form, whether by way of signed statements, sworn affidavits or otherwise, in which case the tribunal may make the admissibility of the testimony conditional upon the witnesses being made available for oral testimony.

J. EXPERT WITNESSES

All the Rules allow the tribunal to appoint experts to testify, unless the parties have agreed otherwise. The Rules also permit the parties to question the appointed experts. The WIPO Rules are unique in that they also make reference to experiments, models, and site visits as well as expert testimony. The AAA, LCIA, ICC, and UNCITRAL Rules all have provisions that obligate the parties to provide information to the experts when the experts ask for information to complete their report.

1. *AAA Rules Article 22*

1. The tribunal may appoint one or more independent experts to report to it, in writing, on specific issues designated by the tribunal and communicated to the parties.
2. The parties shall provide such an expert with any relevant information or produce for inspection any relevant documents or goods that the expert may require. Any dispute between a party and the expert as to the relevance of the requested information or goods shall be referred to the tribunal for decision.
3. Upon receipt of an expert's report, the tribunal shall send a copy of the report to all parties and shall give the parties an opportunity to express, in writing, their opinion on the report. A party may examine any document on which the expert has relied in such a report.
4. At the request of any party, the tribunal shall give the parties an opportunity to question the expert at a hearing. At this hearing, parties may present expert witnesses to testify on the points at issue.

2. *CPR Rule 12.3*

The tribunal, in its discretion, may require the parties to produce evidence in addition to that initially offered. It may also appoint neutral experts whose testimony shall be subject to examination by the parties and the tribunal and to rebuttal.

3. *ICC Rules Article 20.4*

The arbitral tribunal, after having consulted the parties, may appoint one or more experts, define their terms of reference and receive their reports. At the request of a party, the parties shall be given the opportunity to question at a hearing any such expert appointed by the tribunal. Although the other Rules allow for the tribunal to consult the parties before appointing the expert, the ICC Rules are the only set of rules that makes consulting the parties mandatory.

4. *LCIA Rules Article 21*

21.1 Unless otherwise agreed by the parties in writing, the arbitral tribunal:

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

21.2 Unless otherwise agreed by the parties in writing, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report to the arbitral tribunal and the parties, participate in one or more hearings at which the parties shall have the opportunity to question the expert on his report and to present expert witnesses in order to testify on the points at issue.

21.3 The fees and expenses of any expert appointed by the arbitral tribunal under this Article shall be paid out of the deposits payable by the parties under Article 24 and shall form part of the costs of the arbitration.

5. *UNCITRAL Rules Article 27*

1. The arbitral tribunal may appoint one or more experts to report to it, in writing, on specific issues to be determined by the tribunal. A copy of the expert's terms of reference, established by the arbitral tribunal, shall be communicated to the parties.
2. The parties shall give the expert any relevant information or produce for his inspection any relevant documents or goods that he may require of them. Any dispute between a party and such expert as to the relevance of the required information or production shall be referred to the arbitral tribunal for decision.
3. Upon receipt of the expert's report, the arbitral tribunal shall communicate a copy of the report to the parties who shall be given the opportunity to express, in writing, their opinion on the report. A party shall be entitled to examine any document on which the expert has relied in his report.
4. At the request of either party the expert, after delivery of the report, may be heard at a hearing where the parties shall have the opportunity to be present and to interrogate the expert. At this hearing either party may present expert witnesses in order to testify on the points at issue. The provisions of Article 25 shall be applicable to such proceedings.

K. CONTROL OVER QUESTIONING OF WITNESSES

All of the Rules expressly provide that the parties may call witnesses. As for cross-examination, only the LCIA and WIPO Rules expressly provide that any witness

giving oral testimony may be questioned by both parties. All of the other Rules grant general authority to the tribunal to determine how the witnesses will be examined.

1. *AAA Rules Article 20.4*

Hearings are private unless the parties agree otherwise or the law provides to the contrary. The tribunal may require any witness or witnesses to retire during the testimony of other witnesses. The tribunal may determine the manner in which witnesses are examined.

2. *CPR Rule 12.2*

If either party so requests or the tribunal so directs, a hearing shall be held for the presentation of evidence and oral argument. Testimony may be presented in written and/or oral form as the tribunal may determine is appropriate. The tribunal is not required to apply the rules of evidence used in judicial proceedings. The tribunal shall determine the applicability of any privilege or immunity and the admissibility, relevance, materiality, and weight of the evidence offered.

3. *ICC Rules Article 20.3*

The arbitral tribunal may decide to hear witnesses, experts appointed by the parties, or any other person, in the presence of the parties, or in their absence provided they have been duly summoned.

4. *LCIA Rules Article 20.5*

Any witness who gives oral evidence at a hearing before the arbitral tribunal may be questioned by each of the parties under the control of the arbitral tribunal. The arbitral tribunal may put questions at any stage of the witness's evidence.

5. *UNCITRAL Rules Article 25(4)*

Hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses. The arbitral tribunal is free to determine the manner in which witnesses are examined.

6. *WIPO Rules Article 54(c)*

Any witness who gives oral evidence may be questioned, under the control of the tribunal, by each of the parties. The tribunal may put questions at any stage of the examination of the witnesses.

L. DOCUMENTARY EVIDENCE

Under all of the rules, the tribunal is given full discretion of when and how to order production of documents.

1. *AAA Rules Article 19(2), (3)*

2. The tribunal may order a party to deliver to the tribunal and to the other parties a summary of the documents and other evidence which that party intends to present in support of its claim, counterclaim, or defense.
3. At any time during the proceedings, the tribunal may order parties to produce other documents, exhibits, or other evidence it deems necessary or appropriate.

2. *CPR Rule 12.1(e)*

The evidence to be presented, including documents relied upon and the name, capacity, and subject of testimony of any witnesses to be called, the language in which each witness will testify, and an estimate of the amount of time required for the party's examination of the witness.

3. *ICC Rules Article 20.1*

The arbitral tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means.

The ICC Rules have no specific reference to documentary evidence but give the tribunal wide discretion to establish the facts in any way it deems appropriate. This freedom may arise because the ICC Rules have set forth the terms of reference; the Rules then give the tribunal the freedom to obtain any evidence to assist in finding the facts as they relate to the terms of reference.

4. *LCIA Rules Article 22.1(e)*

[T]o order any party to produce to the arbitral tribunal, and to the other parties for inspection, and to supply copies of, any documents or classes of documents in their possession, custody, or power which the arbitral tribunal determines to be relevant.

5. *UNCITRAL Rules Article 24(2)*

The arbitral tribunal may, if it considers it appropriate, require a party to deliver to the tribunal and to the other party, within such a period of time as the arbitral tribunal shall decide, a summary of the documents and other evidence which that party intends to present in support of the facts in issue set out in his statement of claim or statement of defense.

6. *WIPO Rules Article 48(b)*

At any time during the arbitration, the tribunal may, at the request of a party or on its own motion, order a party to produce such documents or other evidence as it considers necessary or appropriate and may order a party to make available to the tribunal or to an expert appointed by it or to the other party any property in its possession or control for inspection or testing.

M. RIGHT TO COUNSEL/ASSISTANCE

All of the Rules allow for the parties to be represented by a person of their choice. However, most of the Rules are silent as to whether the person must be of a specific nationality. Some Rules use the words "of their choice," which would seem to mean that nationality is not a requirement for the representative.

1. *AAA Rules Article 12*

Any party may be represented in the arbitration. The names, addresses, and telephone numbers of representatives shall be communicated in writing to the other parties and to the administrator. Once the tribunal has been established, the parties or their representatives may communicate in writing directly with the tribunal.

2. *CPR Rule 4.1, 4.2*

4.1 The parties may be represented or assisted by persons of their choice.

4.2 Each party shall communicate the name, address, and function of such persons in writing to the other party and to the tribunal.

3. *ICC Rules Article 21.4*

The parties may appear in person or through duly authorized representatives. In addition, they may be assisted by advisers.

4. *LCIA Rules Article 18.1, 18.2*

18.1 Any party may be represented by legal practitioners or any other representatives.

18.2 At any time the arbitral tribunal may require from any party proof of authority granted to its representative(s) in such form as the arbitral tribunal may determine.

5. *UNCITRAL Rules Article 4*

The parties may be represented or assisted by persons of their choice. The names and addresses of such persons must be communicated in writing to the other party; such communication must specify whether the appointment is being made for purposes of representation or assistance.

6. *WIPO Rules Article 13*

(a) The parties may be represented by persons of their choice, irrespective of, in particular, nationality or professional qualification. The names, addresses, and telephone, telex, telefax, or other communication references of representatives shall be communicated to the Center, the other party, and, after its establishment, the tribunal.

(b) Each party shall ensure that its representatives have sufficient time available to enable the arbitration to proceed expeditiously.

(c) The parties may also be assisted by persons of their choice.

N. RIGHT TO "PUBLIC TRIAL"

Unlike judicial systems in most industrialized nations, where a trial is public unless it involves confidential information, such as trade secrets or classified business information, the default position in international arbitration is that the proceedings are to be conducted in private, with only the parties being present. This seems to be a logical position for arbitration because many times, one of the main goals is to settle a dispute with as little publicity as possible. Further, only including the parties and their representatives speeds up the proceedings. Only the CPR Rules do not explicitly state that the proceedings are to be conducted privately unless the parties agree otherwise.

1. *AAA Rules Article 20.4*

Hearings are private unless the parties agree otherwise or the law provides to the contrary. The tribunal may require any witness or witnesses to retire during the testimony of other witnesses. The tribunal may determine the manner in which witnesses are examined.

2. *CPR Rule 12.4*

The tribunal shall determine the manner in which witnesses are to be examined, including the need and arrangements for translation of any witness testimony in a language other than the language of the arbitration. The tribunal shall have the right to exclude witnesses from hearings during the testimony of other witnesses.

3. *ICC Rules Article 21(3)*

The arbitral tribunal shall be in full charge of the hearings, at which all the parties shall be entitled to be present. Save with the approval of the arbitral tribunal and the parties, persons not involved in the proceedings shall not be admitted.

4. *LCIA Rules Article 19.4*

All meetings and hearings shall be in private unless the parties agree otherwise in writing or the arbitral tribunal directs otherwise.

5. *UNCITRAL Rules Article 25(4)*

Hearings shall be held *in camera* unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses. The arbitral tribunal is free to determine the manner in which witnesses are examined.

6. *WIPO Rules Article 53(c)*

Unless the parties agree otherwise, all hearings shall be in private.

O. SUMMARY DISPOSITION

In certain situations, some of the Rules have allowed tribunals to decide the arbitration based only on the evidence and facts that they have before them, for example, if a party is not complying with discovery, disclosure, or production of documents or witnesses. Only the WIPO and AAA Rules expressly have sections that allow for the court to enter a default ruling in the case that one of the parties does not comply with the Rules or the tribunal's orders. Article 28.3 of the UNCITRAL Rules expressly authorizes the tribunal to "make the award on the evidence before it" if a party fails to produce duly requested documentary evidence.

1. *AAA Rules Article 23*

1. If a party fails to file a statement of defense within the time established by the tribunal without showing sufficient cause for such failure, as determined by the tribunal, the tribunal may proceed with the arbitration.
2. If a party, duly notified under these Rules, fails to appear at a hearing without showing sufficient cause for such failure, as determined by the tribunal, the tribunal may proceed with the arbitration.
3. If a party, duly invited to produce evidence or take any other steps in the proceedings, fails to do so within the time established by the tribunal without showing sufficient cause for such failure, as determined by the tribunal, the tribunal may make the award on the evidence before it.

2. *UNCITRAL Rules Article 28(3)*

If one of the parties, duly invited to produce documentary evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.

3. *WIPO Rules Article 56*

- (a) If the claimant, without showing good cause, fails to submit its statement of claim in accordance with Article 41, the tribunal shall terminate the proceedings.
- (b) If the respondent, without showing good cause, fails to submit its statement of defense in accordance with Article 42, the tribunal may nevertheless proceed with the arbitration and make the award.
- (c) The tribunal may also proceed with the arbitration and make the award if a party, without showing good cause, fails to avail itself of the opportunity to present its case within the period of time determined by the tribunal.
- (d) If a party, without showing good cause, fails to comply with any provision of, or requirement under, these Rules or any direction given by the tribunal, the tribunal may draw the inferences therefrom that it considers appropriate.

P. DIVISION OF LIABILITY AND DAMAGES

Like the bifurcated system of justice in the United States where guilt/liability and sentencing/award may be conducted separately, the tribunal may address issues of liability and damages separately upon request of the parties or on its own accord if the tribunal concludes that bifurcation is more efficient.

Q. INTERIM RELIEF/PROVISIONAL REMEDIES

Each of the major international Rules provides that parties may apply for interim relief. The Rules also state that parties may request interim relief from any competent judicial authority, and that such application is neither incompatible with, nor constitutes a waiver of, the agreement to arbitrate.¹⁰

1. *AAA Rules Article 21*

1. At the request of any party, the tribunal may take whatever interim measures it deems necessary, including injunctive relief and measures for the protection or conservation of property.
2. Such interim measures may take the form of an interim award, and the tribunal may require security for the costs of such measures.
3. A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.
4. The tribunal may in its discretion apportion costs associated with applications for interim relief in any interim award or in the final award.

2. *CPR Rule 13*

- 13.1 At the request of a party, the tribunal may take such interim measures as it deems necessary, including measures for the preservation of assets, the conservation of goods, or the sale of perishable goods. The tribunal may require appropriate security as a condition of ordering such measures.
- 13.2 A request for interim measures by a party to a court shall not be deemed incompatible with the agreement to arbitrate or as a waiver of that agreement.

3. *ICC Rules Article 23*

1. Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The arbitral tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an award, as the arbitral tribunal considers appropriate.
2. Before the file is transmitted to the arbitral tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial

¹⁰ See also Gregoire Marchac, *Interim Measures in International Commercial Arbitration Under the ICC, AAA, LCIA and UNICITRAL Rules*, 10 AM. REV. INT'L ARB. 123 (1999); Alan Redfern, *Arbitration and the Courts: Interim Measures of Protection – Is the Tide About to Turn?*, 30 TEX. INT'L L.J. 71 (1995).

authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an arbitral tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the arbitral tribunal. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the arbitral tribunal thereof.

4. *LCIA Rules Article 25*

25.1 The arbitral tribunal shall have the power, unless otherwise agreed by the parties in writing, on the application of any party:

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

25.2 The arbitral tribunal shall have the power, upon the application of a party, to order any claiming or counterclaiming party to provide security for the legal or other costs of any other party by way of deposit or bank guarantee or in any other manner and upon such terms as the arbitral tribunal considers appropriate. Such terms may include the provision by that other party of a cross-indemnity, itself secured in such manner as the arbitral tribunal considers appropriate, for any costs and losses incurred by such claimant or counterclaimant in providing security. The amount of any costs and losses payable under such cross-indemnity may be determined by the arbitral tribunal in one or more awards. In the event that a claiming or counterclaiming party does not comply with any order to provide security, the arbitral tribunal may stay that party's claims or counterclaims or dismiss them in an award.

25.3 The power of the arbitral tribunal under Article 25.1 shall not prejudice howsoever any party's right to apply to any state court or other judicial authority

for interim or conservatory measures before the formation of the arbitral tribunal and, in exceptional cases, thereafter. Any application and any order for such measures after the formation of the arbitral tribunal shall be promptly communicated by the applicant to the arbitral tribunal and all other parties. However, by agreeing to arbitration under these Rules, the parties shall be taken to have agreed not to apply to any state court or other judicial authority for any order for security for its legal or other costs available from the arbitral tribunal under Article 25.2.

5. *UNCITRAL Rules Article 26*

1. At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject matter of the dispute, including measures for the conservation of the goods forming the subject matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.
2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.
3. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

6. *WIPO Rules Article 46*

- (a) At the request of a party, the tribunal may issue any provisional orders or take other interim measures it deems necessary, including injunctions and measures for the conservation of goods which form part of the subject matter in dispute, such as an order for their deposit with a third person or for the sale of perishable goods. The tribunal may make the granting of such measures subject to appropriate security being furnished by the requesting party.
- (b) At the request of a party, the tribunal may, if it considers it to be required by exceptional circumstances, order the other party to provide security, in a form to be determined by the tribunal, for the claim or counterclaim, as well as for costs referred to in Article 72.
- (c) Measures and orders contemplated under this Article may take the form of an interim award.
- (d) A request addressed by a party to a judicial authority for interim measures or for security for the claim or counterclaim, or for the implementation of any such measures or orders granted by the tribunal, shall not be deemed incompatible with the arbitration agreement, or deemed to be a waiver of that agreement.

R. COSTS OF ARBITRATION

The tribunal has authority to distribute these costs according to the circumstances of the case. Some of the Rules expressly call for the loser to pay the costs or for the costs to be divided in a specific way. The AAA Rules provide that the administrator should arrange in advance for an appropriate rate of arbitrator compensation.

1. *AAA Rules Article 32*

Arbitrators shall be compensated based upon their amount of service, taking into account their stated rate of compensation and the size and complexity of the case. The administrator shall arrange an appropriate daily or hourly rate, based on such considerations, with the parties and with each of the arbitrators as soon as practicable after the commencement of the arbitration. If the parties fail to agree on the terms of compensation, the administrator shall establish an appropriate rate and communicate it in writing to the parties.

The AAA also recently revised its fee schedule to incorporate a new refund policy that allows for 100 percent of the initial filing fee to be refunded to the claimant if the case is settled or withdrawn within five calendar days of filing. Up to 50 percent of the filing fee will be refunded to the claimant if the case is settled or withdrawn within thirty calendar days, or up to 25 percent within sixty calendar days, of filing. The initial filing fees for claims over U.S.\$1 million have also been reduced, and fees for mediation are capped at U.S.\$650 (U.S.\$325 per party) for all submission-based case filings. This fee continues to be waived for parties who file for arbitration and subsequently agree to mediation prior to arbitrating.¹¹

2. *CPR Rule 16.1 to 16.3*

16.1 Each arbitrator shall be compensated on a reasonable basis determined at the time of appointment for serving as an arbitrator and shall be reimbursed for any reasonable travel and other expenses.

16.2 The tribunal shall fix the costs of arbitration in its award. The costs of arbitration include:

- (a) the fees and expenses of members of the tribunal;
- (b) the costs of expert advice and other assistance engaged by the tribunal;
- (c) the travel, translation, and other expenses of witnesses to such extent as the tribunal may deem appropriate;

¹¹ The AAA also added a section to its International Dispute Resolution Procedures emphasizing to parties the benefits of engaging in mediation rather than proceeding immediately to arbitration. According to the AAA, mediations can be scheduled more quickly, and are quite often successful in settling parties' disputes in less time than arbitration, with commensurate cost savings.

- (d) the costs for legal representation and assistance and experts incurred by a party to such extent as the tribunal may deem appropriate;
 - (e) the charges and expenses of the neutral organization with respect to the arbitration;
 - (f) the costs of a transcript, if any; and
 - (g) the costs of meeting and hearing facilities.
- 16.3 Subject to any agreement between the parties to the contrary, the tribunal may apportion the costs of arbitration between or among the parties in such manner as it deems reasonable, taking into account the circumstances of the case, the conduct of the parties during the proceeding, and the result of the arbitration.

3. *ICC Rules Appendix III*

The ICC uses a schedule for costs based upon the amount in dispute.

4. *LCIA Rules Article 28.1*

The costs of the arbitration (other than the legal or other costs incurred by the parties themselves) shall be determined by the LCIA Court in accordance with the schedule of costs. The parties shall be jointly and severally liable to the arbitral tribunal and the LCIA for such arbitration costs.¹²

5. *UNCITRAL Rules Article 39*

1. The fees of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case.
2. If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at The Hague, and if that authority has issued a schedule of fees for arbitrators in international cases which it administers, the arbitral tribunal in fixing its fees shall take that schedule of fees into account to the extent that it considers appropriate in the circumstances of the case.
3. If such appointing authority has not issued a schedule of fees for arbitrators in international cases, any party may at any time request the appointing authority to furnish a statement setting forth the basis for establishing fees which is customarily followed in international cases in which the authority appoints arbitrators. If the appointing authority consents to provide such a statement, the arbitral tribunal in fixing its fees shall take such information into account to the extent that it considers appropriate in the circumstances of the case.

¹²The LCIA determines the cost based on a daily fixed rate schedule.

III. POST-ARBITRAL MATTERS

A. IMPLIED DUTY OF CONTINUED CONFIDENTIALITY

Except for the UNCITRAL Rules, all of the other Rules make clear that the arbitral proceedings are confidential.¹⁴ An arbitration under the UNCITRAL Rules could, of course, be kept confidential if the parties agree to this. The only reference to confidentiality in the UNCITRAL Rules is a provision that the tribunal may conduct the hearing *in camera*. Recently, however, the AAA announced its intention to allow for the publication of selected arbitration awards in order to encourage the study of international commercial arbitration. To further this end, the AAA's International Centre for Dispute Resolution ("ICDR") will select awards, decisions, and rulings each month that will be made public. The awards chosen for publication will be edited to conceal the names of the parties, along with any other identifying characteristics. The publication of selected redacted arbitration awards will begin on July 1, 2003.

1. AAA Rules Article 34

Confidential information disclosed during the proceedings by the parties or by witnesses shall not be divulged by an arbitrator or by the administrator. Unless otherwise agreed by the parties, or required by applicable law, the members of the tribunal and the administrator shall keep confidential all matters relating to the arbitration or the award.

2. CPR Rules 11 and 17

Rule 11 The tribunal may issue orders to protect the confidentiality of proprietary information, trade secrets, and other sensitive information disclosed.

Rule 17 Unless the parties agree otherwise, the parties, the arbitrators, and the neutral organization shall treat the proceedings, any related disclosure, and the decisions of the tribunal as confidential, except in connection with judicial proceedings ancillary to the arbitration, such as a judicial challenge to, or enforcement of, an award, and unless otherwise required by law or to protect a legal right of a party. To the extent possible, any specific issues of confidentiality should be raised with and resolved by the tribunal.

3. ICC Appendix I, Article 6

The work of the ICC Court is of a confidential nature which must be respected by everyone who participates in that work in whatever capacity. The ICC Court lays down

¹⁴ See generally Charles S. Baldwin, IV, *Protecting Confidential and Proprietary Commercial Information in International Arbitration*, 31 TEX. INT'L L.J. 451 (1996); Philip Rothman, *Psst, Please Keep it Confidential: Arbitration Makes it Possible*, 49 DISP. RESOL. J. 69 (September 1994).

the rules regarding the persons who can attend the meetings of the Court and its Committees and who are entitled to have access to the materials submitted to the Court and its Secretariat.

4. *LCIA Rules Article 30*

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

30.2 The deliberations of the arbitral tribunal are likewise confidential to its members, save and to the extent that disclosure of an arbitrator's refusal to participate in the arbitration is required of the other members of the arbitral tribunal under Articles 10, 12, and 26.

30.3 The LCIA Court does not publish any award or any part of an award without the prior written consent of all parties and the arbitral tribunal.

5. *WIPO Rules Articles 73 to 76*

Article 74: Confidentiality of disclosures made during the arbitration

(a) In addition to any specific measures that may be available under Article 52, any documentary or other evidence given by a party or a witness in the arbitration shall be treated as confidential and, to the extent that such evidence describes information that is not in the public domain, shall not be used or disclosed to any third party by a party whose access to that information arises exclusively as a result of its participation in the arbitration for any purpose without the consent of the parties or order of a court having jurisdiction.

(b) For the purposes of this Article, a witness called by a party shall not be considered to be a third party. To the extent that a witness is given access to evidence or other information obtained in the arbitration in order to prepare the witness's testimony, the party calling such witness shall be responsible for the maintenance by the witness of the same degree of confidentiality as that required of the party.

Article 75: Confidentiality of the award

The award shall be treated as confidential by the parties and may only be disclosed to a third party if and to the extent that:

- (i) the parties consent; or
- (ii) it falls into the public domain as a result of an action before a national court or other competent authority; or

(iii) it must be disclosed in order to comply with a legal requirement imposed on a party or in order to establish or protect a party's legal rights against a third party.

Article 76: Maintenance of confidentiality by the Center and arbitrator

- (a) Unless the parties agree otherwise, the Center and the arbitrator shall maintain the confidentiality of the arbitration, the award and, to the extent that they describe information that is not in the public domain, any documentary or other evidence disclosed during the arbitration, except to the extent necessary in connection with a court action relating to the award, or as otherwise required by law.
- (b) Notwithstanding (a), the Center may include information concerning the arbitration in any aggregate statistical data that it publishes concerning its activities, provided that such information does not enable the parties or the particular circumstances of the dispute to be identified.

B. IMMUNITY OF ARBITRATORS

In general, all the Rules surveyed provide that the arbitrator and the arbitration organization are not liable for their actions unless the actions were conscious and deliberate. Only the ICC Rules do not contain an express statement that holds the arbitrator or the organization liable for conscious and deliberate wrongdoing.

1. *AAA Rules Article 35*

The members of the tribunal and the administrator shall not be liable to any party for any act or omission in connection with any arbitration conducted under these Rules, except that they may be liable for the consequences of conscious and deliberate wrongdoing.

2. *CPR Rule 19*

Neither the neutral organization nor any arbitrator shall be liable to any party for any act or omission in connection with any arbitration conducted under these International Rules, except that either may be liable to a party for the consequences of conscious and deliberate wrongdoing.

3. *ICC Rules Article 34*

Neither the arbitrators, nor the ICC Court and its members, nor the ICC and its employees, nor the ICC National Committees shall be liable to any person for any act or omission in connection with the arbitration.

4. *LCIA Rules Article 31*

31.1 None of the LCIA, the LCIA Court (including its President, Vice-Presidents, and individual members), the Registrar, any deputy Registrar, any arbitrator, and any expert to the arbitral tribunal shall be liable to any party howsoever for any act or omission in connection with any arbitration conducted by reference to these Rules, save where the act or omission is shown by that party to constitute conscious and deliberate wrongdoing committed by the body or person alleged to be liable to that party.

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

5. *WIPO Rules Articles 77 and 78*

77. Except in respect of deliberate wrongdoing, the arbitrator or arbitrators, WIPO and the Center shall not be liable to a party for any act or omission in connection with the arbitration.

78. The parties and, by acceptance of appointment, the arbitrator agree that any statements or comments, whether written or oral, made or used by them or their representatives in preparation for or in the course of the arbitration shall not be relied upon to found or maintain any action for defamation, libel, slander, or any related complaint, and this Article may be pleaded as a bar to any such action.

IV. CONCLUSION

Although the Rules of the various arbitral institutions contain similar provisions on many issues, there are important differences. These differences should be considered when drafting an arbitration clause in an arbitral agreement, so that the arbitration rules selected are most advantageous or appropriate for the specific situation.