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New ICC Rules unveiled

The text of the new ICC Rules of Arbitration has just been released after a revision process which has lasted nearly three years. The new rules will come into effect on 1 January 2012 and will apply to arbitrations commenced after that date unless parties have agreed otherwise.

The ICC Rules are among the most widely-used for resolving international disputes. However, arbitration law and ICC practice have evolved since the ICC Rules' last revision in 1998, and many of the changes deal with this evolution. And, despite their wide use, the ICC Rules have been the subject of criticism, some ICC-specific, some applying to international arbitration generally. Some changes to the rules aim to address this criticism.

The new rules preserve many of the "pillars" of ICC arbitration, such as Terms of Reference and National Committees for arbitral appointments, while introducing a number of key changes. These changes broadly fall into three categories: those improving ICC arbitration's efficiency; those dealing with multi-party and multi-contract arbitration; and various largely cosmetic, textual improvements. The new rules also introduce an emergency arbitrator procedure for particularly urgent interim measures.

Improving efficiency

Many of the changes to the ICC Rules aim to make arbitration faster, cheaper and more efficient. The new text includes aspirational language requiring arbitrators and parties to "make every effort to conduct the arbitration in an expeditious and cost-effective manner" (Art. 22(1)). New provisions also focus on improving efficiency at different stages of arbitration.

Certain new provisions aim to speed up arbitrations' initial phase. For example, the new rules include a "gate keeper" provision intended to speed up the ICC's *prima facie* decisions on jurisdictional objections (Art. 6(3)). The ICC Rules have historically empowered the ICC Court to decide that an arbitration will proceed despite jurisdictional objections only if the court is *prima facie* satisfied that an ICC arbitration agreement may exist. While this mechanism is generally seen as desirable, it has been criticized as delaying arbitrations at their outset. Under the new rules, the Secretary General will take most of the decisions allowing arbitrations to proceed, only referring potentially problematic matters to the ICC Court. This new filtering process is hoped to speed up the ICC's treatment of jurisdictional objections.

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Changes are also aimed at speeding up the appointment of arbitrators. Users have suggested that the ICC Court takes longer than other institutions to appoint arbitrators because of its reliance on national committees, which will remain the primary source of arbitrator nominations. The new rules allow the ICC Court to fix time limits for national committees' nominations (Art. 13(3)). If a national committee doesn't nominate a candidate in the time limit granted, the ICC Court can appoint the arbitrator directly. The new rules also allow the ICC Court to by-pass the national committee system if its president certifies that a direct appointment is "necessary and appropriate" (Art. 13(4)(c)). This could be used to in urgent circumstances.

Other changes encourage arbitrators and parties to craft faster and more cost-efficient procedures. Under the new rules, arbitrators must hold a "case management conference to consult the parties on procedural measures that may be adopted" to make the arbitration expeditious and cost-effective (Art. 24(1)). The new rules include examples of case management techniques which may be adopted by the tribunal and parties (Annex IV). The examples will serve as a guide for arbitrators and enable parties to familiarize themselves with the kinds of measures available.

The new ICC Rules also include steps to deal with arbitrators taking too long to draft awards, something perceived to be an increasing problem. They require arbitrators to inform the parties and the Secretariat, at the close of proceedings, when they expect to submit their draft award for scrutiny (Art. 27). This is intended to put psychological pressure on arbitrators to render awards sooner.

Multi-party, multi-contract arbitration

International arbitration has often struggled to deal with multi-party and multi-contract situations, largely due to its consensual nature. The new ICC Rules are the first to attempt to provide a comprehensive framework to deal with multi-party and multi-contract arbitration. New articles deal with the joinder of additional parties, claims between multiple parties, multiple contracts and the consolidation of arbitrations.

The most radical innovation relates to the joiner of additional parties. The new rules allow existing parties to an arbitration to "join" new parties until any arbitrator is appointed or confirmed (Art. 7). In practice, this will allow respondents to join new parties to the arbitration. This is a significant departure from the traditional approach under which the claimant defined the parties to the arbitration. While the ICC Court had in practice moderated this traditional approach in recent years by allowing respondents to join parties in limited circumstances, the new Article 7 provides a much broader scope for joinder. As an extension of this joinder rule, the new rules provide a procedural framework for claims between multiple parties (Art. 8).

The new ICC Rules also clarify the extent to which claims under multiple contracts (and multiple arbitration agreements) can be made in a single arbitration (Art. 9).

Finally, the new rules expand the circumstances when the ICC Court can consolidate arbitrations into a single arbitration (Art. 10). Previously, the ICC Court could only consolidate arbitrations if all parties to the arbitrations were the same. The new rules relax this requirement where all claims in the various arbitrations are made under the same arbitration agreement (Art. 10(b)). The "same parties" requirement is, however, maintained if claims are made under more than one arbitration agreement (Art. 10(c)). The new rules also clarify the circumstances that the ICC Court takes into account when deciding on consolidation.

Consequential changes have also been made to the rules to reflect the new approach to multi-party and multi-contract arbitration. For example, requests for arbitration including claims under more than one arbitration agreement must now specify under which arbitration agreement each claim is made (Article 4(3)(f)). The same applies to counterclaims (Art. 5(5)(d)). Also, provisions dealing with the ICC Court's *prima facie* decisions on jurisdictional objections now contain specific guidance about multi-party and multi-contract situations (Art. 6(4)).

Textual improvements

The new ICC Rules contain a number of relatively cosmetic, textual improvements. For example, they adopt a gender-neutral approach, with "President" replacing "Chairman". Article 3(2), dealing with methods of communication, now includes email, while removing the outdated reference to telex.

The new rules also enshrine certain existing ICC practices. For instance, the new rules expressly oblige arbitrators to be "impartial", as well as "independent" (Art. 11(1)), while as a matter of practice, the ICC Court has always required both. This change brings the ICC Rules into line with other major arbitral instruments, which use both words. The new rules also explicitly allow arbitrators to make "confidentiality orders" (Art. 22(3)), a power that was previously only implicit.

Emergency arbitrator procedure

Perhaps the most significant addition to the new rules is the emergency arbitrator procedure. Previously, a party seeking interim or conservatory measures before the tribunal's constitution had to apply to a national court. The new rules allow parties to apply for the appointment of an emergency arbitrator to decide on urgent measures that cannot await the tribunal's constitution (Art. 29(1)). The procedure is governed by a set of "emergency arbitrator rules", appended to the rules themselves. While the parties are bound by the emergency arbitrator's decision, the tribunal, once constituted, will have the power to modify, terminate or annul any order made by the emergency arbitrator (Art. 29(3)). The emergency arbitrator procedure applies unless the parties "opt out" of it, either expressly, or by agreeing to another pre-arbitral procedure that provides for the granting of interim measures, such as a dispute adjudication board (Art. 29(6)).

Conclusion

The new ICC Rules take genuine steps to improve ICC arbitration and to deal with users' criticisms of the ICC system specifically, and of international arbitration generally. Time will tell whether ICC arbitration becomes faster or cheaper because of the changes to the rules. While unlikely to be a panacea, the new multi-party and multi-contract provisions certainly set a new high water mark for dealing with those issues. So, whatever their immediate practical effect, they are likely to have long term effects on international arbitration practice.

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