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ARTICLE 24—CLOSURE OF HEARING

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ARTICLE 24

- 1. After asking the parties if they have any further testimony or evidentiary submissions and upon receiving negative replies or if satisfied that the record is complete, the tribunal may declare the hearings closed.*
- 2. The tribunal in its discretion, on its own motion or upon application of a party, may reopen the hearings at any time before the award is made.*

I. Introduction

This provision grants the tribunal broad powers to conclude the hearing and the discretion, before an award is made, to reopen a hearing. The text of Article 24 closely follows that of Article 29 of the 1976 UNCITRAL Rules, which, apart from one minor wording amendment, remains unchanged in the 2010 UNCITRAL Rules.¹ Article 24 of the ICDR Rules is intended to bring to a close the hearing phase of the arbitration and to clear the way for the arbitrators to proceed to issue their award.² It may also serve to preclude any frivolous requests for additional hearings.³ **24.01**

¹ See 2010 UNCITRAL Rules, Art 31. Regarding the decision not to modify the 1976 version, see UNCITRAL, *Report of Working Group II* (UN Doc No A/CN.9/WG.II/WP145/Add. 1, 6 December 2006) para 29.

² See also ICDR Rules, Art 29, discussed in Chapter 29 below (addressing termination of the proceeding).

³ D Caron, I Caplan, and M Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary* (Oxford University Press, Oxford, 2006) 650–51.

II. Textual commentary

- 24.02** The purpose of Article 24(1) is to provide a mechanism for closing the hearing stage of the arbitration. The provision closely follows 1976 UNCITRAL Rules, Article 29(1), although the ICDR version makes clear that the tribunal must solicit the parties' views on whether there are any additional 'testimony or evidentiary submissions' to be supplied. This is likely to be done in any event. Another difference is the reference in the ICDR Rules to the tribunal being satisfied that the 'record is complete'—a term widely used in common law jurisdictions to describe the evidentiary record.
- 24.03** One ambiguity in Article 24 is whether the close of the 'hearing' is intended to cover only the oral hearing or also any additional post-hearing submissions and/or evidence tendered. The analogous provision in the ICC Rules clearly refers to 'closing of the proceedings' and is intended to encompass any post-hearing briefing or evidence.⁴ The same is true in Article 34 of the SCC Rules ('Close of Proceedings'). However, the language in Article 24 of the ICDR Rules, on its face, suggests that it is limited to only the evidential record. Such a narrow reading is supported by commentary on the 1976 UNCITRAL Rules, in which it is stated that it 'brings finality to the hearing proceedings only and has no other legal effect outside this area', such that post-hearing submissions may be ordered after closure of the hearing.⁵ Having said this, section R-35 of the AAA Commercial Rules (also called 'Closure of Hearing') makes clear that the close of the 'hearing' extends beyond the oral hearing itself to include any post-hearing briefs, or additional documents or evidence ordered by the tribunal.⁶ In the only published ICDR award to refer to Article 24, the tribunal found that the 'hearing is deemed to be closed as of the time the record is complete', and that this was measured from when post-hearing submissions had been filed.⁷
- 24.04** In the AAA Commercial Rules, the close of the hearing triggers the time limit within which the arbitrators must render their award.⁸ Pursuant to the ICC Rules,

⁴ See ICC Rules, Art 22; see also WL Craig, W Park, and J Paulsson, *International Chamber of Commerce Arbitration* (3rd edn, Oceana Publications, New York, 2000) (distinguishing between 'closing of the hearings' and 'closing of the proceedings').

⁵ See Caron, Caplan and Pellonpää, *op cit*, 650–51.

⁶ AAA Commercial Rules, s R-35 ('... if satisfied that the record is complete, the arbitrator shall declare the hearing closed. If briefs are to be filed, the hearing shall be declared closed as of the final day set by the arbitrator for the receipt of briefs. If documents are to be filed . . . the later date shall be the closing date of the hearing').

⁷ See ICDR Case No 030-04, 2004 WL 5750007 (ICDR), 11.

⁸ See AAA Commercial Rules, ss R-35 ('Closing of Hearing') and R-41 ('Time of Award'), providing that, unless otherwise agreed, the award must be made within 30 days from the date of closing the hearing.

upon closure of the hearing, the tribunal is obligated to advise the ICC Secretariat of an approximate date by which the award will be rendered.⁹ The ICDR Rules do not contain any such default deadline and thus the ‘closure of the hearing’ is important only in closing the record and in signalling that the tribunal is about to move into deliberations.

Article 24(2) gives the tribunal the discretion, of its own motion or upon application of one of the parties, to reopen the hearings at any time before the award is made. Unlike Article 29(2) of the 1976 UNCITRAL Rules, reopening is available even in the absence of ‘exceptional circumstances’.¹⁰ In any event, it is likely to be applied only rarely. Appropriate circumstances might arise, for example, where the tribunal’s deliberations have thrown up an issue not adequately covered in the hearing to date, where previously unavailable evidence has come to light, or where a post-hearing development has arisen that affects the issues in dispute. A tribunal might reopen the hearing out of concern to uphold its Article 16(1) duty to ensure that each party is given a fair opportunity to present its case. **24.05**

For obvious reasons, reopening the hearing must occur prior to the award relating to the hearing. Note that the ICDR Rules do not formally state that, upon release of the final award (and subsequent to the passing of any period for interpretation or correction under Article 30), the arbitrators’ mandate expires—that is, that they are ‘*functus officio*’.¹¹ However, subject to any applicable national laws on the topic, it is standard practice for this to be the case.¹² **24.06**

⁹ Compare ICC Rules, Art 22(2).

¹⁰ See Caron, Caplan and Pellonpää, *op cit*, 652 (noting that exceptional circumstances might include: (1) in the course of deliberations, the arbitrators realize that a particular point of law or fact has been insufficiently developed; or (2) new material evidence has been discovered that requires clarification through an additional hearing).

¹¹ See discussion of Art 30 and the principle of *functus officio* in para 30.03 below.

¹² See generally GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 2,513–20.

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