A GUIDE TO THE
MARC ARBITRATION RULES
IN FORCE AS FROM 21ST MAY 2018
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Guide to the use of the MARC Arbitration Rules in force as from 21st May 2018 (MARC Rules)

Introduction

This Guide is intended to assist parties, their lawyers and arbitrators in making the best use of the MARC Rules. The Guide is not intended as an interpretation of the Rules which, in each case, is a matter either for the MARC Court, MARC Permanent Secretariat (Secretariat) or for the arbitral tribunal (tribunal), nor is it intended to cover all aspects of the Rules.

All defined terms are the same as those found in the MARC Rules, unless otherwise stated.

A suggested arbitration clause is set out in the Introduction to the Rules and is strongly recommended for use. The optional clauses should be noted. They relate to the law of the arbitration, the seat of the arbitration, the number of arbitrators and the language of the arbitration. Naturally, the governing law of the contract itself should be also indicated in the contract. It is also recommended that in-house counsel and other party representatives read the ICC Commission on Arbitration and ADR's Guide on Effective Management of Arbitration¹ at the earliest possible stage when they are negotiating arbitration clauses in their contracts².

Article 1 - Scope of application

Special note should be made of Article 1.2 which enables parties to an arbitration agreement to agree that MARC shall carry out various administrative functions or services without subjecting the arbitration to the MARC Rules. For instance, the parties could agree that MARC should be the appointing authority for the tribunal in an ad hoc arbitration, or they could agree that MARC should be the stakeholder for holding funds in support of the arbitration, such as the fees of the tribunal.

Although the MARC Rules only govern arbitrations commenced on or after 21st May 2018, it should be noted that it is always open to parties to agree that these Rules shall apply to their arbitration even if it was commenced before that date.

Article 2 – Notifications, communications and calculation of periods of time

As stated in Article 2.1, all parties, whether they are participating in the arbitration or not, should be notified of all written communications, notifications and pleadings using their last known addresses and contact details as notified in writing in the arbitration.

Special attention should be paid to Article 2.4 which sets out the method of calculating periods of time under these Rules. A misapplication of the calculation can cause delay and extra cost.

Article 3 – Interpretation of Rules

Article 3.9 should be noted and read in conjunction with Article 16 which deals with the seat and venue of the arbitration. The seat of an arbitration is its juridical base, in other words the jurisdiction which will have supervisory powers over the arbitration and the arbitrators. The place or venue of an arbitration is simply the location of any hearings or meetings which may be other than at the seat, as indicated at Article 16.

Article 4 – Request for Arbitration (Request)

It is important to note the mandatory language in Article 4.3. Parties must include all the items set out in sub-paragraphs (a) to (l), where applicable, to avoid any arguments that the Request is invalid. Arguments such as this only take up time and add to costs.

It should be noted that any application for an Expedited Procedure per Article 4.3(g) shall apply only if the arbitration agreement was concluded on or after 21st May 2018. This is subject to an agreement by the parties to the contrary.

As noted at Article 4.3(i), where there are three arbitrators, the party-nominated arbitrators may be appointed under the provisions of Articles 8.1(d) or 8.2(d) and Appendix 5. This applies to “blind” appointments, in other words the arbitrators will not know the identities of the parties who nominated each of them.

Careful attention should be given to Article 4.3(k) with regard to third party funding or insurance as required at Article 41.

It is important to note that the Request will be deemed incomplete if the Filing Fee is not paid and this will only lead to further delay.

Particular attention should be paid to Article 4.6, which obliges the Claimant to lodge documentary proof with the Secretariat of the date of receipt by the Respondent of the Request. This should not be overlooked.

Article 5 – Answer to the Request for Arbitration (Answer)

Parties’ attention is drawn to the mandatory language in Article 5.1 and the same comments apply as set out above in relation to Article 4.

It should be noted that Article 5.1(d) which provides for an application for a Summary Dismissal in accordance with Article 21 can only be brought if the arbitration agreement is dated on or after 21st May 2018.

A Respondent who wishes to raise a counterclaim, set-off or cross-claim should bear in mind the provisions of Article 5.2, which requires any such claim or set-off to be raised as far as possible with the Respondent’s Answer.
Article 6 – Number of arbitrators

The parties are free to select the number of arbitrators, i.e. a sole arbitrator or three arbitrators. However, they should also give consideration to the extra cost involved in a three-person tribunal as well as the extra delay that this can cause. Even in circumstances where the arbitration agreement refers to a three-person tribunal, if, when the dispute arises, it appears to be of low value, the parties may consider whether having a sole arbitrator would save time and money. Any subsequent agreement on the number of arbitrators should be done without delay and within the 30-day time limit specified in Article 6.1.

Where the parties cannot agree on the number of arbitrators or on the identities of the arbitrators, the MARC Court shall decide.

Article 8 – Appointment of three arbitrators

Special attention should be paid to Article 8.1(d), which is a new provision enabling the party-nominated arbitrators to be appointed without knowing which party nominated them in accordance with the procedure set out in Appendix 5. The parties will have chosen their arbitrators thus complying with party autonomy, but the arbitrators will not be informed which party appointed which arbitrator.

Article 8.2 deals with the issues that often arise where there is more than one Claimant and/or more than one Respondent.

Where party-nominated arbitrators are appointing a third arbitrator it is very important that they check with their nominee that that person has sufficient availability, no conflicts, subject matter expertise, language skills (if required) and the necessary experience to chair a tribunal. Further, regard should be had as to whether there are any specific requirements under the arbitration agreement itself.

Article 11 – Qualifications of the arbitral tribunal

Special attention should be drawn to Article 11.2 which sets out the generally accepted rule that the sole arbitrator or presiding arbitrator shall not be of the same nationality as any of the parties unless the parties agree. Article 11.3 provides that in appropriate circumstances and provided none of the parties objects within a specified time limit, the sole arbitrator or presiding arbitrator may hold the same nationality as one of the parties. Examples of appropriate circumstances may include where all parties in the arbitration are of the same nationality, or where the governing law of the contract, the seat and language of the arbitration and the parties’ legal representatives originate from the same jurisdiction or legal background.

Article 11.5 sets out the most important rule that no party representative shall have any ex parte communication with any arbitrator or with any prospective arbitrator except for the purposes set out in that article. Arbitrators would be well advised to take note of the Chartered Institute of Arbitrators’ International Arbitration Practice Guideline on “Interviews for Prospective Arbitrators”.
Article 12 – Challenge of the arbitral tribunal

Challenges to arbitrators have become more widespread. It has become very important for all prospective arbitrators to consider the IBA Guidelines on Conflicts of Interest in International Arbitration before making their Declaration of Independence and Impartiality. The safest rule is “if in doubt, spell it out”.

Article 15 – General provisions

Arbitrators should note with care Article 15.1, which provides that they shall adopt suitable procedures for the conduct of the arbitration in order to avoid unnecessary delay or expense. This sub-clause in effect mirrors statutory provisions found in some arbitration statutes. Parties and arbitrators should refer to the ICC Arbitration Commission’s Report on Techniques for Controlling Time and Costs in Arbitration for useful and practical tips on saving time and costs.

Article 15.2 obliges the parties and the tribunal to do everything necessary to ensure the fair and efficient conduct of the arbitration. An agreement to arbitrate contains the implied obligation to arbitrate in good faith. If parties act unfairly and inefficiently, they may well find that even if they win, their costs may not be recoverable or not recoverable in full.

Article 15.4 encourages the arbitrators, in consultation with the parties, to prepare a procedural timetable for the arbitration. In cases where the amount in dispute warrants it, an early meeting with the parties to discuss this and all other matters relating to the future conduct of the arbitration is extremely useful. This meeting can be in person, by videoconference or by telephone conference.

Article 15.5 provides that after consultation with the parties, the tribunal may appoint a secretary. The secretary is obliged to complete a declaration of independence and impartiality and it is suggested a copy of his or her CV should also be provided. The parties, the tribunal and the tribunal secretary should have regard to the various codes of conduct that have been drawn up to deal with the duties of arbitral secretaries. Of particular note are the guides provided by the HKIAC, ICC and SIAC.

Particular attention should be paid to Article 15.7, which enables a tribunal to exclude new legal representatives appointed after the tribunal has received the file from the Secretariat if such appointment results in, or potentially results in, a conflict of interest arising in respect of any member of the tribunal. Thus, if a tribunal has been constituted and counsel for one party then changes and is, for instance, a former partner of one of the arbitrators or a member of the same set of chambers as an arbitrator, the tribunal has the power to prevent this conflict of interest by declining to allow that new counsel to appear in the arbitration. This provision is essential to maintain the integrity of the arbitral process and the constitution of the tribunal.

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3 See comments on Article 22 below
Article 15.10 should be noted. The ICC and IBA have produced useful guidance for awards which is of great assistance in this regard. Further, mandatory procedural rules at the seat of arbitration should be checked. For instance, in some jurisdictions the tribunal is required to be present in that jurisdiction when the award is signed and, in others, it is necessary to sign every page and in others it is sufficient to sign just the signature page.

**Article 16 – Seat and venue of the arbitration**

It is important for the parties and their counsel to appreciate the difference between the seat and venue or place of arbitration. Every arbitration has to have a seat. In other words, it has to be connected with a defined legal system and have a juridical base. The applicable laws and legal framework of the jurisdiction in which the seat of the arbitration is selected become the lex arbitri, i.e. the law of the arbitration. The venue of the arbitration is a completely different matter. Most rules permit arbitrators to sit wherever is convenient which may be the same as the seat or it may be somewhere else. Even if the venue is at a different location from the seat, the arbitration shall nonetheless be treated for all purposes as having been conducted at the seat. Awards are deemed to be made at the seat, as stated at Article 33.5.

**Article 17 – Language**

Parties are strongly advised to agree on the language of the arbitration in their arbitration agreement. Failure to agree the language of the arbitration in a multi-language dispute can lead to delay and extra cost. If the parties have not agreed on the language then the tribunal will decide the language, but of course that decision may be partly pre-empted by the nationalities and language skills of the arbitrators.

**Article 18 - Applicable rules of law**

It is of course advisable to set out which substantive law governs the obligations of the parties in the contract. It is also possible and, in many cases, advisable, to agree on which law applies to the arbitration agreement as this need not be the same law that governs the substantive rights of the parties. The parties should take note of MARC’s suggested arbitration clause which alerts the parties to this issue.

**Article 19 – Jurisdiction**

Any issues of jurisdiction, including whether an additional party may be joined to an arbitration, should be raised as soon as possible. Article 19.9 provides that a plea that the tribunal does not have jurisdiction shall be raised as soon as possible and at the latest in the Statement of Defence. This is important and it mirrors the provision of the UNCITRAL Model Law on this topic. The fact that a party nominates an arbitrator or provides comments on the constitution of the tribunal does not prevent that party from raising a plea against jurisdiction.

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Article 19.2 provides that issues of jurisdiction should be determined by the tribunal unless the Secretariat decides to refer the matter to the MARC Court pursuant to Article 19.3. If a matter is referred to the MARC Court, the Court will decide on a *prima facie* basis whether or not an arbitration agreement may exist between the parties.

If the MARC Court finds *prima facie* jurisdiction for the arbitration to proceed and the file to be transferred to the tribunal, the matter can still be raised before the tribunal, who is entitled to take a different view in line with the doctrine of *competence-competence*.

**Article 20 – Expedited procedure**

This is a new provision which enables a party prior to the constitution of the tribunal to apply to the Secretariat in writing for the arbitration to be conducted in accordance with Article 20.2. Such an application can only be made where the aggregate of any claim, counterclaim or set-off does not exceed MUR 25 million or if the parties so agree.

Article 20.2 sets out the procedure for an Expedited Procedure, which will be before a sole arbitrator unless agreed otherwise, including that the dispute will be decided on a documents-only basis unless the tribunal decides this would be inappropriate. The award has to be made within six months unless extended and the award may state the reasons upon which it is based in summary form unless the parties have agreed for no reasons to be given.

Article 20.4 enables the Secretariat on application to reconsider the matter and decide that the Expedited Procedure shall no longer apply to the arbitration.

**Article 21 – Summary dismissal of claims and defences**

This is another new provision and should be used sparingly. It is only appropriate for cases that are manifestly without merit or manifestly outside the jurisdiction of the tribunal. It is not a proxy for summary judgment applications, which are not provided for under the Rules.

**Article 22 – Evidence, hearings and experts**

Special attention should be paid to Article 22.4, which enables the parties to agree that they shall only produce the documents that they intend to rely upon in their respective pleadings. Parties should consider agreeing to this provision in cases where, for instance, the issue is simply one of construction of a legal document which cannot be assisted by extraneous evidence. In some cases it may be necessary to have regard to the factual matrix, but in other cases this is unlikely to be of any assistance and therefore costs could be limited by agreeing to no more disclosure than that which each party wishes to produce in support of its claim or defence.

In substantial cases consideration should be given as to whether the tribunal will be assisted by an early opening. This usually takes place 6 or 8 months prior to the main hearing, but after at least

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6 As noted earlier, absent an agreement to the contrary, an application for an expedited procedure may only be made if the arbitration agreement was made on or after 21st May 2018.
the first round of pleadings and witness statements. It enables the parties' counsel to open a case orally and alert the tribunal to the relevant documents and legal authorities that support their respective cases. Such a procedure enables the tribunal to raise matters with the parties which can then be dealt with in the intervening period prior to the main hearing. It also enables the tribunal to be better prepared for the hearing and thus contributes to a better and quicker award.

Under Article 22.6, the tribunal is free to determine the manner in which a witness or expert is examined. In this regard, it is worthwhile for a tribunal to consider with the parties whether some form of expert witness conferencing (such as hot tubbing) would be of assistance.

Article 22.8 deals with the privacy of an arbitral hearing. In other words, no one should be present at a hearing unless authorized by the parties. This should not be confused with confidentiality which is set out in some detail in Article 40.

**Article 23 – Interim measures of protection and emergency relief**

A party to an arbitration often requires urgent interim or emergency relief. Sometimes this is required prior to the constitution of the tribunal or even at the commencement of the arbitration. Prior to commencement of an arbitration, either party may apply to a court of competent jurisdiction for interim measures. Article 23.1 now provides a procedure for an emergency arbitrator, which is set out in Appendix 4. This is an additional tool for the parties to use if needed, provided that the arbitration agreement was made on or after 21st May 2018. It should be noted, however, that an application for emergency relief may only be made concurrently with or following the filing of a Request for Arbitration and prior to the constitution of the tribunal.

**Article 24 – Security for costs**

There is a substantial body of case law on the factors to be taken into account in relation to applications for security for costs. However, one important factor to be taken into account is whether or not there has been a change in the circumstances of the parties since the date of the contract. As an example, if the Respondent is a shelf company with no assets and was known thus to be at the time of the agreement, this is unlikely to be an acceptable ground for seeking security for costs after the commencement of the proceedings. An application for security for costs should not be based solely on the nationality of the Respondent.

Further, in most cases the fact that a party has the benefit of third party funding or insurance should not necessarily be a factor in the application for security for costs.

It is also important that an application for security for costs should not be made simply with the intent of stifling genuine claims. Security can be provided in a number of ways, but essentially it is by way of either a cash deposit or an appropriate bank guarantee.

**Article 25 – Default**

Where a Respondent ceases to take part in the arbitration, it is essential for the other party or parties and the Secretariat to be most careful as to how to deal with this situation. Merely because
a party says that it will no longer have anything to do with the arbitration, this is no excuse for not keeping the party informed of hearing dates, deadlines etc. Similarly, all documents served on a non-participating party should be served in the most secure manner, i.e. by courier or personal service. Careful records should be kept of such notifications. A party who is not participating must be given notice of the hearing date and the tribunal must be satisfied that to the best of its ability this has been brought home to the non-participating party.

Further, merely because a party is not participating in an arbitration does not obviate the need for the Claimant to prove its case.

**Article 26 – Joinder of additional parties**

It is important that any Request for Joinder be submitted as soon as possible before the constitution of a tribunal. Article 26.8 sets out the tests to be considered for joining an additional party.

**Article 27 – Consolidation of arbitrations**

It is important that any Request for Consolidation be submitted as soon as possible before the constitution of the tribunal in any of the pending arbitrations. Under this Article the Court has the power to consolidate arbitrations. Article 27.4 sets out the factors and circumstances to be taken into account by the Court in deciding whether to order consolidation. The importance of dealing with this at the earliest possible stage is that once there are two or more arbitrations with different tribunals, albeit involving the same or similar or connected issues, it is often too late to make an order for consolidation without agreement of the parties, which is often unlikely at this stage.

Where consolidation does take place, the later arbitration shall be consolidated into the arbitration which commenced first, unless there is an agreement to the contrary or the Court decides otherwise taking into account the circumstances of the case.

**Article 29 – Closure of proceedings**

It is important for a tribunal to close proceedings as this prevents further submissions or arguments or evidence after that date. The tribunal is recommended to wait until all post-hearing submissions have been completed before closing the proceedings and should not close proceedings if it has further issues to raise with the parties. Once it has decided that no further submissions are required, then it should close the proceedings.

**Article 32 – Costs of the arbitration**

It is recommended that the tribunal discusses with the parties at the earliest opportunity the question of the costs of the arbitration. Although the general rule tends to be that costs follow the event, the parties should be made aware that the tribunal will not necessarily adopt that course, especially if the successful party has behaved in such a way as to increase the costs and thus disentitle it to recovery from the losing party. The tribunal should at the earliest opportunity confirm that it has a wide discretion as to costs and that it will take into account the conduct of the parties in deciding
this issue at the end of the case. The tribunal should also make clear that where an application has been made which fails during the course of the proceedings, the tribunal has the right to order the costs of those proceedings to be paid by a party immediately.

At the end of the proceedings, the parties should be invited to set out the costs of a claim in the form of a schedule setting out the name of the fee earner, the year of qualification, the number of hours, the hourly rate, together with all disbursements claimed. In addition, any fee arrangements, for instance conditional fee arrangements, should be disclosed in this schedule. It is advisable that all parties provide this schedule before the award is delivered.

Article 33 – Form and effect of the award

An award shall state the reasons on which it is based unless the parties agree that no reasons are required. As noted earlier, regard should always be had to any mandatory requirements of the seat of arbitration, including a requirement under the applicable arbitration law that awards must be reasoned.

Article 38 – Optional appeal procedure

This is another new provision that enables the parties to agree, at any time during the proceedings, to apply the optional appeal procedure found at Appendix 6, which is only in respect of points of law. In such cases, an award may be appealed within 15 days of its receipt from the Secretariat and no later, for consideration by an Appeal Panel consisting of three members, unless the parties agree to have one member. The Appeal Panel may render its decision on the basis of documents only unless the parties agree otherwise or it decides that an oral hearing is necessary. It may review any points of law in the award and affirm, reverse or modify any of them, re-opening proceedings if necessary to review new evidence.

The Appeal Panel’s decision shall be a concise written explanation as to why (a) the award should not be amended; or (b) the award is amended and the precise amendments required to make the award consistent with the decision. It should be made within 21 days of the date of receipt of the last oral argument, new evidence or the file and all pleadings. Upon service of the Appeal Panel’s decision, the award, together with any amendments thereto as set out in the decision, will be final for the purposes of judicial review.

Article 39 – Deposits for costs

Parties are advised to promptly pay any deposits required to cover the fees and expenses of the tribunal and the MARC Administrative Costs as requested by the Secretariat from time to time during the arbitration. If such payments are not made, the tribunal may suspend the arbitration, terminate the arbitration (without prejudice), or continue with the arbitration on such basis and in respect of such claim, counterclaim or cross-claim as it sees fit.

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7 For a comprehensive review on how costs are addressed in awards, see the ICC Commission on Arbitration and ADR’s Report on Decisions on Costs in International Arbitration, available at https://iccwbo.org/publication/decisions-on-costs-in-international-arbitration-icc-arbitration-and-adr-commission-report/. The Report indicates at page 14 that it may be advisable to substantiate all expenses with invoices and explain how expenses were reasonably incurred.
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