

# THE NEW ICC RULES OF ARBITRATION – KEY FEATURES

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# Overall objective of the new rules

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The overall objective of the Task Force, Drafting Committee and the ICC Commission on Arbitration was to devise a **modern set of arbitration rules**, designed to serve the needs of the business community **and states** engaged in international commerce and which will continue to serve those needs for at least the next decade.

# Main Changes

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1. Provisions/ procedures to address concerns about time and costs
2. *Prima facie* jurisdictional assessment / gateway procedure: major change to Art 6(2) of 1998 Rules
3. More flexibility for Court to appoint arbitrators directly rather than through ICC National Committee
4. Transparent, comprehensive provisions for complex arbitrations
5. Changes to facilitate treaty-based arbitrations
6. Emergency Arbitrator procedure

# TIME & COST

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- Greater emphasis on upfront case information & documents (Articles 4 and 5)
- Tribunal and parties have a best efforts obligation to conduct the arbitration in an expeditious and cost-effective manner (Article 22(1))
- Mandatory case management conference (Article 24(1) + case management techniques in Appendix IV)
- Optional further case management conference(s) / on-going obligation to adopt effective case-management (Article 24(1))

# TIME & COSTS – COSTS DECISIONS

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- Cost orders responsive to party misconduct:
  - At any time, the arbitral tribunal may make costs decisions, other than those to be fixed by Court, and order payment (Article 37(3))
  - In deciding costs, the arbitral tribunal may take into account all relevant circumstances including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner (Article 37(5))
- Tribunal required to inform parties and ICC as soon as possible after last hearing/ last briefs when draft award will be submitted (Article 27). Delay may affect arbitrator's fees (Article 2(2) Appendix III)
- Also:
  - Streamlined gateway procedure for jurisdictional issues (Article 6(3))
  - More flexible arbitrator appointment process (Article 13(3) and (4))
- Follow-up work: ICC Working Group on the Role of In-house Counsel

# ***Prima facie* jurisdictional assessment**

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**Major change to former Article 6(2):** Secretary General to act as gatekeeper (Article 6(3))

**Transparency in assessing *prima facie* jurisdiction:** The arbitration shall proceed if the Court is *prima facie* satisfied that an arbitration agreement may exist (Article 6(4)).

Plus:

- Multiple party test (Article 6(4)(i)): If more than two parties (including additional parties), the Court must be satisfied that an ICC arbitration agreement that binds them all may exist.
- Multiple arbitration agreements test (Article 6(4)(ii)): If claims are made under more than one arbitration agreement the arbitration may proceed if the Court is satisfied that (a) the arbitration agreements relied on are “compatible” and (b) all parties may have agreed to the determination of the claims together in a single arbitration.

# Appointment of arbitrators

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- ICC National Committee system for proposing arbitrators is retained.
- But: the Court now has more flexibility to appoint arbitrators directly if a National Committee does not function properly (Article 13(3)).
- The Court may also directly appoint arbitrators where (Article 13(4):
  - a) One party is a state or claims to be a state entity,
  - b) No National Committee or Group, or
  - c) The Court's President certifies that direct appointment is necessary and appropriate.

# Complex arbitrations

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Around 30% of the ICC's cases are multiple party cases.

- The 1998 Rules are designed around usual paradigm of bi-polar arbitration where the Claimant drives the proceeding.
- However, practices have become widely used to provide for the joinder of third parties.
- There was a need for transparency in relation to the Court's practices.
- The advance on costs provisions in the 1998 Rules did not work well in multiparty arbitrations.
- There are new provisions dealing with multiple parties, joinder, claims based on multiple contracts and consolidation of multiple proceedings. The Court has flexibility in those cases to fix the advance on costs according to the needs of the case.



# Complex arbitrations: JOINDER

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## Joinder (Article 7):

- A party may join an additional party to the arbitration in the same way as a party commences arbitration
- No additional party may be joined after the confirmation or appointment of any arbitrator unless all parties, including the additional party, agree.
- The Secretariat may fix a time-limit for the submission of a Request for Joinder.
- *Prima facie* jurisdictional control via multiple party test (Article 6(4)(i))

# COMPLEX ARBITRATIONS: MULTIPLE PARTIES AND CONTRACTS

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- **Claims Between Multiple Parties (Article 8):**
  - Parties may bring cross-claims
  - Effectively allows additional claims at any time before the Terms of Reference. No new claims after Terms of Reference without authorization (Article 23(4))
  
- **Multiple contracts:**
  - Claims arising out of more than one contract may be made in a single arbitration (Article 9)
  - If more than one arbitration agreement, *prima facie* jurisdictional control via multiple arbitration agreement test (Article 6(4)(ii))

## COMPLEX ARBITRATIONS: CONSOLIDATION

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Court may consolidate two or more arbitrations pending under the Rules into a single arbitration, provided that:

1. Parties' agreement, or
2. All claims made under the same arbitration agreement, or
3. Where more than one arbitration agreement:
  - i. Arbitrations are between the same parties;
  - ii. Disputes in the arbitrations arise in connection with the same legal relationship; and
  - iii. Court finds the arbitration agreements compatible.

**Court may take into account any circumstances it considers relevant when deciding on consolidation, including whether any arbitrator has been confirmed or appointed**

# Miscellaneous changes

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There are many. To highlight three:

## Requirement of impartiality for arbitrators:

Included in general provisions (current Article 7 of the Rules, now Article 11) and in respect of challenges (current Art 11 of the Rules, now Article 14). Double standard for disclosure in Article 7: one subjective “in the eyes of the parties” for independence and one objective “reasonable doubts” for impartiality.

**Use of gender neutral language:** e.g. “Chairman” to become “President”

# Miscellaneous continued

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## Confidentiality:

- No general obligation of confidentiality (same as the 1998 Rules);
- Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information (Article 22(3));
- The parties undertake to comply with any order made by the arbitral tribunal, thereby creating a “tailor made” and contractually binding confidentiality obligation (Article 22(5)).

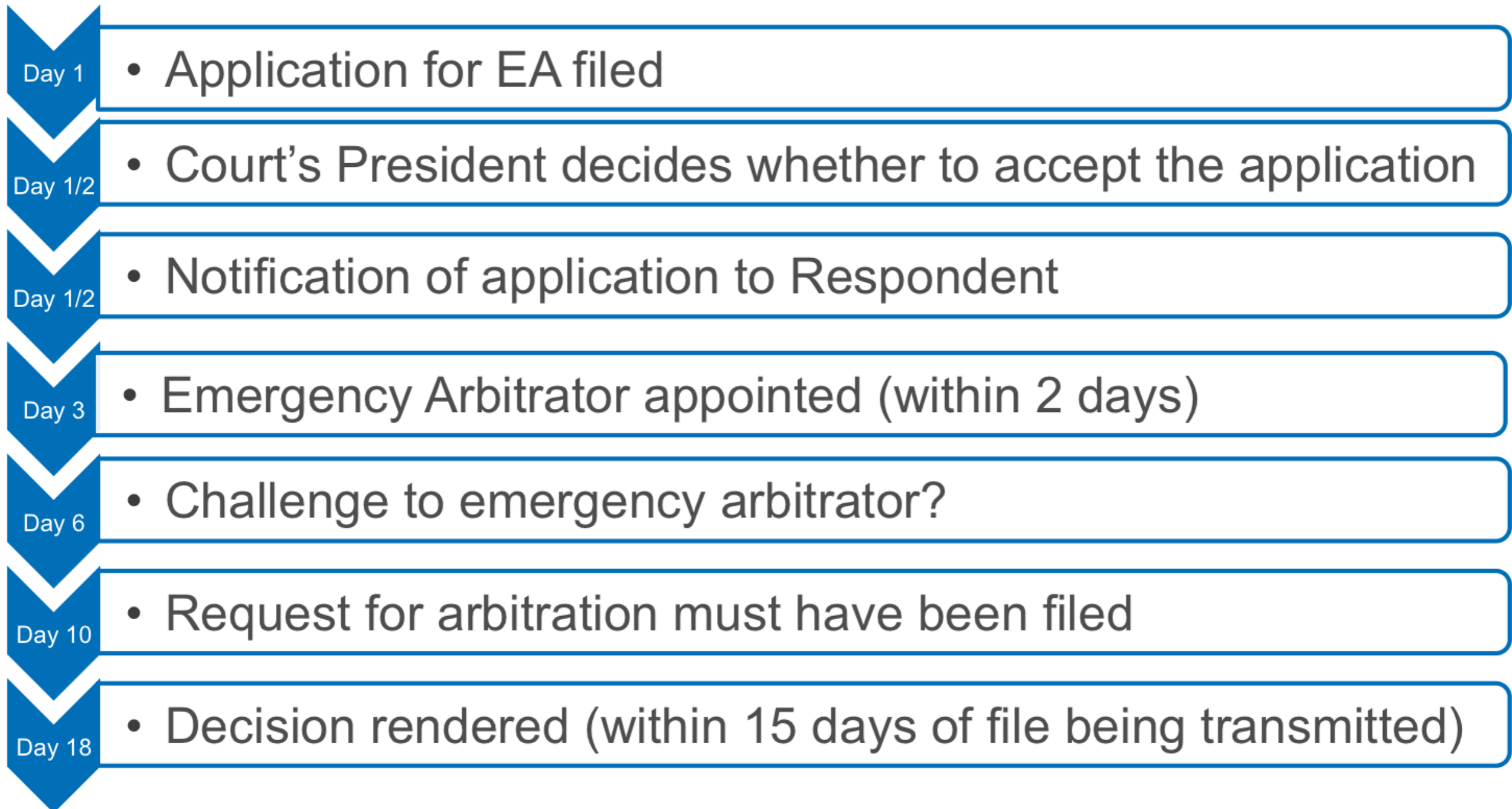
# Emergency Arbitrator Rules

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- For urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal (Article 29 and Appendix V)
- Emergency arbitrator appointed normally within two days of receipt of the application
- Order not Award
- The parties undertake to comply with any order made by the emergency arbitrator (Article 29(2))
- The Arbitral Tribunal shall decide upon any party's requests or claims related to the Emergency Arbitrator proceedings including “any claims arising out of or in connection with the compliance or non-compliance with the order” (Article 29(4))
- The emergency arbitrator's order does not bind the arbitral tribunal, which may modify, terminate or annul the order
- These provisions only apply to parties which are either signatories of the arbitration agreement or successors to such signatories.

# TIMELINE FOR EMERGENCY ARBITRATOR (2/3)

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- **Important:** the emergency arbitrator provisions shall not apply if:
  - The arbitration agreement was concluded before the effective date of the Rules (*i.e.* 1 January 2012);
    - The parties have opted out; or
    - The parties have agreed to another pre-arbitral procedure that provides for conservatory, interim or similar measures.
- Any party may still seek urgent interim or conservatory measures from a competent judicial authority.