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# **INTERNATIONAL CHAMBER OF COMMERCE**

## **REPORT ON CONSTRUCTION INDUSTRY**

### **ARBITRATION**

AUTHORED BY - LUMINA L

#### **Abstract:**

This article focuses on the “ICC Commission Report on Construction Industry Arbitration: Recommended tools and techniques for effective management” – a report for regulating the Construction Industry Arbitration. The main aim of this article is to show that the Report confirms all the provisions of ICC Rules of Arbitration 2017. This was done by checking whether each provision of ICC Rules has its part in the said Report. But the Research showed that not all provision were included in the Report.

#### **Introduction:**

The International Chamber of Commerce (ICC) is a business Organization that functions globally (in 100 countries) and represents nearly 45 million companies<sup>1</sup>. The main aim of ICC is to promote international trade<sup>2</sup>. In 1923 the ICC established International Court of Arbitration to solve the disputes that arise in international trade. The ICC from time to time has published various reports to guide ICC Arbitration. In 2001, ICC published the report on Construction Industry Arbitration known as “Final Report on Construction Industry Arbitration<sup>3</sup>”. This Article focuses on the “ICC Commission Report on Construction Industry Arbitration: Recommended tools and techniques for effective management” which is the update of 2001 report. The main of this article is to find out whether the ICC Commission Report on Construction Industry Arbitration 2017 reflects the ICC rules of Arbitration. This is done by checking the “ICC Commission Report on Construction Industry Arbitration 2017 and its link with ICC Rules on Arbitration. The main aim of updating the report of 2001 is to make it confirm to the rules of ICC

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<sup>1</sup> <https://iccwbo.org/about-us/who-we-are/>

<sup>2</sup> <https://iccwbo.org/about-us/who-we-are/our-mission/>

<sup>3</sup> <https://iccwbo.org/publication/construction-industry-arbitrations-report-icc-commission-arbitration-adr/>

Rules of Arbitration<sup>4</sup> (hereinafter referred to as ICC Rules). This Article will help us know as to whether this aim is fulfilled.

### **Provision for Emergency Arbitrators in Construction Industry:**

Article 29 of ICC Rules creates an Emergency Arbitrator who could be resorted when a party needs interim or conservatory measures and cannot wait for arbitral tribunal. The Report also sets out the provision for Emergency Arbitrators<sup>5</sup>. It states that an Emergency Arbitrator may be called when the parties do not agree in pre-arbitral methods to solve their disputes regarding interim or conservatory measures.

### **Number of Arbitrators in Construction Industry Cases:**

ICC Arbitration would have three arbitrators (Article 12). This was changed when Article 30 of ICC Rules introduced Expedited Procedure. This change was incorporated in the Report<sup>6</sup>. The report while speaking about the number of arbitrators states that when the amount in dispute does not exceed US \$ 2 million, the proceeding would be considered as an expedited proceeding and only one arbitrator will be appointed by ICC, although there is a contrary term in arbitration agreement and more than one arbitrator may be appointed when there is a general agreement between the parties in that regard.

### **Initial Stages in Construction Industry Arbitration:**

The Report reiterates that in a Construction Industry Arbitration Article 4 and 5 of ICC Rules should be applied<sup>7</sup>. When a party wants to take an issue, the party needs to submit its “request” for Arbitration. The “request” should contain all the information stated in Article 4 (3) of ICC Rules. In the same way, while the respondent answering the request should follow the mandate in Article 5 of the ICC Rules.

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<sup>4</sup> <https://iccwbo.org/publication/construction-industry-arbitrations-report-icc-commission-arbitration-adr/>

<sup>5</sup> Paragraph 1.5 of ICC Commission Report on Construction Industry Arbitration: 2017

<sup>6</sup> Paragraph 2.2 of ICC Commission Report on Construction Industry Arbitration: 2017

<sup>7</sup> Paragraph 3.1 of ICC Commission Report on Construction Industry Arbitration: 2017

### **Selection of Arbitrator:**

The Report states that while selecting the arbitrator, the arbitrator's prior knowledge on Construction Industry, his knowledge about relevant case laws, his case management skills, his independency and his Availability<sup>8</sup> (mandate in Article 11 is reiterated) need to be checked. Regarding Availability of an arbitrator, an arbitrator should sign the statement confirming his availability (Article 11(2) of ICC Rules).

### **Transmission of File to Arbitral Tribunal:**

Secretariat will transmit the file as soon as the Arbitral Tribunal is constituted<sup>9</sup>.

### **Terms of Reference in Construction Industry Arbitration:**

The Report states that as required in Article 23 of ICC Rules, in Construction Industry Arbitration the tribunal should draft the Terms of Reference<sup>10</sup>. A Terms of Reference will enlist the disputes between parties, scope and limit of duties of tribunal, full name of arbitrators and parties, summary of claims, relief sought and issue to be settled. The Report further states that the TOR should be finalized within 30 days (Article 23(2) of ICC Rules).

### **Case Management Conference and Procedural Timetable in Construction Industry Arbitration:**

CMC is a formal meeting which acts as a platform for smooth arbitral proceedings. Before conducting an arbitral proceeding according to Article 22 of ICC Rules a CMC need to be convened and procedural measures need to be discussed. The Report mandates that a CMC need to be convened in a Construction Industry Arbitration also<sup>11</sup>. The Report also reiterates that before the start of CMC, the Terms of Reference needs to signed and finalized.

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<sup>8</sup> Paragraph 2.1 (e) of ICC Commission Report on Construction Industry Arbitration: 2017

<sup>9</sup> Paragraph 3.1 of ICC Commission Report on Construction Industry Arbitration: 2017

<sup>10</sup> Paragraph 4.1 of ICC Commission Report on Construction Industry Arbitration: 2017

<sup>11</sup> Paragraph 8.1 of ICC Commission Report on Construction Industry Arbitration: 2017

## **Issues in Construction Industry Arbitration:**

The report (as stated in Article 23(1) of ICC Rules) suggests preparing a list of issues<sup>12</sup>. Though creating issues may not be possible for big construction cases, initially known issue at least need to be listed.

## **Time Table and Practicability of steps:**

The Report calls to create a Procedural time table that is practicable, in the Case Management Conference<sup>13</sup>. This is a mandate in Article 24 (2) of ICC Rules. The Report has also incorporated Article 31(1) of ICC Rules which states that the final award needs to be rendered within six months of preparing the Terms of Reference<sup>14</sup>.

## **Cost Effective measures:**

The report has reiterated (as stated in Article 38(5) of ICC Rules) the arbitral tribunals to take the course that is cost effective for the parties<sup>15</sup>. It also urges the arbitral tribunal to take decisions by considering the financial position of the parties involved<sup>16</sup>.

## **Facts in Construction Arbitration:**

In a construction Arbitration Case, the facts need to be established as soon as possible with all possible means<sup>17</sup>.

## **Experts in Construction Arbitration:**

As stated in Article 25(4) of ICC Rules, the arbitral tribunal, with the consent of the parties concerned may appoint one or more experts, mention their terms of reference and receive the reports from them<sup>18</sup>. The parties will also be given opportunity to question the witness at hearing.

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<sup>12</sup> Paragraph 6.1 of ICC Commission Report on Construction Industry Arbitration: 2017

<sup>13</sup> Paragraph 9.1 of ICC Commission Report on Construction Industry Arbitration: 2017

<sup>14</sup> Paragraph 9.3 of ICC Commission Report on Construction Industry Arbitration: 2017

<sup>15</sup> Paragraph 10.4 of ICC Commission Report on Construction Industry Arbitration: 2017

<sup>16</sup> Paragraph 6.1, 8.3, 11.1 15.3, 17.1 and 22.1 of ICC Commission Report on Construction Industry Arbitration: 2017

<sup>17</sup> Paragraph 10.3 of ICC Commission Report on Construction Industry Arbitration: 2017

<sup>18</sup> Paragraph 18.5 of ICC Commission Report on Construction Industry Arbitration: 2017

## **Hearing in Construction Arbitration Case:**

The Arbitral Tribunal should be fair and impartial to both the parties<sup>19</sup>.

### **Language:**

In a Construction Industry Arbitration, the language between the parties as stated in Article 20 of ICC Rules must be the one that was agreed by the party. If no such agreements were made between the parties then the arbitral tribunal will decide the language in which the proceedings will be undergone.

### **Conclusion:**

The Report “ICC Commission Report on Construction Industry Arbitration: Recommended tools and techniques for effective management” has not covered all the aspects of ICC Rules of Arbitration in it. **The Report did not speak about:**

- Multiple Parties, Multiple Contracts and Consolidation in Construction Industry Arbitration.
- Awards (like time limit for Final Award, Award by Consent, Making of Award, and Scrutiny etc.,) in Construction Industry Arbitration.
- Costs (like advance costs, decision as to cost) in Construction Industry Arbitration
- Others like Modified Time Limits, Waiver and Limitation of Liability in Construction Industry Arbitration

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<sup>19</sup> Paragraph 19.3 of ICC Commission Report on Construction Industry Arbitration: 2017