Optional Provisions for the Terms of Reference and Procedural Order No. 1

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The Terms of Reference and Procedural Order n°1 tend to have a predictable minimum content comprising provisions either mandated by institutional rules or generally viewed as good practices in the international arbitration community. This article outlines provisions beyond the standard content that the arbitral tribunal may wish to discuss with the parties and include in the Terms of Reference or Procedural Order. In particular, the article addresses optional provisions regarding (1) the arbitral tribunal, (2) counsel, (3) scheduling issues, (4) evidence, and (5) other matters.

Introduction

The **Terms of Reference** ('Terms') tend to have a predictable minimum content comprising provisions either mandated by the ICC Arbitration Rules ('ICC Rules') or generally viewed as good practices in the international arbitration community. Specifically, most Terms set out:

- the parties, their representatives, and their respective contact details for notification purposes;
- the arbitral tribunal members, their method of appointment, as well as their contact details;
- a summary of the parties' claims, defenses, relief sought, and, if possible, the preliminary amount in dispute;
- a list of issues to be determined;
- the procedural history of the case;
- the arbitration agreement invoked in support of the arbitral tribunal's jurisdiction;
- the applicable version of the ICC Rules;
- the place and language of the arbitration;
- the potentially applicable substantive laws; and
- the arbitral tribunal's power to bifurcate and issue interim and partial awards.

Similarly, the **Procedural Order** establishing the timetable and particulars of procedure (Procedural Order No. 1 or for brevity here the 'Order') usually contains ground rules on the:

- calculation of time limits;
- means of communication;
- procedural, jurisdictional and merits briefs that will be allowed in the case;
- submission of evidence in general, and witness statements and expert reports in particular;
- ground rules on document production requests, replies, and comments thereto;
- translations and interpretation; and
- hearing basics, most notably provisions aimed at preventing a so-called trial 'by ambush'.

It is also standard for the Terms and the Order to address the procedure on how to amend them, as well as applicable confidentiality measures.

This article outlines additional provisions beyond the standard content that the arbitral tribunal may wish to discuss with the parties and include in the Terms or the Order. In particular, the article addresses optional provisions regarding (1) the arbitral tribunal (or 'tribunal'), (2) counsel, (3) scheduling issues, (4) evidence, and (5) other matters. Before considering each of those topics, three preliminary practical remarks are in order.

First, what and how much to codify in the Terms and the Order is ultimately a prudential decision for the tribunal to make with party input. Most of the potential provisions discussed below would be permissible in any arbitration, but they will only be necessary in a few. In evaluating whether to include an optional provision, the tribunal should consider how likely the issue addressed in the provision is to arise and whether it is desirable and even possible to introduce certainty on that issue at an early stage. It should also consider the interest shown by the parties in the adoption of the provision.

Second, the ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules (the 'ICC Note') is a remarkably useful resource for identifying issues to address in the Terms or the Order. The ICC Note, however, is only 'intended to provide … with practical guidance'.[1] By incorporating some of its language and principles in the Terms or the Order, the tribunal can make them binding on the parties.

Third, in deciding whether an optional provision is a better fit for the Terms than the Order or vice versa, the tribunal should keep in mind the nature and goals of each of these two instruments. The Terms are a document central to the ICC system and usually signed both by the parties and the tribunal. The Order, by contrast, is usually signed by the tribunal (or even the chair only) and thus easier to modify. Provisions that introduce significant departures from normal ICC practice should be included in the Terms and quite often only if all parties sign them. This is the case, for instance, of provisions allowing the tribunal to mediate the dispute. Conversely, provisions on clerical issues, such as those on page limits for briefs, belong in the Order. This article generally indicates whether a certain optional provision is better suited for the Terms or the Order, but this should be taken as generic guidance, subject to the needs of the case.

1. The tribunal

Optional provisions regarding the tribunal include those to confirm (when appropriate) that there is no objection to the appointment of its members, clarify the tribunal's powers, address the use of secretaries, anticipate the use of artificial intelligence, allow for travel charges outside of an arbitrator's usual place of business, or regulate VAT or other charges the tribunal may be subject to.

i) Lack of objections to constitution

When no challenge or objection has been made to the service of any of the arbitrators, some tribunals include language like this in the Terms for the sake of certainty:

> 'Each party expressly waives any objection or challenge that it may have with respect to the constitution of the Tribunal, or the appointment of any of its members, based on any matter known or that should be known to such party as at the date of these Terms of Reference.'

ii) Powers of the tribunal

Powers of the President. Provisions clarifying that procedural orders only require chair signature are relatively common in the Terms. A possible formulation is this:

> 'The President shall have authority to sign Procedural Orders on behalf of the Arbitral Tribunal.'

A more complex question is whether the president can act for the tribunal in case of emergency. In anticipation of situations in which deliberation of procedural matters may not take place soon enough, the Terms occasionally include language such as the following:

> 'In urgent circumstances, the President, acting alone, may make and issue procedural orders, which shall be subject to revision further to consultation with the co-arbitrators [or upon request by a party or any co-arbitrator].'[2]

A more restrained alternative reads as follows:

> 'In case of urgency, the President acting alone may extend or modify a procedural time limit.'

Sometimes the parties and the co-arbitrators agree that the chair will serve as special master if one is needed. In those cases, language like this can be added to the Terms:

> 'If a dispute arises as to whether certain documents should be produced, the parties agree that the tribunal president shall review those documents and decide the dispute. This decision shall be subject to revision by the entire tribunal upon request by a party.'

Tribunal power to allocate costs. Article 38(3) of the ICC Rules already grants the tribunal the power to (at any time during the arbitral proceedings), 'make decisions on costs, other than those to be fixed by the Court, and order payment'. The Terms or alternatively the Order can flesh out this rule with language such as the following:

> 'The Tribunal may make decisions on costs pursuant to Article 38(3) on its own initiative or upon a party's request.'[3]

1 ICC Note, para. 1.

2 In this article, a bracketed text within an optional provision means a variation of or alternative language to the main text of that provision.

3 On this issue, see also ICC Note, para. 193.

Tribunal powers to apply the law: *Iura novit arbiter*. As a matter of general practice, the existence and contents of the law must be established by the parties. In other words, the tribunal is not expected to know or supply them *sua sponte*. In certain cases, however, the tribunal may be very familiar with the law being invoked or want to preserve some margin to raise legal issues. In those cases, the tribunal can include language like this in the Terms or alternatively the Order:

> 'The Tribunal expressly reserves the power to ask the parties to comment on legal authorities [and/or legal theories] that the tribunal finds of potential significance to the dispute, irrespective of whether raised by the parties.'

Powers to mediate, decide in equity, or express preliminary views. In the extraordinary event that the parties wish that the tribunal resolve the dispute *ex aequo et bono*, serve as amiable compositeur, mediate the dispute, or express preliminary views on how it may dispose of the case, the Terms should address the issue. The specific language to be included in the Terms should be agreed by the parties to reflect their needs and the tribunal approval thereof. Where appropriate, the Terms may also reference documents or instruments contemplating a more proactive conduct of the tribunal, such as the Prague Rules on the Efficient Conduct of Proceedings in International Arbitration, which provide in Article 9 for the possibility that the tribunal assist the parties in reaching settlement.

iii) Tribunal secretaries

The ICC Note details the role secretaries can perform.[4] If a secretary is appointed, the tribunal should consider incorporating the relevant sections of the ICC Note by reference or at least distilling their key tenets. This should be done if possible in the Terms of Reference, as a preeminent resolution that is secured with party agreement, rather than in the Order. A frequently used formulation – that both distills and develops – the principles of the ICC Note goes as follows:

> 'The Tribunal Secretary will complete such tasks specifically assigned to him/her by the Tribunal or the Chair, which may include:
>
> (a) assisting the Tribunal in the review of the evidence and of the issues in dispute, including the preparation of summaries and/or memoranda, and research on specific factual or legal issues;
>
> (b) assisting the Tribunal in the preparation and communication of its decisions to the Parties on issues of procedure and substance, including by preparing drafts of procedural orders and awards, pursuant to the directions and under the strict supervision of [the Tribunal] [the Chair]; and
>
> (c) providing other support to the Tribunal or its members, especially the Chair, at any time, especially during hearings and deliberations, which the Tribunal Secretary may attend.
>
> Under no circumstances shall the Tribunal delegate any decision-making functions to the Tribunal Secretary. The Tribunal Secretary will work at all times under the specific instructions and continuous control and supervision of the Tribunal.
>
> The Tribunal Secretary's remuneration will be assumed by [the Tribunal] [the Chair], [save for reasonable expenses incurred in connection with meetings and hearings].
>
> The Tribunal Secretary shall be bound by the same ethical and confidentiality duties as the Tribunal and shall be accorded the same immunities as the Tribunal.'

iv) Use of artificial intelligence ('AI')

Not unlike the concerns sometimes expressed about the use of secretaries, the rapid increase in the availability and capabilities of AI may give rise to questions as to whether the tribunal is actually helming and deciding the case. To guarantee that no improper 'delegation' or use of AI takes place, the following text may be added to the Terms of Reference:

> 'Unless previously disclosed to and accepted by the Parties, the Tribunal members shall perform all their duties and functions – including their decision-making function – personally, without reliance on or use of any generative Artificial Intelligence tool. To the extent that with prior Party acceptance, the Tribunal relies on any generative Artificial Intelligence tool, the Tribunal shall personally supervise and correct the outputs of such tool.'

v) Ethical obligations

Certain institutions and organizations have enacted codes of ethics for arbitrators – e.g., the AAA/ABA Code of Ethics for Arbitrators, The Arbitrators' Code of Ethics by the European Court of Arbitration, the FINRA Code of Ethics for Arbitrators in Commercial Disputes, or the ICSID and UNCITRAL Code of Conduct for Arbitrators in International Investment Disputes.

4 See the ICC Note, paras. 222 to 226.

There is some risk in adopting in an ICC case a code of ethics devised for a different context. Also, the Rules and the Notes already contain ethical protections[5] (and those in the Note can certainly be made binding through incorporation in the Terms). Anyhow, if the parties are keen to supplement the Rules or the ICC Note on ethical obligations, or if the tribunal considers that there is good cause to do so, then the Terms can include language along the following lines:

> 'In the discharge of its functions, the Tribunal agrees to be bound [alternatively: to be guided by] the provisions in [name of the code of ethics] in the understanding that nothing in those provisions will derogate from the Rules or from ethical practices in the ICC Note, which are hereby incorporated by reference.'

vi) Expenses

The ICC Note provides that the only travel expenses an arbitrator will be reimbursed for are those 'he or she incurs travelling from and returning to his or her usual place of business as indicated on the curriculum vitae filed for the relevant ICC arbitration'.[6] Arbitrators, however, occasionally spend significant time in locations other than the 'usual place of business' designated in their CVs. If they wish to be reimbursed for trips from or to a different location, it is recommended that they secure party agreement to include the following language in the Terms:

> 'The parties agree that, as an exception to paragraph 235 of the ICC Note, any arbitrator shall be reimbursed for travel to and from any such other location as the arbitrator may notify before incurring such travel costs [or in the alternative: The parties agree that, as an exception to paragraph 235 of the ICC Note, arbitrator [X] will be reimbursed for travel from and returning to location [Y].]

vii) VAT

To ensure the integrity of the tribunal's compensation and avoid uncertainty as to the allocation of taxes, some tribunals include a provision like this in the Terms:

> 'The Parties and the Arbitrators confirm that Appendix III Article 2(13) of the ICC Rules is applicable.[7]
>
> As between them and the Arbitrators, the Parties take note that Arbitrators may have to pay value-added or similar taxes or charges on their fees and expenses. To the extent that this is the case, each Arbitrator subject to such taxes or charges is entitled to claim, directly from the Parties, in addition to any entitlements received from the ICC, any such taxes or charges to be paid by them. The Parties will jointly and severally be obliged to pay such taxes or charges on demand. The Arbitrator(s), who is (are) subject to such taxes or charges may request the Parties to pay, under the same conditions, a retainer on the subject taxes or charges.'

2. Counsel

The Terms of Reference and the Order can also contain provisions regarding counsel and their conduct. Two relatively common examples include instances of withdrawal and adoption of provisions on ethics.

i) Withdrawal

Counsel's withdrawal can lead to a period during which it is not clear who is to receive notifications on behalf of the party. The following language can be included in the Terms of Reference, or alternatively the Order, to mitigate difficulties:

> 'Counsel who withdraws or resigns in the course of the case shall nonetheless continue to validly receive notifications in the proceeding until replacement counsel or party representatives are designated.'

ii) Ethical obligations

Instruments setting out obligations or guidelines for counsel conduct can be incorporated through clauses such as this:

> 'The Tribunal is empowered to enforce, and counsel agrees to be bound by, the 2013 IBA Guidelines on Party Representation.'

5 See, e.g. ICC Note, para. 66 that provides: 'Arbitrators shall discharge their duties in accordance with the Rules, be at all times independent and impartial, avoid any behaviour that may create a conflict of interest, a bias or an appearance of bias, and not allow any consideration that is extraneous to the case to influence their decisions'.

6 ICC Note, para. 235.

7 Appendix III, Art. 2(13), ICC Rules provides: 'Amounts paid to the arbitrator do not include any possible value added tax (VAT) or other taxes or charges and imposts applicable to the arbitrator's fees. Parties have a duty to pay any such taxes or charges; however, the recovery of any such charges or taxes is a matter solely between the arbitrator and the parties'.

A 'softer' version may provide:

> 'In addressing issues involving counsel conduct, the Tribunal will be guided by the 2013 IBA Guidelines on Party Representation.'

Either language is consistent with paragraph 67 of the ICC Note, which provides that '[p]arties and arbitral tribunals are encouraged, where appropriate, to adopt or otherwise be guided by the IBA Guidelines on Party Representation in International Arbitration'.

The tribunal may also include in the Terms language borrowed from paragraph 65 of the ICC Note to the effect that '[a]rbitral tribunals, parties and their representatives are expected to abide by the highest standards of integrity and honesty, to conduct themselves with honour, courtesy and professionalism, and to encourage all other participants in the arbitral proceedings to do the same'.

3. Scheduling issues

There are multiple variants of schedule that the parties and the tribunal can adopt. Salient optional issues range from establishing hearing dates, which is useful to do even when alternative timetables are contemplated, to scheduling update communications. The following paragraphs discuss these and other possibilities.

i) Hearing dates

The ICC Note orders an expeditious and cost-efficient conduct of the arbitration.[8] This is typically best achieved when the procedural timetable already sets out specific hearing dates not too distant from the parties' last pre-hearing submissions. Orders that set out deadlines for pre-hearing submissions but do not reserve exact dates for the hearing may result in delays, as it becomes difficult to organize and ensure availability for hearings on shorter notice.

ii) Bifurcation

If the schedule contemplates a motion to bifurcate, the tribunal should consider establishing full calendars, including hearing dates, both for the case that the bifurcation request be granted and for the case it is denied. This will avoid having to develop calendars and book dates on the go based on the outcome of the motion.

iii) Tribunal list of issues of interest

Certain arbitrators favor indicating early in the case issues they find of interest and would like the parties to focus their presentations on. The following language is adapted from the schedule in one Order reflecting this approach:

> 'Statement of Claim – [Date MM/DD/YYYY]
>
> Statement of Defence – [Date MM/DD/YYYY]
>
> Tribunal to indicate to Parties specific issues or questions it suggests the Parties address in forthcoming submissions, without prejudice to other allegations the Parties wish to make in them – [Date MM/DD/YYYY]
>
> [The schedule then continues with dates for the document exchange process, second round memorials, and the evidentiary hearing.]'

Alternatively, the tribunal can provide to the parties shortly before the hearing a list of specific issues of interest.

iv) Status conferences / Submissions to update the tribunal

Mediation or settlement efforts made while the arbitration is pending may affect its schedule. Sometimes the Order contemplates this contingency. For instance, in an Order the author has recently seen, the parties undertook to report to the tribunal after their first memorials whether a mediation would be attempted and, if so, whether it would lead to a stay of the arbitration or run in parallel with it. In another case the tribunal added the following provision to the Order:

> 'If this proceeding is stayed for longer than a month for any reason, the Tribunal may order at its discretion status conference calls with the parties to discuss, without limitation, the expected further duration of the stay and its impact, if any, on the proceeding.'

4. Evidence

Optional provisions on evidence include those requiring parties to preserve evidence, detailing aspects of the document exchange process and privilege rules, and addressing certain issues that may come up with witnesses.

8 Id. para. 92.

i) Evidence preservation/hold

Tribunals can direct the preservation of evidence relevant to the dispute, including through the use of language like this in the Terms of Reference:

> 'The parties, their directors, executives, and employees are directed to preserve through the duration of this proceeding all documents, including electronically stored information, related to the dispute as defined in Section [X] of the Terms of Reference. In case of doubt as to whether a document relates to the dispute, the doubt shall be resolved in favor of preservation.'

ii) Document production

Limits on document production requests, replies, and comments. For the sake of efficiency, the Order may establish limits to the number of document production request or extension of the replies and comments, such as these:

> 'The number of document production requests per Party shall not exceed [30], including sub-requests. A Party wishing to exceed this number shall seek leave from the Tribunal two weeks before the submission of its requests to the opposing Party pursuant to Annex A, explaining in detail the reasons and need for a higher number of requests.
>
> Requests to produce and any objections to such requests shall be submitted in the form of the "Redfern Schedule" provided in Annex A. To the extent possible, the Redfern Schedules submitted to the Tribunal for disposition shall not exceed [80] pages each, using a Times New Roman 11 font.'

Obligation to meet and confer. To facilitate the resolution of document production disputes, the tribunal may also order that the parties meet and confer to narrow their differences before submitting contested requests for the tribunal to adjudicate.

Role of IBA Rules. On document production, the Order may define the role to be played by the IBA Rules on the Taking of Evidence using language such as this:

> 'In regard to matters concerning the gathering or taking of evidence, including in particular questions related to document production, if any, the Tribunal may be guided by [or apply] the IBA Rules on the Taking of Evidence in International Arbitration 2020.'

Alternatively, the Order may refer to other instruments, such as the Prague Rules.

Standards applying to document production. Additionally, the tribunal can specify or emphasize the criteria it will apply to contested document production requests with language like this:

> 'The factors considered by the Tribunal in granting or denying Requests to Produce, will include those stemming from the IBA Rules and standard international arbitration practice, with particular emphasis on the precision with which the Requests have been drafted, their relevance and materiality, and their proportionality to the amount in dispute and allegations made in the case.'

For further clarity, some tribunals define upfront terms expected to be contested. For instance:

> 'For document production purposes, a category of documents will be deemed "relevant and material" when it refers to issues actually raised in a submission from a party in the case. Categories of documents that may refer or that arguably refer to issues raised will not be deemed relevant and material.'

Power to appoint a special master. As a general matter, the tribunal has the power to appoint a special master to help dispose of document production disputes. In some circumstances, the tribunal may want to set out rules in this respect in the Terms or alternatively the Order. This language can be helpful:

> 'In its discretion, the Tribunal may appoint a special master to help resolve document production disputes. The special master shall be subject to the same independence and impartiality requirements as the arbitrators and shall have authority to convene the parties, hear disputes referred to him/her by the Tribunal, and recommend in writing to the Tribunal the resolution of such disputes.'[9]

iii) Ground rules on privilege

The Order typically contains provisions on the submission of a privilege log. As an additional precaution, the tribunal may also include ground rules on the scope of the privilege or the law governing it. These topics are contingent on several factors and there is no-one-size-fit all solution. Occasionally, the following language may be appropriate:

9 See Section 1(ii) of this Article for the possibility that the tribunal president serves as special master.

> 'In resolving disputes on the privilege or confidentiality applicable to documents, the Tribunal may consider the laws of the jurisdictions where the parties have their residence and apply consistently to both the law that contains the most protective (i.e. anti-disclosure) standard.'

With respect to experts, a solution like the following is often adopted in the Order:

> 'Drafts, working papers or any other documentation created by an expert witness for the purpose of providing expert evidence in the arbitration, and any communications between the expert and a party or its counsel in relation to that purpose, shall be privileged and shall not be subject to production in the arbitration, provided, however, that all documents relied upon by an expert in formulating his or her opinions shall be identified in the expert's report.'

iv) Witnesses

Contact with witnesses. Arbitration practice countenances meetings with witnesses in ways that may be unusual, if not outright off-limits, in certain jurisdictions. If permissible under applicable laws, the tribunal can consider the addition of this language to the Order to clarify the issue:

> 'It shall not be improper for a party, its directors, officers, employees or other representatives, or its counsel, to interview actual or potential fact or expert witnesses, or to discuss their prospective testimony with them, including for the purpose of establishing the facts relevant to the arbitration, preparing Witness Statements or Expert Reports and preparing for hearings. In all cases a party will seek to ensure that a Witness Statement or Expert Report reflects the witness's own account of relevant facts, events and circumstances, or his or her own opinion, as reflected in the Witness Statement or Expert Report.'

Prior witness statement and third-party evidence. Standard Orders contain language to the effect that:

> 'Only witnesses from whom Witness Statements have been duly submitted, or expert witnesses from whom Expert Reports have been submitted, may testify at the hearing.'

This provision, however, is rarely enough to address practical difficulties that may arise.

First, a question may exist as to who can call a witness to testify at the hearing. Typically, the party against whom that testimony was proffered can do it, but, if the tribunal expects to call witnesses or (less commonly) let the party who submitted the testimony call its own witness, it is prudent to make that clear in the Order, using language such as this:

> 'Any witness or expert from whom a Witness Statement or Expert Report has been submitted must, at the request of another party made in accordance with the Procedural Timetable, or at the request of the Tribunal [or of the party submitting the Witness Statement or Expert Report], be made available for examination at the hearing.
>
> Each party shall be responsible for summoning its own witnesses and experts to the hearing when called for examination by another party or the Tribunal, and shall advance the costs of appearance of such witnesses.'

Second, a witness who has submitted a witness statement and has been called to testify at the hearing may fail to appear, which creates the question of whether the tribunal can then consider the written testimony of the witness. The Order may address this situation in different ways. A frequently used solution reads thus:

> 'If a witness or expert is called to appear at the hearing and fails to do so without providing a reason considered valid by the Tribunal, the Tribunal may in its discretion disregard the witness' Witness Statement(s) or the expert's Expert Report(s) and/or draw such inferences as it considers appropriate in relation to the witness's failure to appear. In the event that the Tribunal decides to consider the witness's Witness Statement(s) or the expert's Expert Report(s), it may ascribe less weight to that evidence, having regard to the circumstances including the fact that the witness or expert was not subject to cross-examination.'

Third, a witness who submitted a statement or an expert who submitted a report may not be called for examination at the hearing, thus begging the question of whether the party who failed to call them has acquiesced to the contents of the statement or report. Language along the following lines can cover this situation in the Order:

> 'If a party has not called another party's fact or expert witness for cross-examination, that fact will not be deemed as an admission by the party nor will it imply that the party accepts that the substance of the witness's Witness Statement(s) or the expert's Expert Report(s) is correct or proven. The Tribunal will in its discretion, assess the weight of the written evidence of a witness or expert who is not called to testify at the hearing.'

Fourth, the tribunal may want to ensure that the party who proffered the witness's testimony makes its best efforts to bring the witness to the hearing and that, consequently, any failure of the witness to appear is not to be attributed to a strategic decision from that party. To that effect, the Order can include this language:

> 'Each Party shall use reasonable efforts to provide for the appearance for testimony at a hearing of any person whose Witness Statement the Party has previously submitted. The Tribunal retains the power to seek details and evidence of those efforts.'

Fifth, there may be times when a party wishes that the tribunal hear testimony from a third-party witness who is disinclined to voluntarily provide a witness statement. This problem will typically come up at a later stage of the case, but the Order can preliminarily address it with language to this effect:

> 'Nothing in this Order prevents a party from resorting to the Tribunal or exercising its statutory rights in court seeking to compel the testimony from a witness outside of its control. An application to the Tribunal to compel third party testimony will detail the necessity, relevance, materiality, and expected format in which that testimony is to be provided.'

The tribunal's powers to enforce an order that a third party testify will depend on the applicable laws.

5. Other matters

i) Pleading extension limits

For the sake of efficiency, the tribunal can impose in the Order limits to the extension of pleadings, witness statements, or expert reports. If that is the case, word limits may be more effective than page limits, especially in cases in which the parties are likely to use graphics in their submissions (as pictures and other visuals may take a significant part of a page).

ii) Setting out standards on bifurcation and unmeritorious claims

To save time later and facilitate the parties' submissions, the tribunal may set out in the Order the parameters it will apply to adjudicate issues that are expected to come up.

Bifurcation. If a bifurcation request is announced, the tribunal may consider it appropriate to include in the Order the standard for its disposition, which may be as follows:

> 'In order to be granted a motion for bifurcation will need to establish that a defense or allegation has been made which, if proven, would be entirely dispositive of the case and is likely to be more efficiently addressed with separation and ahead from the rest of the proceeding.'

Manifestly unmeritorious claims. As for an application for the expeditious determination of manifestly unmeritorious claims, the tribunal may set out a standard like this:

> 'For purposes of paragraphs 109 to 114 of the ICC Note, a claim or defence is 'manifestly unmeritorious' when the Tribunal is satisfied that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'

iii) Consult in good faith before making applications to the Tribunal

For the sake of efficiency (including trying to decrease the number of procedural issues that require tribunal disposition), the Order can include language like the following:

> 'Unless urgent, the parties shall attempt in good faith to address any procedural disputes before the Tribunal is involved.'

iv) Need to promptly object

Article 40 of the ICC Rules requires any party to object to infractions of the Rules or any other applicable provision, legal requirement or tribunal direction, lest the objection be waived.[10]

10 Art. 40, ICC Rules: 'A party which proceeds with the arbitration without raising its objection to a failure to comply with any provision of the Rules, or of any other rules applicable to the proceedings, any direction given by the arbitral tribunal, or any requirement under the arbitration agreement relating to the constitution of the arbitral tribunal or the conduct of the proceedings, shall be deemed to have waived its right to object'.

The ICC Rules, however, do not include a deadline or timeframe to make the objection (even though some degree of promptness seems implied in Article 40). For this reason, some tribunals choose to add language similar to the following in the Terms or, in the alternative, in the Order:

> 'Except when the Rules or an otherwise applicable provision sets out a different deadline, each party agrees to provide written notice to the Tribunal [promptly since/within 15 days of] becoming aware of any complaint, protest or objection that it may have with respect to any matter affecting the conduct of the arbitration; and, if such notice is not given, the party shall be considered to have waived any such complaint, protest or objection.'

v) Extemporaneous submissions and evidence

The standard Order contains a schedule detailing the dates for briefing and submission of evidence. A party, however, may seek to make submissions or file evidence in ways or at times other than those set out in the Order. To address those requests, the tribunal may include the following provision:

> 'No submissions, Briefs, Witness Statements, Expert Reports, Exhibits or Legal Authorities may be submitted after the last date stipulated in the Procedural Timetable for each of these, unless a party demonstrates exceptional circumstances that prevented the submission or document in question from being provided earlier, and the Tribunal so orders. A request to make new submissions or to submit new Briefs, Witness Statements, Expert Reports, Exhibits or Legal Authorities shall not include the submission, Brief, Witness Statement, Expert Report, Exhibit or Legal Authority in question, which shall only be filed if and when ordered by the Tribunal. The foregoing shall not apply to applications for interim or provisional relief, provided urgent circumstances exist that prevent seeking prior leave from the Tribunal to submit them.'

vi) Applicable rules

While not a priority in most cases, some Orders incorporate the following text:

> 'Should an amendment to or a new version of the Rules be enacted in the course of the arbitration, the Tribunal will seek party input on whether to apply the amended or new Rules.'

vii) Use of artificial intelligence ('AI')

The nascent use of AI is poised to become a topic in the Terms and the Order.[11] With respect to counsel, witnesses, and experts, the Terms of Reference or alternatively the Order may contain language like the following:

> 'Each Party and its representatives shall be liable for the accuracy of their submissions in the case and will accordingly supervise and when necessary correct the output of any Artificial Intelligence tool they may have used in the preparation of those submissions. Witness and experts will be similarly liable for the accuracy of the statements and reports they submit in the case.'

Document production is an area where AI has been used extensively for years now (with digital tools often doing at least a first search for potentially responsive documents). The following language can be included in the Order to make sure any decision to produce or not ultimately rests with an individual:

> 'While each party may use digital tools to assist in the identification of responsive documents, the ultimate decision as to whether and what to produce will be made by an authorized party representative. The Tribunal may request at any point that any party identify the manner in which it searched for and identified responsive documents, and the individuals who took the decision to produce on its behalf.'

At the time of this article going to press, protocols for the use of AI in international are being developed. Most notably, on 31 August 2023, the Silicon Valley Arbitration and Mediation Center invited comments on a draft set of 'Guidelines on the Use of Artificial Intelligence in Arbitration'.[12] Tribunals should consider whether this or another protocol, once finalized, should be incorporated by reference in the Terms or the Order.

viii) Third-party funding

Article 11(7) of the ICC Rules provides that 'each party must promptly inform the Secretariat, the Arbitral Tribunal and the other parties, of the existence and identity of any non-party which has entered into an arrangement for the funding of claims or defences and under which it has an economic interest in the outcome of the arbitration'.

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11 See Section 1(iv) of this article for provisions the Terms may contain with respect to its use by the tribunal.

12 https://svamc.org/svamc-draft-guidelines-released-for-public-consultation/

In practice, this language has been supplemented in two ways at least.

- Some tribunals set out a deadline in the Terms or the Order to make the disclosure (to thus clarify the meaning of 'promptly' in the ICC Rules).
- Some tribunals add language in the Terms or the Order to the effect that 'to the extent a party is unsure as to whether its arrangement with a third-party qualifies for disclosure under Article 11(7) of the Rules, it will err on the side of disclosing'.

ix) Data protection

By now protective provisions in the Terms or the Order are standard in cases when the parties wish to avoid the dissemination of confidential or sensitive information. However, standard confidentiality provisions do not always cover the gamut of situations that can arise, especially when personal data and privacy issues are involved. For some of those situations, a provision similar to the below could be considered:

> 'The members of the Arbitral Tribunal, the Secretary, the Parties, and their representatives, acknowledge that the processing of their personal data is necessary for the purposes of these arbitration proceedings.
>
> The members of the Arbitral Tribunal, the Secretary, the Parties and their representatives, agree to comply with the provisions of [the General Data Protection Regulation (Regulation (EU) 2016/679)] and/or any other relevant data protection law, including providing appropriate notice to data subjects whose personal data will be processed in the arbitration proceedings, where necessary.
>
> Each of the Parties shall indemnify and hold harmless the Arbitral Tribunal and/or the Secretary with respect to any breach of the applicable data protection and privacy regulations by such Party and their representatives in relation to the arbitration proceedings.'

Also, it is not uncommon for the Order to require that witness statements provide the witness' picture, ID number, and address. Usually, the applicable legislation will be sufficient to protect those data, but if a party expresses concerns, the tribunal may consider adopting additional confidentiality measures, such as the redaction of personal information from the statements to be submitted to the other side.

x) Cybersecurity

In addition to the cybersecurity measures discussed below for virtual hearings, tribunals can adopt in the Order cyber-protocols to ensure the confidentiality of communications exchanged in the case. Depending on the specific circumstances of each case, this may include the use of encrypted communications, password protected files, FTP sites with certain specifications, or encrypted and password protected USB keys for the exchange of information.

xi) Sealed offers

The ICC Note encourages the tribunal to consult with the parties at an early stage about a procedure for the potential use of sealed offers.[13] If the tribunal fails to raise the issue, the parties are invited to do so. The ICC Note also provides a process for the submission of offers with the Secretariat. Accordingly, the tribunal should check with the parties whether they want to incorporate into the Order the sealed-offer process set out in the ICC Note or an alternative one.

xii) Remote hearings

The ICC Note also encourages tribunals to establish cybersecurity protocols when the hearing will take place remotely.[14] To this effect tribunals are encouraged to consider and apply the ICC Checklist for a Protocol on Virtual Hearings and Suggested Clauses for Cyberprotocols and Procedural Orders dealing with Remote Hearings.

xiii) Trade sanctions

In cases involving international trade sanctions, the tribunal should consider the ICC Note to Parties and Tribunals on ICC Compliance ('ICC Compliance Note'). Depending on the ways in which sanctions affect each arbitration, there are provisions in the ICC Compliance Note that the tribunal may want to incorporate and potentially develop in the Terms or the Order. A further provision that will often be apposite in the Terms of Reference would run along these lines:

> 'The Parties shall promptly let the Tribunal and Secretariat know about any changes to the sanctions regime with a bearing on this proceeding.'

13 ICC Note, para. 268.

14 Id. para. 101.

xiv) Execution of Terms and Award

Under the ICC Note, unless the parties otherwise provide or a law so prevents, the Terms may be signed in counterparts and communicated electronically.[15] Accordingly, the tribunal should invite the parties to indicate any disagreement with this practice.

Conversely, under the ICC Note, the execution in counterparts and electronic delivery of the award originals must be agreed by the parties.[16] Again, it is prudent for the tribunal to invite the parties to comment on whether they agree to dispense with hardcopy originals (this may be problematic in those jurisdictions in which the laws require physical hardcopies of the original, for instance to seek annulment or enforcement).

For electronically minded practitioners, the following language (which requires party agreement as it explicitly allows for awards signed in counterparts and delivered electronically) can be adopted in the Terms:

> 'Subject to mandatory requirements to the contrary, these Terms of Reference, as well as other documents (including awards) to be executed by the Tribunal in the course of the arbitration, may be signed by each party and member of the Arbitral Tribunal in counterparts, and such counterparts may be scanned and communicated to the Secretariat and the parties pursuant to Article 3 of the ICC Rules by email or any other means of telecommunication that provides a record of the sending thereof. Each executed counterpart shall be deemed an original, but all of them, taken together, shall constitute one and the same instrument. Documents, including these Terms of Reference and any awards, issued by the Tribunal may also be signed and executed by facsimile or by email transmission of a PDF format file.'

(xv) Disabilities

The ICC's Guide on Disability Inclusion in International Arbitration and ADR establishes that 'tribunals should consider making disability inclusion one of the default points on the agenda for initial case management conferences, as well as including in its first procedural order standardised provisions for the disclosure of disabilities and the requesting of accommodation by any participants in the arbitration, including members of the arbitral tribunal'.[17] The Guide and its toolkit provide guidance on how deal in the Order with disabilities at any stage of the case and any hearing format (in person or virtual)'.[18]

Concluding remarks

The foregoing is a catalogue of optional provisions and language for their adoption. Obviously, the article covers only a fraction of the provisions that can be found in practice, but tries to capture the most significant ones – or at least those the author and close colleagues have encountered more often in practice. The author welcomes correspondence on additional optional provisions and their language. As international arbitration practice continues to develop, an update of the article may become necessary in a not too distant future.

15 Id. para. 196.

16 Id. para. 199.

17 See ICC Guide to Disabilty Inclusion in International Arbitration and ADR (ICC, Oct. 2023), at p. 4.

18 Id. at p. 6. The sample language for the first CMC or PO1 provides: 'At any point during the proceedings, but ideally as soon as practicable, either party may advise the arbitral tribunal of a person who, by reason of disability, requires reasonable accommodation to facilitate their full participation in the arbitration, including site visits and oral hearings. In considering such requests, the arbitral tribunal will take account of the privacy rights of such persons against the unnecessary disclosure of their disability. For the purposes of this provision, disability means any physical or mental health condition that – without accommodation – would impair a person's ability to participate in work related to an arbitration'.