



International Cotton Association Limited

Arbitrators training course

Basic Level 1

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### **Acknowledgements**

The International Cotton Association Limited acknowledges the advice and assistance of the Chartered Institute of Arbitrators, and Mr Graham Perry, MA FCI Arb in compiling the Basic Level 1 Training Course and Examination.

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<http://www.legislation.gov.uk/ukpga/1996/23/contents>

Please note that the contents of this course, and Glossary are intended only to provide an introduction to Arbitration, and ICA Bylaws and Rules concerning Technical Arbitration procedures, for the purposes of the Basic Level (1) Arbitrators Examination Course. Examination questions will not be provided in relation to the Glossary, which is intended merely as a tool, to assist with specific terms set out within the course itself. The Glossary is not a definitive document providing further interpretation on ICA Bylaws and Rules.

The contents of the course and Glossary do not take precedence over the ICA Bylaws and Rules, which apply strictly in each case, and must be consulted and followed in the course of any ICA Technical Arbitration. In the event of a conflict between this document and the ICA Bylaws and Rules, the Bylaws and Rules will prevail.

- **Link to the Arbitration Act 1996:**

<http://www.legislation.gov.uk/ukpga/1996/23/contents>

- **Link to the BYLAWS & RULES: ICA Bylaws and Rules?**

<http://www.ica-ltd.org/safe-trading/bylaws-rules/>

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### **1. FEATURES OF ARBITRATION**

Arbitration is a formal, private and binding process.

Disputes are resolved by an award.

An award is made by an independent Tribunal.

The tribunal will be composed of one or more arbitrators.

The process is formal and not informal.

The process is private and not public.

The process is binding – it leads to a written award which can be enforced like a court order.

The parties can choose their arbitrators.

### **2. FEATURES OF LITIGATION**

Litigation is also a formal process.

Claims are made through the courts.

The hearings are conducted in public.

Judgments of the court are binding upon the parties.

The courts, not the parties, select the judges.

The courts fix the dates for the management of the court process.

### **3. FEATURES OF MEDIATION**

Mediation is a private process.

An independent third party helps the parties to settle the dispute by negotiation.

If an agreement is reached at the end of the process- this is set out in writing and becomes a legally binding contract.

A failure to comply, or recognise the terms of the settlement will be a breach of contract, which the courts can resolve.

### **4. COMPARISONS OF ARBITRATION, LITIGATION, AND MEDIATION**

**Formality**

Arbitration is less formal than litigation, although in some respects it may seem similar to litigation. Mediation is considerably less formal when compared with Arbitration and Litigation.

**Speed**

Arbitration can be quicker than litigation. This depends on the ability of the parties to comply with deadlines, and the availability of the arbitrators. Complex cases with lots of documents may take longer to consider and resolve.

The majority of mediations will take place during the course of a day, but this can vary. Litigation will generally take longer than Arbitration, from the start of the action to judgment after a trial has taken place.

**Flexibility**

Arbitration and mediation can be adjusted to suit the needs of the parties.

Arbitrators have broad powers under the Arbitration Act to achieve flexibility.

Specific steps have to be taken to progress the process of Litigation, which means that it is less flexible.

**Cost**

Mediation will not usually cost as much as Litigation, or Arbitration. Arbitration can help in reducing costs and in dealing with a dispute in a proportionate manner. Litigation is generally more expensive than mediation or arbitration.

**Confidentiality**

In arbitration and mediation all matters are confidential, and are kept confidential unless the parties agree otherwise.

All arbitration matters will be in the public domain if the dispute is referred to the courts on appeal.

Litigation is generally a public matter and can attract media attention. Litigation may expose confidential matters, unless the court believes that there is a good reason to restrict, or prohibit details of the case being published.

**5. Relationships**

Mediation and Arbitration may allow the parties to sort out an agreement between them. Sometimes this helps to preserve, or even strengthen a working relationship between the parties in dispute.

Litigation may be more likely to damage the relationship between two parties. This is because both parties are prepared to argue that they are right, but that the other party is wrong.

### **Control and Choice**

In mediation, the parties remain in control of the negotiation process. They can walk away from the process at any time, or keep it going, depending on what they choose to do.

Arbitration and litigation hands the dispute over to the arbitrator or the judge. The parties will normally need permission or agreement of the other party to stop the process

### **Solutions**

Mediation allows for creative solutions such as apologies, future business arrangements and re-drafted commercial agreements.

Arbitration and litigation is restricted to providing specific legal remedies.

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## **6. Progress summary**

You are now familiar with:

The main features of Arbitration.

How this compares and contrasts with other dispute resolution procedures.

## 7. THE ARBITRATION ACT 1996

Arbitrators (either acting as a sole arbitrator or as part of a Tribunal) are required to carry out their work as arbitrators in accordance with:

- The Arbitration agreement in the contract for the sale and purchase of cotton.
- The Bylaws and Rules of the International Cotton Association Limited.
- The Arbitration Act 1996.

We will address each of these in more detail later on in this course.

Please note that references to “**the arbitrator**” or “**an arbitrator**” within this course can be read to apply equally to a **Tribunal** of arbitrators, where this has not been expressly stated.

References to “he, his” within this document also apply equally to female arbitrators.

## 8. WHAT IS ARBITRATION?

Arbitration is a **legally enforceable** process.

Its purpose is to obtain the **fair** resolution of disputes by an **impartial** tribunal without unnecessary **expense** or **delay**.

It is a **private** and **confidential** process.

The parties are **free to agree how the disputes are to be resolved**.

The court **should not intervene** *except* to assist in the administration of the process.

## WHAT IS ARBITRATION?

When a dispute is referred to arbitration **all other existing legal proceedings are stayed**. However, under ICA Bylaw 300(6), parties can apply to the courts to obtain security for the costs of its claim, whilst the arbitration or appeal is taking place.

The award of the arbitrator is **enforceable** like a court order.

The award is **final** in deciding the matters of fact referred to arbitration, subject to the right of any party to appeal.

The award is **binding** on both parties that have agreed to use arbitration as the means to resolve the dispute, although this is again subject to the right of any party to appeal.

## 9. THE ARBITRATION AGREEMENT

The parties must first **agree** to refer their dispute to arbitration.

The **agreement must be in writing**, or evidenced in writing (as per section 5 of the Arbitration Act 1996).

This may be either an existing arbitration clause in the agreement **or** an entirely separate arbitration agreement.

**The arbitration agreement stands alone-** even if the remainder of the contract is found to be unenforceable (or void) fails (becomes void).

Arbitration Agreements come in different forms. This will be looked at later, when we consider the issue of **Jurisdiction**.

## 10. HOW IS THE ARBITRATOR APPOINTED?

There are two ways under the ICA Bylaws and Rules to appoint an Arbitrator.

- Voluntary Appointment by a party (Claimant or Respondent) to the dispute
- Appointment by the President of the ICA.

A Claimant, when requesting arbitration, can provide the details of their nominated arbitrator, or if appropriate, the name of the sole arbitrator agreed by the parties. (**Bylaw 302(2)**).

*'When sending the request, the claimant shall also send:*

*the name, address including email address, telephone and facsimile number of the other party (“the respondent”),*

*a) a copy of the contract signed by both parties; or*

*b) a copy of the arbitration agreement signed by both parties if not included in the contract; or*

*c) a copy of the contract with any additional supporting evidence, the name of their nominated arbitrator, or, if appropriate, the name of the sole arbitrator agreed by the parties, and such application fee and deposit as may be due under Appendix C of the Rule Book. An arbitration may be dismissed if the deposit is not received within one calendar month.*

*3 Upon receipt of the above, we shall copy the request to the respondent and the arbitration shall be considered to have officially commenced as of that date.’*

The Association will then appoint a third arbitrator to act as Chairman. This will take place within 7 days from the appointment of the Respondent’s arbitrator. **(Bylaw 304(1)).**

This procedure will be followed if an arbitrator dies, resigns, refuses to act, or becomes incapable of performing his functions **(Bylaw 304(5)).**

If the decision of a Tribunal is appealed within the ICA, a Technical Appeal Committee of 4 individual members of the ICA, together with a Chairman who is a Director or ex-Director, will be appointed by the Directors of the ICA **(Bylaw 314).**

The parties **cannot select** the members of the Technical Appeal Committee, but may object to the appointment of the members proposed. **(Bylaw 314(8)-(9)).**

It is important that the appointment process is correctly followed. If an arbitrator has not been correctly appointed they may not have jurisdiction. **Jurisdiction** is looked at later on in this course.

## 11. THE ROLE OF THE ARBITRATOR

The object of arbitration is to obtain the **fair** resolution of disputes by an **impartial** tribunal without unnecessary **expense** or **delay**

The arbitrator has a judicial role.

He may act inquisitorially. This means that he can ask questions of the parties as the case proceeds.

He will hear and read evidence put before him.

He will **not become involved in the adversarial presentation** of any party's case. The arbitrator will at all times be **impartial**.

The arbitrator **must not act as an advocate** for the party which appointed him. He is **not there to win the case for the party that appointed him**.

The parties cannot manipulate or use the arbitration for illegal or unlawful reasons. Therefore, **arbitration cannot be used to commit a crime, to promote or perpetuate a fraud**. An arbitrator who finds himself in such matters should resign and report the wrongdoing to the appropriate authorities.

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## 12. Progress Summary

We have looked at:

- **A Comparison of Arbitration** with other dispute resolution procedures.
- **The Aims of Arbitration** – why parties chose arbitration and what they expect.
- **The Role of the Arbitrator** – what the arbitrator can, and cannot do.
- **The Arbitration Agreement** – the parties must have agreed to arbitrate their disputes.
- **Appointment of the Arbitrator** – How an ICA arbitrator is appointed.

Now we will look at **Jurisdiction** – or the power or authority of arbitrators, and where this comes from.

### 13. THE JURISDICTION OF THE ARBITRATOR

Jurisdiction means the **power** of a tribunal to sit in judgment on a dispute.

If an arbitrator **does not have jurisdiction** he has **no power** to take **any action** in relation to the dispute. None whatsoever.

He **cannot act** as an arbitrator if he **does not have jurisdiction**.

Parties may argue that an arbitrator has no jurisdiction, in order to delay or hinder the arbitration. It is therefore important for arbitrators to understand the meaning of jurisdiction.

An arbitrator only has jurisdiction if there is a **valid arbitration agreement** under which he is appointed and his **appointment has been properly made**.

Additionally, he **only has jurisdiction** to decide those disputes that were **in existence at the date the arbitration proceedings commenced** and which are **specifically referred to him**.

### 14. WHEN WILL AN ARBITRATOR NOT HAVE JURISDICTION?

A **lack of jurisdiction** might result from:

- no valid arbitration agreement
- the invalid appointment of the arbitrator
- the issues in dispute falling outside the arbitration agreement
- disputes not being validly referred to arbitration
- disputes not in existence at the date that the arbitration proceedings commenced.

### 15. JURISDICTION CHECKLIST

The Tribunal, or a sole Arbitrator (if acting alone), must always **check the source** of his jurisdiction.

- Is there an arbitration agreement?
- Has there been proper service of the notices from the parties, commencing the arbitration?
- The 1996 Arbitration Act allows Arbitrators to rule on their own jurisdiction.
- Have the rules of the ICA regarding jurisdiction been satisfied?

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## 16. Progress Summary

- We have considered **Jurisdiction**, and how this gives an arbitrator acting alone, or a Tribunal, basic authority to act.
- Now we will consider in more detail, the **specific powers and duties** that will apply to an Arbitrator, **once he has been appointed** to deal with a dispute, either alone, or as part of a Tribunal.

We will now look at:

- What they can do – WHO?
  - How they can do it
  - And where these powers can be found.
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## 17. THE POWERS OF THE ARBITRATOR

The powers given to Arbitrators are contained in the **1996 Arbitration Act**.

A few of them are **mandatory** – or compulsory.

This means that the arbitrator has to observe them and act in accordance with such powers as if they were written out line by line in the arbitration agreement itself.

The majority are **“permissive”** – not compulsory. An arbitrator can use them *unless* the parties have specifically told him that he cannot use them.

## 18. ARBITRATION ACT 1996 – MANDATORY POWERS

ICA Bylaw 300(2) states that:

*“The law of England and Wales and the mandatory provisions of the Arbitration Act 1996 (the Act) shall apply to every arbitration and/or appeal under these Bylaws.”*

An arbitrator does not have to memorise the mandatory provisions of the Arbitration Act 1996, but it is **important to read, understand, and apply them**.

- **S 9 a stay of proceedings** – a stop on all activity in the arbitration
- **S 12 power of the court to extend time limits** – normally for applications to be made to the court
- **S 13 application of the Limitation Acts** – that is, the time within which arbitration must commence or proceed if already commenced.
- **S 24 power of the court to remove an arbitrator-** if the arbitrator is unqualified, or unable to carry out his duties.
- **S 26 (1) effect of the death of an arbitrator-**his authority is automatically ended.
- **S 28 liability of parties for fees and expenses of the arbitrator-** the parties must pay the arbitrators fees, whatever the result.
- **S 43 ensuring the attendance of witnesses**
- **S 56 power to withhold award in case of non-payment** (of fees and costs)
- **S 60 effectiveness of agreement for payment of costs in any event-** agreements that one party must bear all of the costs of the arbitration are not allowed (unless made after the arbitration started)

- **S 66 enforcement of the award**- the court's permission is needed to enforce an Award.
- **S 67 challenging the award**- the court procedure for appealing an Award
- **S 68 substantive jurisdiction and serious irregularity**- the further grounds by which an Award may be appealed to the courts
- **S 70 supplementary provisions**- following the application and appeals against Awards, to the court
- **S 71 effect of order of court**- explains the legal effect that an order of the court to either vary or set aside the Award will have, or an order to remit back to the Tribunal the issue for reconsideration
- **S 72 saving for rights of person who takes no part in proceedings**- a person who does not take part in the arbitration has the same right to appeal the Award to the high court, on an issue of jurisdiction, as a party that did take part in the arbitration
- **S 73 loss of right to object**- a failure by any party to object to a decision or act by the arbitrator (a jurisdictional/ procedural issue) within a certain time period will mean that the right to object is lost. This also sometimes referred to as "waiver"
- **S 74 immunity of arbitral institutions**- right of the ICA to be protected from claims arising from the arbitration itself
- **S 75 charge to secure payment of solicitor's costs**- a solicitor involved in arbitration proceedings can take a charge over assets recovered in the proceedings, as security for costs.

## 19. MANAGEMENT OF THE ARBITRATION

Each arbitrator, including the Chairman must apply the rules of **Natural Justice** when managing the case.

This means that he must allow each party a **reasonable opportunity** of **putting their case** and to **respond to the case** made against them.

The arbitrator manages the case **in consultation with the parties**. He has the **discretion** to decide how matters are to proceed.

Decisions from the Tribunal or sole arbitrator are “**orders for directions**” to the parties.

They will set out the timetable and specify what the parties have to do. This is looked at in more detail below.

Specific Rules and procedures have been provided by the ICA to assist the Arbitrators with their case management duties.

The Chairman in an ICA Technical Arbitration will provide standard directions setting out the timetable for the arbitration, but these deadlines can be extended on application to the Tribunal (**see Appendix 2**).

The ICA expects the Chairman of the Tribunal to take the lead when deciding the directions that should apply to each case. This is reflected in **Bylaw 307a**.

We will look now at all **Bylaw 307a** in more detail, to understand:

- what the Arbitrators duties and powers mean in practice
- what the parties obligations in the proceeding will be.

## 20. ICA Rules for Management of the Arbitration

### Bylaw 307

#### 21. Bylaw 307a (1)

“It shall be for the Chairman, having consulted his fellow arbitrators:

- to determine whether the Tribunal has jurisdiction; and
- to decide all procedural and evidential matters,

subject to the right of the parties to agree any matter.”

If the parties are prepared to agree that certain evidence should be introduced, or additional arguments submitted, then the Arbitrators will generally respect this.

Otherwise, the Tribunal will decide what the timetable for the arbitration. These are generally referred to as directions.

#### 22. Bylaw 307a (2)

*“The Chairman shall ensure the prompt progress of the arbitration, where appropriate by the making of Orders.”*

For example:

A party has failed to comply with a specific deadline, or

A party is taking longer than appears to be reasonable to advance its case,

The Chairman should agree directions with the other Arbitrators that will move the case along or suspend the case until some other necessary step has been taken.

#### 23. Bylaw 307a (3)

*“As soon as the Chairman has issued directions and determined a timetable for proceedings, we shall notify the parties.”*

Standard directions are provided by the Secretariat to the Chairman

These set out basic timescales within which documents must be filed, amongst other things.

These basic directions can be changed and adapted for each individual case.

They will be sent to the parties by the Secretariat once they have been agreed by the Tribunal.

#### 24. Bylaw 307a (4)

*“The parties have a duty to do all things necessary for the proper and expeditious conduct of the proceeding including complying without delay with any order or direction of the tribunal as to procedural and evidential matters. We will copy communications between either party and the tribunal to the other party.”*

This means that the parties must comply without delay with the timetable decisions of the arbitrators.

#### 25. Bylaw 307a (5)

*“If either party fails to comply with any procedural order of the tribunal, the tribunal shall have power to proceed with the arbitration and make an Award.”*

This is sometimes called proceeding “ex parte”.

If a Claimant can be shown to have caused inordinate and inexcusable delay, giving rise to substantial risk of unfairness or a likelihood of serious prejudice, the arbitrators may dismiss the claim.

If there is a failure to comply with any other order of the arbitrators, then the arbitrators may make a peremptory order (that is, an order which gives a last and final chance for a particular step to be taken) and failing compliance with the peremptory order the arbitrators may make the following orders:

If the order relates to provision of security for costs by the claimant, the arbitrators may make an award dismissing the claim.

In all other cases:

- the arbitrators may order that the defaulting party cannot rely upon the allegations/ material which were the subject matter of the order; or
- the arbitrators may draw adverse inferences from the non-compliance; or
- the arbitrators may proceed to an award on the basis of the materials then before them; or
- The arbitrators may make any orders as to payment of costs as they think fit.

#### 26. Bylaw 307a (6)

*“Decisions, Orders and Awards shall be made by all or a majority of the arbitrators, including the Chairman. The view of the Chairman shall prevail in relation to a decision, order or Award in respect of which there is neither unanimity nor a majority.”*

Decisions are made by a majority of the Tribunal.

The Chairman will have the casting vote in the event of a deadlock.

Consultation between Tribunal members is expected as a matter of course.

A sole Arbitrator will simply act alone.

#### 27. Bylaw 307a (7)

*“All statements, contracts and documentary evidence must be submitted in the English Language. Whenever documentary evidence is submitted in a foreign language, unless otherwise directed by the tribunal, this must be accompanied by an officially certified English translation. ”*

The Arbitrators should check the documents received from the parties to see if any translations are required.

## 28. TYPES OF ICA ARBITRATION

### Documents-v- Oral

- The simplest type of arbitration is “*documents only*” when the arbitrators will never meet the parties. ICA arbitrations are mostly documents only.
- Occasionally it will be necessary to hold an oral hearing, but this is rare. It also adds to the costs, and time spent dealing with the arbitration.
- Either of the parties in an ICA Arbitration can apply to the Tribunal for permission to have an oral hearing, under **Bylaw 308**.
- The strict rules of evidence applied in court proceedings are relaxed for arbitration.
- **Neither party has the right** to an ICA oral hearing. The Tribunal has a discretion to allow or refuse to grant an oral hearing. Its decision is final.
- Sometimes, the Arbitration can be heard by way of written representations, combined with a short oral hearing.
- This remains the choice of the Arbitrators, and not the parties.

### 29. Deposits on account of costs

The ICA Bylaws allows the Chairman of Technical Arbitrations to ask for **deposits** to cover the Arbitrators **fees, costs and expenses** which will arise out of the arbitration.

- **Arbitrators fees**  
The hourly rate charged by the Arbitrators for the work done.
- **Costs**  
The ICA, as an Arbitral Authority may have costs (courier charges, bank charges or excessive copying charges) which will also be recovered from the deposit. The Arbitration Act 1996 provides that an arbitral authority can recover its costs.
- **Expenses**  
The Tribunal may need to obtain translations, or seek expert advice, which the arbitrators will be liable to pay. These will be set out in the Award as a cost payable by the parties.

A failure to pay the deposit may result in the proceedings being suspended or discontinued until payment is made (**Bylaw 358(4)**), if the Arbitrators decide this is necessary.

### 30. What can the Arbitrators charge?

The ICA Arbitrators can charge up to £150.00 per hour for the time that they have spent on arbitration (**Bylaw 358(1)**).

The range of hourly rates can be increased for cases of **extraordinary complexity and/or value (Bylaw 358(2))**. This can only be done at the discretion of the Chairman.

This means that the Award can be published (signed and stamped), but it will not be released by the ICA Secretariat **until payment has been received (Bylaw 309(7))**.

Further deposits can be requested by the Chairman of the Tribunal (**Bylaw 358(4)**) if the first deposit is not enough to cover all of the fees, costs and expenses.

### 31. What happens if the Arbitrators do not manage the case properly?

The arbitrators must drive the process forward. If they delay, they are failing in their duty.

The ICA and court will remove an arbitrator (or arbitrators) if the party complains and can show that the delay is **inordinate** (or excessive) and this delay has caused **substantial injustice** to the party making the application.

An arbitrator can also be removed if he **fails to act impartially**.

An arbitrator can also be removed if he **falls ill** or **it is discovered that he does not possess the necessary qualifications**.

Either party can apply to the court for an order to remove an arbitrator if the grounds for doing so (see above) are justified.

### 32. Progress Summary

We have looked at:

**The Aims of Arbitration** – what the parties expect.

**The Role of the Arbitrator**- what the arbitrator can, and cannot do.

**The Arbitration Act**-the statutory powers and obligations which affect all arbitrators.

**Appointment of the Arbitrator**-How an ICA arbitrator is appointed.

**Jurisdiction**-the power of the Arbitrator to act, and where this power comes from.

**Management of the Arbitration**-The ICA Bylaws which set out what the Arbitrators must do, and the procedural rules that need to be followed.

**Removal of Arbitrators**- the ICA and Court's power to remove arbitrators that are not up to the job.

Now we will look at what the Arbitrators must consider when deciding the case, and how to set out their decisions within a final Award.

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### 33. The Burden of Proof

Arbitration is a civil dispute and so a civil standard of evidence (or burden of proof) applies.

This civil burden of proof is called "the balance of probabilities".

This means that the tribunal should be satisfied that, on the evidence presented by the parties, **it is more probable** (or **likely**) that one party's **version of accounts is correct**, when compared with those of the other party. You do NOT have to prove your case 'beyond all reasonable doubt' which is the much higher, criminal standard of proof.

### 34. INVOICING BACK-Rules 238 and 239

The cotton trade has developed particular trading rules and procedures for dealing with disputes.

These are contained in **Rules 238 and 239** of the Bylaws and Rules, in the Trading Rules Section.

**35. Rules 238 and 239 (August 2012)****Rule 238**

- 1 If for any reason a contract or part of a contract has not been, or will not be, performed (whether due to a breach of the contract by either party or due to any other reason whatsoever) it will not be cancelled.
- 2 The contract or part of a contract shall in all instances be closed by being invoiced back to the seller in accordance with our Rules in force at the date of the contract.

**Rule 239**

Where a contract or part of a contract is to be closed by being invoiced back to the seller, then the following provisions will apply:

- 1 If the parties cannot agree upon the price at which the contract is to be invoiced back to the seller, then that price will be determined by arbitration, and if necessary, appeal.
- 2 The date of closure is the date when both parties knew, or should have known, that the contract would not be performed. In determining that date the arbitrators or appeal committee will take into account:
  - a) the terms of the contract;
  - b) the conduct of the parties;
  - c) any written notice of closure; and
  - d) any other matter which the arbitrators or appeal committee consider to be relevant.
- 3 In determining the invoicing back price, the arbitrators or Technical Appeal Committee shall have regard to the following:
  - a) the date of closure of the contract as determined in paragraph (2) above;
  - b) the terms of the contract; and
  - c) the available market price of the cotton which is the subject of the contract, or such like quality, on the date of closure.
- 4 The settlement payable on an invoicing back will be limited to the difference (if any) between the contract price and the available market price at the date of closure.

- 5 Any settlement due and payable on an invoicing back of a contract closed in accordance with Rules 238 and 239 will be calculated and shall be paid regardless of whether the party receiving or making the payment is considered to be responsible for the non-performance and/or breach of the contract.

#### **Other claims and losses**

- 6 Any other losses or claims expressly agreed between the parties as recoverable will not be included in an invoicing back price. Such losses or claims should be settled by amicable settlement, or claimed at arbitration or appeal.

#### **36. INVOICING BACK-Rules 238 and 239**

If the parties are unable to agree an invoicing back price, the matter may be referred to an ICA tribunal.

The ICA Arbitrator or Tribunal will be required to determine the date and hence the price that the contract will be invoiced back at.

The date of closure is the date that the parties knew or ought to have known that the contract would not be performed.

The date of closure of the contract may not be the date that the Claimant's arbitrator is appointed.

When applying the invoicing back rule, the tribunal is, however, required to not only look to the contract to determine the price but is also required to take into account:

such aspects as the conduct of the parties, the terms of the contract, etc and

“any other matter which the arbitrators...consider to be relevant.”

### 37. THE AWARD

The award is the **final decision** of the arbitrator.

It **disposes of all issues** referred to the arbitrator by the parties.

The award **informs** the parties of the arbitrator's decision, the **reasons** for that decision and the **obligations and liabilities** of one party to the other **to enable the award to be enforced**.

The award is **private and confidential** between the parties and the arbitrator. It cannot be shown to third parties – except for enforcement purposes – without the consent of all parties and the arbitrator.

Each award is **final** on the issues or matters that it addresses, subject to any right of Appeal.

Awards are enforceable like any court judgment and final in deciding the matters of fact referred to the arbitrator.

Once the award is issued **the involvement of the arbitrator ceases** *except* when the award is sent back to the arbitrator or Tribunal for correction or review.

### 38. WHAT MUST THE AWARD CONTAIN?

In First tier arbitrations, the Tribunal will draft the Award.

Under S. 52 of the 1996 Act – the award **must**:

- Be in **writing**
- Be **signed**
- Be **dated**
- State the **seat of the arbitration** – see below
- Give **reasons for the decision** of the arbitrator.

Additionally, the Award must **also**:

- be **clear** and **unambiguous**

- Provide **certainty**
- **Not contain any contradictions**
- Be **complete**
- There must be **consistency** between the **facts and the law**
- The **reasons** given by the arbitrator must be **adequate**, and **understandable**, and **sufficient**
- It must be **capable of performance**
- It must state a **time frame** within which **every obligation** by either party **must be completed** ( eg payment of any sum due, timescales for appeal)
- The **time frame must be reasonable**
- And as the award is written for the parties; it must be **capable of being understood** by them.

### 39. AWARD CHECK LIST

- Title
- Names of the parties - who is Claimant/Respondent and Buyer/Seller?
- The seat of the arbitration
- Recite the story – the contract, the dispute, referral to arbitration
- Jurisdiction finding
- The contract (or contracts)
- The relevant clauses of the contract (s) – eg demurrage or date for opening of letter of credit
- The arbitration clause
- The appointment of the arbitrator
- The conduct of the arbitration – documents only or an oral hearing?
- Any relevant directions made by the arbitrator during the arbitration
- The relevant facts of the case set down neutrally and factually

- The issues to be determined by the arbitrator
- Summary of Claimants' arguments
- Summary of Respondent's arguments
- The findings – the decisions reached by the arbitrators on the facts and their reasons
- The decisions of the arbitrators concerning interest and costs.
- Date and signature of the arbitration. Arbitrator/s?

#### 40. COSTS AND INTEREST

#### 41. INTEREST

**Bylaw 310 states** that the Tribunal (and any Technical Appeal Committee) can award simple and compound interest from such dates and at such rates as they consider meets the justice of the case.

This must also be included and detailed in the Award.

#### 42. COSTS IN THE AWARD

##### What Costs Orders can be made?

**Bylaw 360** contains the provisions by which ICA Arbitrators can make orders as to costs in their Awards.

The General Position is that “**Costs Follow the Event**”. This simply means that the loser pays the winner's costs.

The Tribunal has an **overriding discretion** to decide which party shall pay (or “bear”) the costs of the arbitration.

##### What must the Tribunal consider?

**Bylaw 360** states that when exercising its discretion to make a costs order other than “costs follow the event”, the Tribunal must have regard to:

**All material circumstances**, and any of the following as appear to be relevant:

- **Which of the issues raised** in the arbitration have **led to substantial costs** being incurred (and the **conduct** of the parties raising these issues)
- **Which party succeeded in** respect of **such issues**
- Whether **any claim which partially succeeded** was **unreasonably exaggerated**
- The **conduct of the party** which **succeeded** on any claim and **any concession made by the other party**
- The **degree of success** of **each party**.

### What are the “Costs” of the Arbitration?

“Costs” may include

- The fees of **the Tribunal**, or the sole **Arbitrator** (if acting alone)
- Any **stamping fee** that is payable (plus Value added Tax, or “VAT” if applicable)
- Any **expenses or disbursements** incurred by the **ICA** or the **Tribunal** (e.g. cost for translations, legal advice, courier costs, bank charges etc)
- The **legal costs** incurred by **each side** (e.g. lawyer’s fees, or expert’s fees) in taking part in the arbitration proceedings. These are referred to as “**costs of the reference**”. But these lawyers costs are **NOT** recoverable in ICA arbitration if claimed at arbitration – unless the lawyers were commissioned by the Tribunal.
- (In the case of an appeal) the **costs of the arbitration at first tier**.

The Tribunal must ensure that it considers these costs and deals with them in its Award.

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## APPENDIX 1

### ICA standard arbitration agreement

The ICA has a standard ICA arbitration clause which they encourage parties to use:

*“All disputes relating to this contract will be resolved through arbitration in accordance with the Bylaws and Rules of the International Cotton Association Limited. This agreement incorporates the edition of the International Cotton Association’s Bylaws & Rules at the date that this agreement was made, which contains the Association’s arbitration procedure.*

**Note not part of the clause wording:** If both parties agree, the words ‘All disputes’ can be changed to read ‘Quality disputes’ or ‘Technical disputes’. But if nothing else is agreed, the words ‘All disputes’ apply.

*The parties must not take legal action against the other party anywhere in the world over a dispute suitable for arbitration, other than to obtain security for any claim, unless the party has first obtained an arbitration award from the International Cotton Association Limited and exhausted all means of appeal allowed by the Association’s Bylaws.”*

**NB** It is the responsibility of both parties to read the complete The International Cotton Association’s Bylaws and Rules which are available on the ICA Website.

**NB** This clause is **not compulsory**. It is a good example of an agreement to use ICA Arbitration, if there is a dispute. The latest version is always freely available on the ICA web-site for anyone to use.

## APPENDIX 2

### **TRIBUNAL'S DIRECTIONS (01/2022)**

*The mission of the ICA is to protect the legitimate interests of all those who trade cotton, whether buyer or seller. One of the three keyways in which we seek to achieve this is by providing an impartial and effective dispute resolution service. These Tribunal's Directions are issued in line with this mission and intent.*

*Any questions regarding these Tribunal Directions, please contact the International Cotton Association (ICA) Management Team (email)*

*Our Bylaws and Rules can be found at <https://www.ica-ltd.org/safe-trading/bylaws-rules/>  
The parties are referred to these Bylaws and Rules of the ICA, which are recommended to be read in conjunction with these Tribunal Directions.*

*Parties may seek guidance on these and any other matters relevant to the process of ICA dispute resolution from any ICA arbitrator, person or party, except those serving on this Tribunal or the ICA Management Team . A list of ICA arbitrators is available here: <https://www.ica-ltd.org/arbitration/meet-the-arbitrators/>*

*Parties are free to pursue amicable remedies at any time prior to or during an arbitration but the Tribunal cannot be involved in these discussions. Where settlement is agreed by the parties prior to the conclusion of an award the Tribunal will have the right to receive payment for the work it, or any third party appointed by the Tribunal, has done up to that point.*

*Parties are reminded that the Tribunal will not accept submissions directly from legal firms or independent lawyers.*

- 1. The Claimant must submit all documents to the ICA that they consider relevant in support of their claim within 14 days of receipt of this notification. Such particulars of claim are to include a written chronological summary of events, the points in dispute and the remedy and/or amount sought.*
- 2. The Claimant and Respondent will both be requested to pay a deposit of £8,000 on account of fees and expenses arising from the arbitration. The claimant will have already paid this deposit to the ICA. The Tribunal can call for additional deposits to be requested at any time.*
- 3. The Respondent is to submit a written summary of their reply to the Claimant's particulars of claim and all supporting documents, such reply to include a written chronological summary of events, detailing the points in dispute and any remedy and/or counterclaim sought that they consider relevant. The reply should be sent within 14 days of receipt Claimant's particulars of claim.*

4. *The Claimant will be allowed a further fourteen days from receipt of the Respondent's comments on Claimant's particulars of claim to make their final comments.*

5. *The Respondent will be allowed a further fourteen days from receipt of the Claimant's final comments to make their final comments. The ICA Management Team will automatically exchange between the parties any documents, e-mail, faxes and other communications mentioned in paragraphs of these "Tribunal's Directions" that need to be sent to the parties, without first having to seek the permission of the Tribunal to do so.*

6. *The Tribunal may call for further documents from the parties, as deemed necessary, which will be copied to the other party. The Tribunal may seek information on cotton prices when an "invoicing back" matter is being considered. These prices, but not the sources, will be shared with the parties.*

7. *Once the parties' documents have been received at the ICA, the Tribunal will meet to consider the matters in dispute and publish their Award, in due course. All documents should be submitted electronically must be numbered / paginated by the parties before submitting them to the ICA.*

8. *If, at any stage, either party fails to comply with the timetable, they will be given a final period (of seven days) within which to comply. Failure to comply within the (seven-day) deadline will result in the matter proceeding ex-parte as directed by our Bylaw 307 (a)(5), unless they write to the Tribunal to request an extension of time and state their reasons for doing so. The Tribunal may grant an extension of time if it thinks fit. Should the parties fail to meet any deadline then this will result in the matter proceeding ex-parte as directed by our Bylaws. Ex-parte means that the Tribunal will proceed to produce an award based on the evidence before it, if any party fails produce documentary evidence requested.*

9. *Parties are reminded of their duty under Bylaw 307a(4) "to do all things necessary for the proper and expeditious conduct of the proceedings, including complying without delay with any order or direction of the Tribunal as to procedural and evidential matters" plus providing before the end of the submissions stage, any comments on costs in the case.*

10 *Three original versions of the Award will be published, one for each party and one for the ICA. Further originals of the Award can be produced upon a written request from a party to the ICA Management Team, prior to the publication date (one week's notice) for a fee.*

11. *These standard directions are subject to alteration on particular cases as directed by the Tribunal but any alterations will not conflict with the ICA Arbitrators Code of Conduct or English Law.*

**NOTE**

Please note that the following examples at Appendices 3 and 4 are for illustration purposes only and are not template solutions for Arbitrators to apply. For the avoidance of doubt, each case is different and ICA Arbitrators are subject to a duty to ensure that each case is determined on its facts, as supported by evidence.

APPENDIX 3

Example of how Rule 238 can be applied in practice

- 1. Seller Invoicing back example:
- Let us say that Merchant-A (Seller) sold 500MT of MOT SM 1-1/8" cotton to Spinner-Z (Buyer) at the contract price of 60.00 USC/LB on 1st June 2005, with shipment during October 2005.
- At the time of shipment the market value of MOT SM 1-1/8" has fallen. Unfortunately, despite repeated requests from Merchant-A, Spinner-Z is unwilling or unable to open a workable letter of credit (L/C).
- On 15th November 2005 Merchant-A closes out the contract in writing as this is when, despite repeated requests, he knew that Spinner-Z would not perform the contract.
- On the same day Merchant-A sells 500MT of MOT SM 1-1/8" in order to mitigate his losses, the price he received was 50.00 USC/LB. At the same time Spinner-Z is free to buy 500MT of MOT SM 1-1/8" for 50.00 USC/LB.
- Merchant-A had to resell the cotton at 10.00 USC/LB below the contract price of 60.00 USC/LB, in order to dispose of the cotton for which Spinner-Z did not open an L/C. At the same time Spinner-Z was able to replace the cotton at a discount of 10.00 USC/LB.
- i) Contract price = 60.00 USC/LB
- ii) Invoicing back price = 50.00 USC/LB
- iii) Contract quantity = 500MT
- iv) Market difference =  $60.00 - 50.00 = 10.00 \text{ USC/LB} \times 500\text{MT} = \text{USD } 110,230.00$
- Therefore, Merchant-A is 10.00 USC/LB worse off, and Spinner-Z is 10.00 USC/LB better off, because the contract was not performed.
- The invoicing back principle can be best described as attempting to put the parties back in the position that they would have been in if the contract had been performed.
- In the above example the market difference is 10.00 USC/LB and the invoicing back price is 50.00 USC/LB. Therefore, Spinner-Z pays Merchant-A 10.00 USC/LB on the contract quantity.
- This means that Merchant-A has received 60.00 USC/LB for the cotton and Spinner-Z has paid 60.00 USC/LB for the cotton, the original contract price. By using the invoicing back procedure the Buyer and Seller have effectively bought and sold cotton at the original contract price. Therefore, there is no winner and no loser.
- See worked example below:
- i) Contract price = 60.00 USC/LB

- ii) Invoicing back price = 50.00 USC/LB
- iii) Contract quantity = 500MT
- iv) Market difference =  $60.00 - 50.00 = 10.00$  USC/LB x 500MT = USD 110,230.00

## APPENDIX 4

## 2. Buyer Invoicing back example:

- Let us say that Merchant-A (Seller) sold 500MT of MOT SM 1-1/8" cotton to Spinner-Z (Buyer) at the contract price of 60.00 USC/LB on 1st March 2005, with shipment during July 2005.
- At the time of shipment the market value of MOT SM 1-1/8" has risen. Unfortunately, despite repeated requests from the Spinner-Z, Merchant-A is unwilling or unable to ship the cotton.
- On 15th August 2005 Spinner-Z closes out the contract in writing as this is when, despite repeated requests, he knew that Merchant-A would not perform the contract.
- On the same day Spinner-Z buys 500MT of MOT SM 1-1/8" in order to cover his spinning requirements, the price he paid was 70.00 USC/LB. At the same time Merchant-A is free to sell the 500MT of MOT SM 1-1/8" for 70.00 USC/LB.
- Spinner-Z has had to pay an additional 10.00 USC/LB, over the contract price of 60.00 USC/LB, in order to replace the cotton that Merchant-A did not ship. Merchant-A was able to resell the cotton that he did not ship for an additional 10.00 USC/LB.
- Therefore, Spinner-Z is 10.00 USC/LB worse off, and Merchant-A is 10.00 USC/LB better off, because the contract was not performed.
- The invoicing back principle can be best described as attempting to put the parties back in the position that they would have been in if the contract had been performed.
- In the above example the market difference is 10.00 USC/LB and the invoicing back price is 70.00 USC/LB. Therefore, Merchant-A pays Spinner-Z 10.00 USC/LB on the contract quantity.
- This means that Merchant-A has received 60.00 USC/LB for the cotton and Spinner-Z has paid 60.00 USC/LB for the cotton, the original contract price. By using the invoicing back procedure the Buyer and Seller have effectively bought and sold cotton at the original contract price. Therefore, there is no winner and no loser.
- See worked example below:
  - i) Contract price = 60.00 USC/LB
  - ii) Invoicing back price = 70.00 USC/LB
  - iii) Contract quantity = 500MT
  - iv) Market difference =  $70.00 - 60.00 = 10.00 \text{ USC/LB} \times 500\text{MT} = \text{USD } 110,230.00$



The International Cotton Association Limited

Arbitrators Training Course- Basic Level 1

Glossary of Terms

### GLOSSARY OF TERMS

Adversarial Approach	A system where one party must challenge the views and arguments of his opponent /the other party, with the aim of winning the argument. This is typical of litigation.
Adversarial Presentation	The presentation of a case, or argument, representing one side's position, with the aim of convincing an independent party that they are correct- and the other party's argument is wrong.
Adverse-	Unfavourable, harmful, intended to damage or punish. E.g. Adverse Inferences (unfavourable views).
Advocate	To present or argue a case. This also is the name given to a person appointed or employed to present or argue a case on behalf of a party.
All material circumstances	All of the relevant circumstances, and/or factors.
Arbitrator	A person with judicial authority to consider and decide a dispute referred to him or her with the agreement of the parties. See TRIBUNAL.
The Arbitration Act 1996	The main English Statute (or Law, passed by the UK Parliament) which governs the conduct of Arbitrations.
Award	The written document which sets out the decisions reached by the Arbitrators in the proceedings.
Binding	A Compulsory, or necessary effect on two parties. For example: "Binding terms of an agreement"- this means both parties must comply- they cannot claim that the terms do not apply to them.
Case Management	The process of ensuring that the arbitration proceeds smoothly, making appropriate directions, which meet the changing needs of the case.
Commence	To start- for example to start an arbitration, from a particular point in time.

Commencement (of Arbitration)	The act of starting arbitration proceeding- the first step in the proceedings which signals that an arbitration has begun.
Confidentiality	Privacy or Secrecy. For the purposes of Arbitration, maintaining the confidentiality of proceedings or information means that any information presented at arbitration must not be passed on to third parties or made public without the consent of both parties. This includes the existence of the arbitration proceedings themselves.
Concession	Compromise, acknowledgement, or admission. If a concession is made in a case, it may mean that one party accepts, or admits that part of a claim is agreed or not disputed.
Conduct of the parties	How the parties to the action (and their representatives) have performed a contract.
Consultation:	Discussion that takes place before a decision is reached or action taken.
Deadlines	Dates when specific tasks or steps must be completed. See TIMETABLE below.
Discretion	A power which allows arbitrators a certain freedom of choice to make a decision on a particular issue.
Enforce	To put into effect, or to implement.
Enforceable	the quality that allows something (such as an Order) to be put into effect, implemented, or relied upon. . For example, enforceable Awards, are capable of being relied upon in court proceedings.
Ensure	To make sure, or make certain a particular requirement. For example, the parties must ensure that they meet deadlines set by the Tribunal. They must take steps to be sure that they can comply with the deadlines given.
Ex parte	“Without a hearing”.
Expeditious	Speedy or relatively prompt.
Exaggerated	Inflated, overstated. If a claim has been “unreasonably exaggerated”, it has probably been made out to be much more serious, or worth far more money, than it actually is.

Fair	Just, reasonable, open-minded.
Flexible	Adaptable, not fixed.
ICA Secretariat.	This is the formal title given to the ICA's staff. It is responsible for copying and forwarding documentation received from parties in any arbitration and appeal proceedings, forwarding correspondence and communications from the parties to the Tribunal and from the Tribunal to the parties. It cannot give advice to either party on their case, or how to best conduct its case.
Impartial	Open minded, objective, independent.
Inordinate	Excessive, unnecessary, unjustified (as in, "inordinate delay").
Inexpensive	Reasonably priced.
Inflexible	Fixed, difficult to change or adapt, uncompromising
Injustice	Unfairness, prejudice. See JUSTICE.
Inquisitorially	A means of investigating or examining facts or matters. This is sometime referred to as an "Inquisitorial approach".
Interim Award	A provisional, or "stage one" award which deals with certain issues, before a later award on the remaining issues is provided (see s. 32 of the Arbitration Act 1996).
Invalid	Worthless, wrong, not recognised.
Invoicing back	This is the process of closing out a contract under ICA Trading Rules, 238, and 239. can be done by agreement, or ordered by the Tribunal, where the parties have agreed to apply Rules 238 and 239 in the event of a dispute.
Invoicing Back Price	The price that is determined amicably between the parties or by the Tribunal, or Appeal Committee, and is used in the market difference calculation. The invoicing back price is based on the market price on the date of closure but may be adjusted by the Tribunal, or Appeal Committee, to take into account; the date of closure of the contract, the conduct of the parties, the terms of the contract and all other matters which the arbitrators or appeal committee consider to be relevant.

Judicial	Legal, part of a legal process. For example: a Judicial role, means that the role is part of a legally recognised procedure- such as Arbitration.
Jurisdiction_	Power, authority and competence.
Justice	Fairness (See JUSTICE).
Market price	The prevailing price level for the particular growth and quality of cotton stipulated in the contract.
Market difference	The difference in value between the contract price and the invoicing back price.
Mandatory	Compulsory, normally by reason of a statute or some other legislation. Such as, mandatory sections of the Arbitration Act.
Natural Justice	Natural Justice is a term which reflects the basic right of a party to be informed of allegations made against it, and to have a reasonable opportunity to reply to, and rebut (or deny) those allegations.
Not validly	Incorrectly, improperly, wrongly. See INVALID.
Oral Hearing	A hearing before the Tribunal at which spoken evidence can be given, and/or the parties can make their case to the Tribunal.
Peremptory Order	An Order which gives a party a “last and final chance” to comply with a particular deadline.
Permissive	As in “permissive” provisions of the Arbitration Act. Not compulsory- to the extent that it is capable of being excluded by agreement
Perpetuate	Continue or carry on.
Prejudice	Unfairness, harm.
Promote	To encourage, support or endorse.
Private	Confidential to certain parties, not public, closed from public view.
Reasonable	Fair.

Resign	To stand down, or leave. For example, if an arbitrator resigns, he or she will be declining to continue with their appointment, and will leave the position of arbitrator, for a particular case.
Seat of the Arbitration	The place which determines what procedural law will apply to the conduct of the case. E.g. the seat of all ICA arbitrations is stated in the Bylaws and Rules to be England. This means that the procedural law to apply will be that of English law.
Sole Arbitrator	A single arbitrator, appointed by both parties who agree that he or she can consider their dispute and make an Award determining the dispute.
“Stands Alone”	Exists independently of anything else. For example, an arbitration agreement is said to “stand alone” because it is treated as a separate agreement, in its own right.
Strict Rules of Evidence	In court proceedings, evidence can only be allowed, or admitted in accordance with strict rules of evidence- that is, in a particular form. By contrast, the ICA does not apply the strict rules of evidence to its Arbitrations.
Substantial	Significant, considerable, large.
Substantive	As in the “substantive jurisdiction” of an Arbitrator. In this context, “substantive” means the entire basis, or essence by which the Arbitrator claims to have jurisdiction. A challenge to substantive jurisdiction is a challenge to the basic, underlying authority of the Arbitrator.
Suspended	Stopped in time: temporarily halted. If something has been suspended, such as proceedings, it can be reactivated at a later date.
Timetable	A set of chronological dates, by which certain steps in the arbitration procedure should be completed.
Tribunal	The collective name given to three arbitrators appointed by the ICA to deal with an arbitration. Also, the term used in the Arbitration act to refer to any person or persons acting as Arbitrator. See ARBITRATOR.
Validly	Correctly, properly.
Void	Meaning: something which does not exist, in law, for one reason or another, and therefore has never existed. For example, an

illegal contract is not recognised by English law. The contract is said to be “void”.

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