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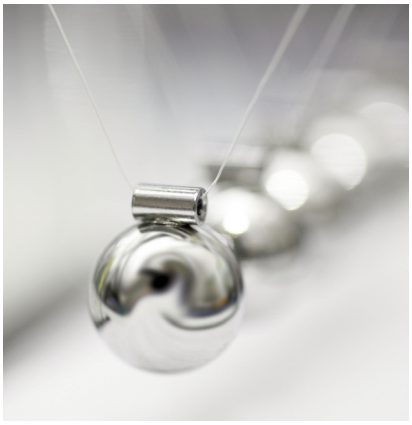

ICC produces new Arbitration Rules

September 2011

On 12 September, the International Chamber of Commerce published its revised Rules of Arbitration. These will come into force on 1 January 2012. The aim has been to make the ICC a more attractive dispute resolution forum for international businesses and governments.

Which Arbitrations Will the new Rules Apply to?

It appears to be the case that they will apply to ICC arbitrations commenced on or after 1 January 2012 (although there is a carve-out for the emergency arbitrator provision – see further below). There is no express provision to that effect in the Rules (the same was the case under the current rules), but in relation to the Scales of Administrative Expenses and Arbitrator's Fees, it is stated that the Scales in the revised version apply to all arbitrations commenced on or after that date. Article 4 of the Rules provides that arbitration commences on the date on which a Request for Arbitration is received by the Secretariat of the ICC.

Moves to make ICC arbitrations more cost-effective

A common complaint about arbitrations in general (and the ICC in particular) is that it is too expensive. The ICC (unlike, for example the LCIA) fixes its costs as a percentage of the amount claimed, so in large-scale, complex arbitrations, the costs to the parties are high. In return, the ICC Secretariat keeps the arbitration moving along and the ICC Court scrutinises all awards before they are handed down by the arbitral tribunals. However, critics complain that this simply adds a layer of bureaucracy and that the Court does little more than check for grammatical and typographical errors, since it does not review evidence or hear arguments first-hand.

It is worth noting that the Administrative Expenses under the new Rules have been increased. For example, the expenses for a dispute worth between USD 1 million and USD 2 million have been increased from 0.70% to 0.95% of the sum in dispute. Arbitrators' fees, too, have generally increased. Under the old rules, for a dispute worth between USD 1 million and USD 2 million, arbitrators could charge between a minimum of 0.50% and a maximum of 2.75% of the disputed sum. Under the new Rules, the minimum for the same disputed sum is now 0.689% and the maximum is 3.604%.

More generally, a new provision has been introduced, specifying that both the tribunal and the parties "shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute". The tribunal is also given power to adopt appropriate procedural measures to meet this objective (provided the parties have not agreed otherwise).

Procedural Changes

The new Rules introduce some significant procedural changes. The main ones are listed below:

(1) Whereas under the old rules and arbitrator need only provide a statement of independence, under the new Rules, a statement of acceptance and availability is required. This will be of particular importance where a popular arbitrator is likely to receive a request to act in another arbitration after agreeing to act during a particular timeframe.

Arbitrators must now also confirm their impartiality as well as their independence. This brings the ICC rules into line with other major arbitral institutions, such as the LCIA (and, the English Arbitration Act 1996 also requires arbitrators to be impartial).

(2) Emergency Arbitrators: A common problem is that emergency interim relief may be required by a potential party to an arbitration in order to preserve the status quo in circumstances where the tribunal has not yet been constituted. In appropriate cases, it is possible in a case of urgency for a party to apply to the English court (wherever the seat of the arbitration is likely to be) for an order to preserve assets or evidence.

The new rules now provide that a party which needs urgent interim relief before the tribunal has been constituted can apply to an "emergency arbitrator", who is empowered to make an order which the parties agree to observe. The duly constituted tribunal can subsequently modify or annul the emergency arbitrator's order.

However, the emergency arbitrator rule applies only where parties have entered into an arbitration agreement after 1 January 2012 (and the parties can also agree to opt out of this provision or can agree another form of pre-arbitral procedure for interim relief). It may be that parties will, in any event, prefer the perceived "force" of a court order over an emergency arbitrator's order.

(3) Multi-party and multi-contract arbitrations: The new rules recognise the complexity of international arbitrations. The inability to join third parties to an arbitration is a difficulty which parties to litigation do not face. Multiple arbitrations to resolve a dispute which involves many different parties also push up the overall cost of the arbitration process. The ICC seeks to address this issue by widening its consolidation procedures. Under the old rules, parties could only request that multiple claims arising out of a legal relationship be heard together in an arbitration between the same parties.

The new Rules provide that: (a) additional parties can be joined to an arbitration before the arbitrators have been appointed (and there is no requirement that such additional party be a party to the arbitration agreement); (b) claims can be made between multiple parties to an arbitration; (c) claims arising out of multiple contracts can be heard in a single arbitration, even where more than one arbitration agreement applies; and (d) the ICC Court can consolidate two or more arbitrations into a single arbitration if the parties agree or all the claims are made under the same arbitration agreement or the disputes arise in connection with the same legal relationship and the ICC Court finds that the arbitration agreements are "compatible".

(4) Case management: As mentioned above, the new Rules aim to speed up ICC arbitrations. As a result, it is now compulsory for the tribunal to convene a case management conference to consult the parties on measures to ensure that the arbitration is expeditious. Appendix IV of the new Rules provides examples of case management techniques which the tribunal might adopt. These include requiring the parties to produce with their submissions the documents on which they rely, avoiding requests for document production (if appropriate) to control time and costs and limiting disclosure requests to documents which are relevant and material to the outcome of the case.

So far as disclosure is concerned, these new provisions do not represent a shift in the ICC's stance. As before, there is only very limited provision for documentary disclosure it is up to the parties to agree on the scope of this or ask the tribunal for an order. This default position is also adopted by, for example, the LCIA and UNCITRAL, which provide that parties need only disclose the documents on which they rely.

(5) Challenging jurisdiction: Under the old rules, the ICC Court itself heard any jurisdictional challenges. Under the new rules, the decision is made by the arbitrators themselves, unless the Secretary General of the ICC refers the matter to the ICC Court. This is intended to speed up the hearing of such challenges.

Finally, it should be noted that the new Rules provide that the ICC Court is the only body authorised to administer arbitrations – accordingly, clauses providing for an ad hoc arbitration under ICC Rules will be ineffective (although the parties could agree to refer to the ICC Rules for guidance).

Further information

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CC000155- September 2011