

The Revised ICC Arbitration Rules

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Introduction

The ICC Court of Arbitration is widely acknowledged as one of the leading international arbitration institutions, and ICC arbitration clauses are a common feature in contracts concerning international trade and investment. With more than 700 new ICC Arbitration cases every year, many companies that trade internationally also have direct experience of resolving disputes under the ICC Arbitration Rules.

News that the ICC has revised its arbitration rules will therefore be received with considerable interest by members of the international business community - particularly when some of the adopted revisions will have a significant impact on the way ICC arbitration is conducted in practice.

In this Client Alert we review the key revisions introduced by the new Rules of which businesses should be aware, and consider the impact they might have.

Entry into force: 1 January 2012

The new ICC Arbitration Rules (the "new Rules") were formally adopted in September 2011, and come into force on 1 January 2012. They will apply (with the exception of the Emergency Arbitrator Provisions - see below) to all ICC arbitrations commenced after that date, even where the arbitration agreement or clause was entered into beforehand.

Emergency Arbitrator Provisions

Undoubtedly the most significant change heralded by the new Rules is the introduction of the Emergency Arbitrator Provisions.

Under Article 29 and Appendix V of the new Rules (the "Emergency Arbitrator Provisions" or "Provisions"), parties may seek *"urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal"* from a specially appointed temporary Emergency Arbitrator, even before arbitration has been formally commenced. Such relief should, in appropriate circumstances, enable parties to secure important evidence or prevent the dissipation of assets by a party seeking to frustrate a claim.

Timeframe

Following an application by a party, an Emergency Arbitrator will be appointed by the President of the ICC Court within two working days. The appointment can be challenged within short time limits. Where an application for emergency measures is made before the arbitration is commenced, the Request for arbitration must be submitted within 10 days, failing which the emergency proceeding will be terminated, unless the Emergency Arbitrator extends time.

The Emergency Arbitrator is required to issue an order within 15 days, extendable at the discretion of the President of the ICC Court. The Emergency Arbitrator may himself revisit an order he made upon request by a party that is made prior to transmission of the file to

the arbitral tribunal. His order does not bind the arbitral tribunal, which may modify, terminate or annul any order made by the Emergency Arbitrator.

Finality

Under Article 29.2 of the new Rules, the parties "*undertake to comply with any order made by the emergency arbitrator*". However, an Emergency Arbitrator order is not a final arbitration award that can be enforced directly through national courts under the New York Convention. This could be viewed as a weakness in a system that is intended to provide emergency relief in urgent cases. It is appropriate therefore that Article 29.7 of the new Rules confirms that the Emergency Arbitrator Provisions are not intended to prevent parties from seeking urgent interim measures of protection from national courts.

Cost

The ICC will charge a minimum fee of USD40,000 for any application for Emergency Measures, irrespective of the amount of the claim. The fee will cover the fees and expenses of the emergency arbitrator as well as the ICC's administrative expenses. These costs may be increased at the discretion of the President of the ICC Court.

Application

Unlike the rest of the new Rules, the Emergency Arbitrator Provisions will only apply to ICC arbitrations commenced under an arbitration clause or agreement entered into **after** 1 January 2012. The Emergency Arbitrator Provisions will not apply where the parties have agreed to the application of another pre-arbitral procedure for the granting of conservatory measures, or if they have expressly agreed to opt out of the Provisions.

Utilisation

The potential advantages of the Emergency Arbitrator procedure strongly militate against excluding the Provisions. Nevertheless, the relatively high cost and potential difficulties with the enforceability of an Emergency Arbitrator order will require parties to weigh up the advantages of the Emergency Arbitrator procedure over any interim relief available from national courts (if any). It is possible therefore that the Emergency Arbitrator Provisions will commonly be utilised in circumstances where national courts cannot (or cannot be trusted to) provide the urgent relief required.

Multi-party and multi-contract arbitrations

Articles 7 - 10 of the new Rules deal with the issues of multi-party and multi-contract arbitration proceedings. Normally only the parties to an arbitration agreement or clause can participate in the proceedings under it, and the arbitration award will only bind those parties. Where commercial relationships involve more than one contract or more than two parties (e.g., energy or construction projects or multiple related sales contracts), there is a risk that any dispute could give rise to parallel proceedings which in turn could result in wasted time and cost, and even inconsistent decisions.

The key provisions of the new Rules address these issues in the following manner:

- *Joinder of additional parties (Article 7)*: Any party may now request that an additional party join the arbitration before any of the arbitrators have been confirmed;

- *Claims between multiple parties (Article 8)*: Where there are more than two parties, this provision allows any party to make a claim against any other party. No new claims can be made after the Terms of Reference are signed or approved by the ICC Court without consent of the tribunal;
- *Multiple contracts (Article 9)*: Claims arising out of, or in connection with, several contracts, and under several arbitration agreements, can now be brought within a single arbitration proceeding; and
- *Consolidation of arbitrations (Article 10)*: Multiple related arbitrations pending under the ICC Rules can be consolidated into a single arbitration where: (a) there is agreement between the parties, or (b) the claims in the arbitrations are made under the same arbitration agreement, or (c) where the claims in the arbitrations are made under more than one arbitration agreement, the arbitrations are between the same parties, the disputes arise in connection with the same legal relationship, and the ICC Court finds the arbitration agreements are "*compatible*".

Conduct of the arbitration

The new Rules require the parties and the arbitral tribunal to do as much as possible to conduct the arbitration in an efficient and cost-effective manner. This obligation finds expression in a number of the new Rules:

- *Article 24.1*: The arbitral tribunal is required to hold a case management conference with the parties when drawing up the Terms of Reference, or soon thereafter, and the arbitral tribunal is allowed to adopt procedural measures to ensure effective case management.
- *Article 37.5*: When deciding on the costs of the proceedings, the arbitral tribunal may take into account circumstances it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-efficient manner.
- *Appendix IV (Case management techniques)*: This new Appendix to the Rules provides examples of case management techniques that can be used by the arbitral tribunal and parties for controlling time and costs. The suggested techniques include (a) rendering one or more partial awards on key issues, (b) identifying issues that can be resolved by agreement between the parties or their experts, (c) identifying issues to be decided solely on the basis of documents rather than oral evidence, (d) limiting the length and scope of written submissions and written or oral witness evidence, and (e) arbitrators informing the parties that they are free to settle all or part of disputes by ADR.
- *Controlling time and costs*: Finally, the parties are referred to the 2009 ICC booklet entitled *Controlling Time and Costs in Arbitration*, for further procedural techniques.

Confidentiality

Although confidentiality is regularly trumpeted as one of the advantages of international arbitration, the ICC Arbitration Rules have never contained automatically applicable confidentiality provisions.

The new Rules do expressly provide protections for the privacy (but not confidentiality) of arbitration hearings (article 26 (3)), and for the confidentiality of the work of the ICC Court (appendix I article 6, and appendix II articles 1 and 3). Further, article 22 (3) of the new Rules confers broad power on the arbitral tribunal to issue orders concerning the "*confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration*", upon the request of any party.

Thus, confidentiality issues are left to be addressed on a case-by-case basis, and will depend on the terms of the arbitration agreement, the applicable laws, and exercise of the arbitrators' discretion under article 22 (3). Consequently, parties entering into ICC arbitration agreements should consider whether to address confidentiality in their arbitration clause or agreement.

Advance on Costs

As a general rule, the costs of an ICC arbitration are assessed on an *ad valorem* basis, by reference to the amounts claimed. The fee (or Advance on Costs) is payable in advance in equal share by the parties. The new Rules have restructured and updated the system, bringing the relevant provisions into a single Article and making provision for joinder of an additional party and multiple-party proceedings. The new Rules also permit the ICC Court to exercise discretion in fixing and allocating advances on costs between the parties.

Additionally, the new Rules contain a provision dealing with the cost implications of withdrawal of a party's claims before a final award was rendered. Where the arbitral tribunal has not yet been constituted, the ICC Court may proceed to constitute the tribunal so that it may make decisions as to costs.

Conclusion

The revisions adopted in the new Rules have not only modernised ICC arbitration; they also seek to address many issues perceived as problematic by many users of ICC Arbitration. In numerous instances, revisions reflect a desire to 'democratise' the rules by spelling out established ICC Court practice previously known only to experts in the field. As a result, however, the new Rules are longer and may appear more complex than previous versions. The introduction of two new appendices and the reference to a separate booklet on the subject of controlling time and costs could be perceived as complicating rather than simplifying the procedures.

However, the adoption of the new Rules was preceded by a two-year international consultation process through which the views of international arbitration experts from around the world were canvassed. Thus, the new Rules do represent an accumulation of the most innovative practices and up-to-date thinking of the world's leading arbitration institution, and as such the new Rules are expected to be received enthusiastically by the legal and business communities alike.

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