



**Working Group on the Future of the
International Coffee Agreement**

1st Meeting

1 July 2019

London, United Kingdom

**Preliminary legal advice on the
difference between amendment and
renegotiation of the Agreement**

Background

1. Under the provisions of paragraph 1 of Article 48 of the International Coffee Agreement (ICA) 2007, the Agreement is due to expire on 2 February 2021. Paragraph 3 of the same Article provides that the Council may decide to extend this Agreement beyond its expiry date for one or more successive periods not to exceed eight years in total while paragraph 4 stipulates that the Council may at any time decide to terminate this Agreement.
2. Under the provisions of Article 49 of the Agreement, the Council may propose an amendment of the Agreement, while Article 35 of the ICA 2007 states that the Council may examine the possibility of negotiating a new International Coffee Agreement.
3. The options therefore available are to:
 - i. Extend the Agreement, with or without amendments (one or more successive periods not to exceed eight years in total).
 - ii. Negotiate a new Agreement.
 - iii. Terminate the Agreement.

Amendment v. Renegotiation

3. In response to questions raised by Members at the 124th Session of the International Coffee Council on the process involved in extending or negotiating a new Agreement, the ICO sought and has now received preliminary advice on the difference between amending or negotiating a new Agreement. This legal advice is enclosed in Annex A.

4. To further inform discussion a draft outline timeline for both options for extension or renegotiation are enclosed at Annex B.

Recommendation

5. TO NOTE: the preliminary legal advice, and outline schedule for the options of extension with amendments, and negotiation of a new International Coffee Agreement.

COMMUNICATION FROM LAWYERS

International Coffee Agreement

*As requested we have considered the status of the International Coffee Agreement (**Agreement**) and whether amendments intended to be made by the International Coffee Organization (**Organization**) to that Agreement would amount to a variation or be considered to constitute a new agreement.*

Our advice below is subject to the following points:

- 1. The Agreement is not governed by English Law;*
- 2. The Agreement is likely to have the status of an international treaty between governments or governmental bodies rather than an international trade agreement;*
- 3. We have had limited time to review the Agreement and, the rules of the International Coffee Council (ICC); and*
- 4. We have not been given details of the proposed amendments.*

The International Coffee Council (ICC) is the governing body of the Organization and administers the Agreement.

Amendments to Agreement

Having reviewed the Agreement and in particular Articles 40,48 and 49, any amendment to the Agreement would need to be approved substantially in the same way as a new Agreement in order for it to become legally binding on a member country. Assuming that the ICC had resolved to amend the Agreement and that the resolution of the ICC to propose that amendment was approved in accordance with the ICC's rules, then that amendment would be proposed by the ICC to the Members of the ICO who are parties to the Agreement, for approval in accordance with Article 49. Article 49 provides that acceptance of 2/3 of the votes of "importing members" of the Organization and 2/3 of the votes of "exporting members" of the Organization are required for any amendment to the Agreement. Acceptance by a member effectively means ratification of the amendment by that member state and that is normally done by the appropriate legislative body in the member country ie in England and Wales that might mean approval by way of a statute, statutory instrument or delegated authority under statute or SI.

*Provided the relevant percentage approvals have been obtained from the members then the amendment is in force for and binding on **all** members of the ICO (subject to specified transition periods.) The ICC communicates the amendment to all members by way of a Depository Notice (**DN**) and any member that does not subsequently notify the ICC within the time specified in the DN that the amendment has been approved (i.e in accordance with that member's legislative requirements) ceases to be a contracting party to the Agreement*

A new Agreement

*Article 35 -Preparations for a new Agreement – provides that the ICC may examine the possibility of negotiating a new International Coffee Agreement subject to the progress made by the Organization in achieving the objectives of the Agreement. In broad terms the objectives of Agreement, which are detailed in Article 1, are to promote and facilitate the expansion and transparency of international trade of coffee (**Objectives**). In our view, substantial changes to those Objectives would constitute a new agreement as they would be changes to the original intention and purpose of the Agreement.*

The Agreement is intended to continue for 10 years from when it came into force i.e. 10 years from 2011 however Article 48(4) permits the ICC to decide to terminate the Agreement – having made that decision in accordance with the rules of the ICC i.e. where possible by consensus or if not then as resolved by 70% “exporting” members and 70% “importing” members.

If the Agreement were terminated or it expired, then any new Agreement would need be negotiated between the Organization members and, once approved, each Organization member would then need to sign up to the new Agreement having obtained authority to do so in accordance with its national laws as mentioned above or it may choose not to.

Under English law, if the varied agreement departs from the original contract in an essential way, it may be considered by the court to be a new agreement, such that the original contract is rescinded. That could have unforeseen consequences if a party seeks to rely on a provision of the original contract which may not have been reproduced in the new agreement. However, in order to advise further as to whether or not an amendment amounts to a new agreement, we would need to see and discuss the detail of any proposed amendments. This could also have implications if a member has obtained authority to sign up to any amendment to the Agreement on the basis that it is amounts to an amendment as opposed to a new agreement and might affect the validity of that member's signature.

However, the Agreement may not be governed by English law and based on the above and more specifically based on the very nature of the Agreement and the lack of information on the amendments we are not in a position to provide the Organization with a definitive answer as to whether an amendment proposed to the Agreement might be qualified as a New Agreement. We therefore highly recommend that the Organization seek advice from counsel with the appropriate expertise in international treaties/charters/regulations to advise further or, at the very least, provide further information as to what is proposed by way of amendment.

OUTLINE SCHEDULE
(for the option of extension with possible amendments)

Phase I:	Preparatory
March 2019	<ul style="list-style-type: none"> • The Council examines options for the future of the Agreement and decides that it should be extended with possible amendments. • The Council decides to establish a Working Group and sets out terms of reference, including working procedures and a schedule of work. • Preliminary statements by Members setting out views on possible amendments.
May/June 2019	<ul style="list-style-type: none"> • ED document/survey circulated to Members, the PSCB and relevant international organizations inviting formal proposals for amendment. • Circulation of proposals to Members.
September 2019	<ul style="list-style-type: none"> • Proposals reviewed and discussed by the Working Group. • Progress report to the Council.
January 2020 (Intersessional)	<ul style="list-style-type: none"> • The Working Group continues its review of draft amendments (meeting to be held in English only).
Phase II:	Drafting
April 2020	<ul style="list-style-type: none"> • The Working Group continues its review of draft amendments. • Progress report to the Council.
July 2020 (Intersessional meeting)	<ul style="list-style-type: none"> • The Working Group continues its review of draft amendments (meeting to be held in English only).
Phase III:	Concluding
September 2020	<ul style="list-style-type: none"> • Discussions and possible adoption of amendments by the Working Group and Council. • Possible extension of the ICA 2007 for a further period until negotiations have concluded.
October 2020 onwards	<ul style="list-style-type: none"> • Contracting Parties notify the Depositary of their acceptance of amendments, and the amendment becomes effective 100 days after requirements of number of parties and votes are met.
January 2021	<ul style="list-style-type: none"> • Extension of Agreement with amendments comes into effect.

OUTLINE SCHEDULE
(for the option of negotiating a new ICA)

Phase I:	Preparatory/drafting
March 2019	<ul style="list-style-type: none"> • Preliminary statements by Members setting out their views. • The Council examines options for the future of the Agreement and decides that it should be renegotiated. • The Council decides to establish a Working Group on the Future of the Agreement and sets out terms of reference including working procedures and a schedule of work.
May/June 2019	<ul style="list-style-type: none"> • The Secretariat prepares a report on progress on achieving the objectives of the ICA 2007. • ED document/survey circulated to Members, the PSCB and relevant international organizations inviting comments on the Agreement and proposals for renegotiation. • Circulation of proposals to Members.
September 2019	<ul style="list-style-type: none"> • The Council/Working Group examine the progress on achieving the objectives of the ICA 2007 and the results of the survey. • Proposals reviewed and discussed by the Working Group. • Progress report to the Council.
November 2019 (Intersessional)	<ul style="list-style-type: none"> • The Working Group continues its review of draft amendments (meeting to be held in English only).
January 2020 (Intersessional)	<ul style="list-style-type: none"> • The Working Group continues its review of draft amendments (meeting to be held in English only).
Phase II:	Drafting
February 2020	<ul style="list-style-type: none"> • Draft document containing proposals for a new ICA prepared by the Secretariat and circulated to Members.
April 2020	<ul style="list-style-type: none"> • The Working Group reviews the draft ICA. • Progress report to the Council.
July 2020 (Intersessional meeting)	<ul style="list-style-type: none"> • The Working Group continues its review of draft ICA (meeting to be held in English only).
Phase III:	Concluding
September 2020	<ul style="list-style-type: none"> • Final discussions and adoption of text of a new Agreement by the Council. • Definitive text of Agreement prepared by the Secretariat, deposited with the Depository, and circulated to Members with procedures for signature. • Extension of the ICA 2007 for a further period until negotiations have concluded.
October 2020 onwards	<ul style="list-style-type: none"> • New ICA opens for signature, followed by instruments of ratification, approval or accession.
April 2021/ September 2021	<ul style="list-style-type: none"> • Countries which have completed the procedures could decide that the Agreement should enter into force amongst themselves if the conditions for entry into force have not been met ¹

¹ If Members consider that further time is needed to complete the necessary procedures for membership of a successor Agreement, consideration could be given to an extension of the 2007 Agreement for a short period.