Arbitration in Switzerland

The Practitioner's Guide

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Article 27: Closing of the Proceedings and Date for Submission of Draft Awards

As soon as possible after the last hearing concerning matters to be decided in an award or the filing of the last authorized submissions concerning such matters, whichever is later, the arbitral tribunal shall:

(a) declare the proceedings closed with respect to the matters to be decided in the award; and

(b) inform the Secretariat and the parties of the date by which it expects to submit its draft award to the Court for approval pursuant to Article 33.

After the proceedings are closed, no further submission or argument may be made, or evidence produced, with respect to the matters to be decided in the award, unless requested or authorized by the arbitral tribunal.

I. Purpose of the Provision

The ICC added the provision in 1998.[1] The current version shows reformed language without significant changes in substance. Before the introduction of this provision it was the practice of parties to submit last minute documents and pleadings, to which the other party had to be given the right to respond to maintain parity. This pattern severely prolonged the proceedings.[2] **1**

Article 27 serves the expediency of the proceedings. It helps to organize the arbitration efficiently and clearly.[3] In addition, it prevents dilatory behavior, both stemming from the tribunal and the parties.[4] **2**

II. Derogation from the Provision

Closing the proceedings is a mandatory step in any ICC arbitration.[5] However, the tribunal is free to re-open proceedings either *sua sponte* or upon motion by the parties, as long as all parties are treated equally and the right to be heard is respected.[6] Re-opening of the proceedings in such manner may be required by the right to be heard, when new information becomes available, or when a party was prevented from advancing the information for good cause.[7] Similarly, the tribunal may find during its deliberations that additional information is needed on any issue and may request it.[8] If the tribunal required more information or re-opened the proceedings, a new close of the proceedings must take place. **3**

The parties may attempt to submit additional information or pleadings without request by the tribunal. This derogation is not permitted in general.[9] The tribunal may decide, however, not to reject the submission. If it does accept further submissions from one party, the other party must be heard concerning the new submission.[10] Nevertheless, proceedings should only be re-opened in special circumstances. Closing the proceedings at any other time than the two options provided by Art. 27 is permissible, so long as the opportunity to present one's case in accordance with Art. V of the New York Convention is not curtailed. **4**

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1 Derains/Schwartz, p. 292; Schäfer/Verbist/Imhoos, p. 113; Craig/Park/Paulsson, p. 446.
2 Bühler/Jarvin, *2009*, para. 15.851.
3 Reiner/Jahnel, para. 1 at Art. 22; Fry/Greenberg/Mazza, para. 3-1018.
4 Lachmann, p. 3174; Derains/Schwartz, p. 270; Briner/Hömberg, para. 50.
5 Craig/Park/Paulsson, p. 446.
6 Bühler/Webster, paras. 22-9 to 22-10.
7 Reiner/Jahnel, para. 2 at Art. 22.
8 Fry/Greenberg/Mazza, para. 3-1028.
9 Fry/Greenberg/Mazza, para. 3-1030.
10 Fry/Greenberg/Mazza, para. 3-1031.

III. Content of the Provision in Detail

5 The close of the proceedings refers not to the end of the arbitration as such, but to the end of the collection of evidence and the assertions of the parties. It marks the time when the arbitrators retire for deliberations.[11] Consequently, under the Art. 22 ICC Rules 2004, the timing of closing the proceedings depended on the arbitrators reaching the conclusion that the parties had sufficient time and opportunity to present their case.[12] Art. 27 reworded the provision by offering two options for the closing of the proceedings. These options reflect the practice followed by arbitrators and remove the uncertainty that exist when arbitrators have full discretion.

A. Scope of the Provision

6 The provision applies to all types of awards.[13] The re-wording clarifies the application of Art. 27 to all awards by specifying "*concerning matters to be decided in an award* or the filing of the last authorized submissions *concerning such matters*" and "proceedings closed *with respect to the matters to be decided in the award*" (emphasis added). However, under Art. 22 of the 1998 Rules, closing proceedings should be applied only sparingly if not only before deliberations on the final award begin. The provision was intended to expedite the proceedings, give them more structure and provide a clear framework, signaling the end of the proceedings. Extending their scope to specific issues incapable of separate partial awards robs the provision of its highlighting function.[14]

7 After the close of the proceedings, no more submissions, i.e., pleadings, explanations, or witness statements, may be made.[15] The tribunal must, however, remain mindful of Art. 19.[16] Failure to object to the close of the proceedings may amount to a waiver of the right to submit additional evidence or have additional hearings and may be taken into account when considering a plea for refusal of the right to be heard at a later stage.[17]

8 To prevent a challenge for curtailment of the right to be heard, it is reasonable, but not strictly required,[18] for the tribunal to announce the imminence of the close of the proceedings.[19] Last submissions can still be made with the awareness that no more opportunities for statements will arise. The same recommendation can be drawn from the ICC's report on Techniques for Controlling Time and Costs in Arbitration.[20]

9 Article 22 of the 1998 Rules preconditioned the close of the proceedings on the satisfaction of the tribunal that the parties had a reasonable opportunity to present their cases. By its wording, it affords the opportunity to the tribunal to shorten the proceedings significantly without regard for previewed submissions or hearings, so long as the tribunal is satisfied that a reasonable opportunity to be heard was given. This standard sought to correspond to the due process standards of the New York Convention. In practice, the close of the proceedings occurred most often after the two events now listed in Art. 27.

10 Article 27 also provides a more specific definition of the close of proceedings. The close of the proceedings are to follow the later of two specific events in ICC proceedings: the last hearing concerning matters to be decided in an award or the filing of the last authorized submissions concerning such matters. The tribunal is to close the proceedings after the later of the two events occur, in order to ensure greater predictability. Under the 1998 Rules, the tribunal does not have to give prior warning of the close of the proceedings, so the closing could potentially be surprising. Under Art. 27, the parties will be able to

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11 Reiner/Jahnel, para. 1 at Art. 22.
12 Briner/Hömberg, p. 50.
13 Fry/Greenberg/Mazza, para. 3-1020.
14 Differing opinion: Bühler/Webster, para. 22-5.
15 Reiner/Jahnel, para. 1 at Art. 22.
16 Bühler/Webster, para. 22-2; Derains/Schwartz, p. 293.
17 Bühler/Webster, para. 22-6, mentioning the *Karaha Bodas* case as example.
18 Craig/Park/Paulsson, p. 447.
19 Reiner/Jahnel, para. 5 at Art. 22; Schäfer/Verbist/Imhoos, p. 113.
20 See <http://www.iccwbo.org/uploadedFiles/TimeCost_E.pdf>.

anticipate the close of the proceedings (with adjustments during the proceedings) from the Terms of Reference forward.

B. Article 27(a)

Article 27(a) is not a substantive innovation from Art. 22 of the 1998 Rules. It does however clarify, that the arbitrators not only have to announce their decision to close the proceedings, but to specify the matters to which this closing applies. The specification serves a dual purpose. On the one hand it permits the parties advance knowledge of which matters will no longer be at their disposal to discuss, and on the other hand, it provides a limitation to the tribunal concerning the matters it may decide in any specific award. **11**

It is not specified what form the decision to close the proceedings has to take.[21] It neither has the quality of a procedural order nor can it take the form of an award. In our opinion, the close of the proceedings is a purely administrative decision. Nothing prevents a purely oral close of proceedings. However, it is advisable to close in writing.[22] **12**

C. Article 27(b)

The substance of Art. 27(b) was already contained in Art. 22(2) of the 1998 Rules. Art. 27(b) is an administrative provision, which does not impose strict time limits, but rather sets a climate for information exchange. No formal requirements are attached to the communication to the Secretariat as per Art. 22(2) of the 1998 Rules, and both the Secretariat and the parties as per Art. 27(b).[23] The arbitrators estimate the time required for deliberating and drafting of the award and communicate this schedule. Under the 1998 Rules, in case of delay, the tribunal simply informs the ICC thereof; which can be expected as a matter of professional courtesy in any case. This sentence is not contained in the 2012 Rules, in order to emphasize the desire to expedite the proceedings and discourage delays on the part of the tribunal. **13**

There are no official sanctions for delay.[24] It may, however, happen that a long delay on the part of the arbitrators may lead the court to consider a fee adjustment based on lack of diligence.[25] Under Art. 22 of the 1998 Rules, neither the ICC nor the arbitrators have to inform the parties of this schedule. It is common and permissible, however, that the tribunal will inform the parties directly, or that the court will answer questions relating to the schedule by the parties.[26] Art. 27(b) now mandates communication to the parties. **14**

Knowing in advance the expected date of delivery of the final award not only means that the parties will have some forewarning that the award is imminent, but it also may be helpful in facilitating possible settlement before the award is issued. **15**

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21 Bühler/Webster, para. 22-4.

22 Bühler/Jarvin, para. 15.859.

23 Bühler/Jarvin, para. 15.867; Bühler/Webster, para. 22-13.

24 Reiner/Jahnel, para. 6 at Art. 22; Bühler/Webster, para. 22-13.

25 Bühler/Jarvin, para. 15.865; Fry/Greenberg/Mazza, para. 3-1022.

26 Reiner/Jahnel, para. 7 at Art. 22; Bühler/Webster, para. 22-12.