4

ARTICLE 4—AMENDMENTS TO CLAIMS

I. Introduction 4.01
II. Textual commentary 4.05
A. Amendment and supplement of claims, counterclaims, or defences 4.05
B. Tribunal's acceptance and denial of amendments and supplements to claims, counterclaims, or defences 4.09
C. Impact on fees 4.13

Article 4

During the arbitral proceedings, any party may amend or supplement its claim, counterclaim or defense, unless the tribunal considers it inappropriate to allow such amendment or supplement because of the party's delay in making it, prejudice to the other parties or any other circumstances. A party may not amend or supplement a claim or counterclaim if the amendment or supplement would fall outside the scope of the agreement to arbitrate.

I. Introduction

4.01 Article 4 affords the parties relatively wide latitude to modify claims, counterclaims, or defences, and establishes the principle that modification by means of amendment and supplementation are admissible at any time during the proceedings, as long as the arbitral tribunal considers it appropriate. Such claim, counterclaim, or defence modifications are required to be within the scope of the arbitration agreement—that is, the boundaries of an arbitral tribunal's jurisdiction. The parties' general right to amend their claims or defences is subject to the tribunal's power of rejection on grounds of unexcused delay or prejudice to the parties or proceedings.

4.02 Article 4 is based on the similarly worded Article 20 of the 1976 UNCITRAL Rules. An ad hoc tribunal established under the UNCITRAL Rules warned that the alternative would be an 'unduly static or formalistic rule that would require

parties to recommence proceedings every time the adversarial evolution of argument and evidence suggests the need for a different legal articulation of claims'.[1]

4.03 In contrast, the comparable provision in the ICC Rules, Article 19, addresses new claims and counterclaims after the Terms of Reference have been signed only. Before allowing a party to amend any 'claim, counterclaim, defence and reply', Article 22.1(a) of the LCIA Rules even requires the tribunal to give the parties a 'reasonable opportunity to state their views'. No such requirement can be found in the ICDR Rules.

4.04 Yet another approach is taken by the AAA Commercial Rules. Pursuant to section R-6 of the AAA Commercial Rules, the parties' right to make a new or different claim or counterclaim is unqualified before the appointment of the arbitrator(s). Once appointed, no new or different claim may be submitted, except with the arbitrator's consent.

II. Textual commentary

A. Amendment and supplement of claims, counterclaims, or defences

4.05 Whether amendments and supplements may be considered appropriate or inappropriate depends on the individual circumstances of the case and the arbitral tribunal's exercise of its discretion vested under Article 16(1). Article 16(1) requires the arbitral tribunal to treat the parties with equality, and provides that each party has the right to be heard and is given a fair opportunity to present its case. In discharging their mandate, arbitral tribunals carefully structure procedural directions and it is not for the parties to treat an arbitral tribunal's carefully structured procedural direction with an unwelcome disregard on its own motion.

4.06 Article 4 is open-ended, and applies to both amendments and supplements of claims, counterclaims, or defences. Although Article 4 spells out the party's delay in making amendments or supplements and the prejudice to the other parties as grounds to consider when ruling whether the amendments or supplements are timely, Article 4 allows for any other circumstances to be considered as well.

[1] *Himpurna California Energy Ltd v PT (Persero) Peruashaan Listruik Negara* (Final Award, 4 May 1999) para 58, reprinted in (2000) XXV Ybk Comm Arb 13, 29.

Such other circumstances may include weighing the benefits against the burdens of the amending party having to initiate a new arbitration or court proceeding. Generally speaking, what Article 4 seeks to avoid is unjustified, substantial changes of the legal or factual basis of claims, counterclaims, or defences at the last minute. The interpretation of any provision regulating the amendment or supplementation of the parties' pleadings must aim at avoiding disruption, while promulgating procedural efficiency.[2] **4.07**

The balancing of interests under Article 4 may well depend on the conduct and stage of the written proceedings. The tribunal's power to impose amended or supplemented claims, counterclaims, and defences may discourage parties from unnecessary changes to their written statements. In this respect, the initial pleadings, and the claims, counterclaims, and defences presented therein, serve a critical purpose as a basis for all other steps in the proceedings, including the structuring of the introduction, and adducing of witness and expert evidence, as well as document production requests. In light of the standards of Article 16, the threshold for the admission of an entirely new theory, whether factually or legally—that is, an amendment of the claims, counterclaims, and defences—at a late stage of the proceedings must be higher than for a mere supplementation of an already presented, yet not fully pled, claim, counterclaim, or defence. **4.08**

B. Tribunal's acceptance and denial of amendments and supplements to claims, counterclaims, or defences

In an ICDR arbitration, as the result of having allowed a third party to intervene in the arbitration, the tribunal had initially allowed the claimant to amend its demand with the addition of a claim against the intervenor based on tortious interference. More than a year into the arbitration, the claimant moved to amend its demand a second time, with two antagonistic claims against the initial respondent: one based on tortious interference; the other based on an invalid assignment of rights claim. The tribunal granted leave to add the tortious interference claim against the initial respondent, but denied leave with respect to the assignment of rights claim, because the claimant had notice of the assignment for months and an amendment at that stage of the proceeding could be prejudicial to the respondents and 'inject new issues and complexities into the case that might adversely affect and delay the fair, expeditious and efficient resolution of the present dispute'. The tribunal's ruling **4.09**

[2] *See eg* GB Born, *International Commercial Arbitration: Commentary and Materials* (3rd edn, Kluwer Law International, The Hague, 2010) ch 14; FT Schwarz and CW Konrad, *The Vienna Rules: A Commentary on International Arbitration in Austria* (Kluwer Law International, The Hague, 2009) para 11-030.

was 'without prejudice' and 'not meant to limit any of the arguments that the parties may make, or the evidence they may proffer, which may touch upon the subject matter of [the claimant's] motion'.[3]

4.10 Since they are based on Article 20 of the 1976 UNCITRAL Rules, the awards published by the Iran-US Claims Tribunal may also be instructive as to a proper reading of Article 4. Tribunals find no undue delay or prejudice when a party seeks to amend the amount or interest rate claimed at a reasonable stage of the arbitration.[4] If the facts supporting it are already pleaded or the other party has sufficient time to respond, a new legal theory for recovery may be admissible.[5]

4.11 By contrast, amendments were held inadmissible in the case of addition of a new respondent well after the statement of claim had been filed and in a case of the introduction of a new legal claim based on facts not introduced into the arbitration prior thereto.[6] However, the addition of a new respondent can also be deemed a 'clarification' of the claim—as opposed to an amendment of the claim.[7]

> *. . . A party may not amend or supplement a claim or counterclaim if the amendment or supplement would fall outside the scope of the agreement to arbitrate.*

4.12 While the wording of Article 4's first sentence signals a presumption in favour of allowing amendments and supplements, Article 4's second sentence establishes a strict boundary to the parties' latitude. Amendments or supplements falling outside the scope of the agreement to arbitrate are inadmissible. A tribunal may well be cautious in using its power to avoid challenges for illegitimate broadening of its jurisdiction. A tribunal may hear claims, counterclaims, and defences only if competent to do so.

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[3] See *F Hoffman-La Roche Ltd v Qiagen Gaithersburg, Inc*, 2010 BL 184649 (SDNY, 11 August 2010) (confirming the tribunal's ruling and denying a violation of US Federal Arbitration Act, s 10(a)(3)).

[4] *See eg Fereydoon Ghaffari* [a claim of less than US$250,000 presented by the USA] *v Islamic Republic of Iran* (Order by Chamber Two in Case No 10792, 15 September 1987), reprinted in 18 Iran-USCTR 64, 65 (1988-I); *Cal-Maine Food Inc v Islamic Republic of Iran* (Award No 133-340-3, 11 June 1984), reprinted in 6 Iran-USCTR 52, 62–3 (1984-II).

[5] *See eg Sedco Inc v National Iranian Oil Co et al* (Award No ITL 55-129-3, 28 October 1985), reprinted in 9 Iran-USCTR 248, 265–6 (1985-II).

[6] *Bank Markazi Iran v Bank of Boston International, New York*, Case No 733 (Order of Chamber Two, 8 December 1983); *Arthur Young and Co v Islamic Republic of Iran* (Award No 338-484-1, 1 December 1987), reprinted in 17 Iran-USCTR 245, 253–54 (1987-IV).

[7] *Fedders Corp v Loristan Refrigeration Industries* (Decision No DEC 51-250-3, 28 October 1986), reprinted in 13 Iran-USCTR 97, 98 (1986-IV).

C. Impact on fees

4.13 If admitted by the arbitral tribunal, the administrative fee may be subject to increase in case the amount of a claim (or counterclaim) is modified after the initial filing date. Fees are also subject to decrease if the amount of a claim or counterclaim is modified before the first hearing. The ICDR's assessment of fees is based on the parties' presentation of claims after having consulted with the tribunal.[8]

[8] See para 2.40 ff (administrative fees).

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