

CLIENT ALERT

The 2012 ICC Rules of Arbitration: New Rules, New Responsibilities

October 3, 2011

The International Court of Arbitration of the International Chamber of Commerce (the "ICC") launched its long-awaited revised version of the Rules of Arbitration (the "Rules") on 12 September 2011. The Rules come into effect for arbitrations commenced on or after 1 January 2012. The revision process, initiated in 2008, was intended to address the growing complexity of business transactions, to enhance transparency, and to meet the demands for greater speed and cost-efficiency.

The revisions appear to do just that: they now include detailed articles allowing for joinder of parties and consolidation of arbitrations (Arts. 7-10); expedited consideration of ICC jurisdiction (Art. 6(3)); and a mandatory case management conference aimed at identifying issues and setting a timeline for arbitration (Art. 24(1)). In addition, the new ICC rules introduce for the first time a procedure for the appointment of an emergency arbitrator (Art. 29 and App. V).

Potential parties to an ICC arbitration should note that the Rules also require more of the party and at an earlier stage. For the first time, in fact, the Rules contain an explicit requirement that both the tribunal and parties aim to conduct the arbitration in an "expeditious and cost-effective manner." (Art. 22.1) On its own, this requirement may leave the parties with little concrete guidance, but the importance of this mandate is reflected throughout the Rules. Parties submitting to ICC jurisdiction should be on the alert for these changes:

1) More Robust Requirements at the Commencement of Arbitration

The Rules now appear to require the parties to provide more information at the outset. Thus, a party submitting a Request for Arbitration ("RFA") must now provide the "basis upon which the claims are made" and the "amounts of any quantified claims." (Art. 4(3)(c) and (d)). In addition, Article 4(3)(h) permits the claimant to submit "such other documents or information with the Request as it considers appropriate or as may contribute to the efficient resolution of the dispute." Article 5(f) provides the respondent the same opportunity to submit documents with its Answer.

According to the drafters of the Rules, the new requirements were aimed at avoiding the "North American" habit of submitting brief, conclusory requests for arbitration seeking specific relief and extensive discovery without any substantive evidence. In practice, many parties already file detailed and well supported RFAs. The practical consequence of these revisions therefore remains to be seen, and much will depend on the rigor with which the Secretariat insists that these requirements are fulfilled before accepting an RFA.

2) Joinder of Parties, Multiple Contract Arbitrations and Multiple Party Arbitration

Among the most anticipated revisions are the new rules on joinder and arbitrations involving multiple contracts or multi-parties. The new Rules adopt procedures which have been followed in practice under the 1998 Rules, allowing parties to join additional parties through a separate Request for Arbitration at any time *before* the appointment of any arbitrator, unless the parties agree otherwise. (Art. 7). Similarly, in arbitrations involving multiple contracts or multiple parties, claims may be consolidated and

may be made by any party against any other party *before* the Terms of Reference are signed or approved by the Court. (Art. 8(1); Art. 9). The temporal restraints on these new provisions mean that parties will need to contemplate potential parties and claims early on, as well as be prepared to submit supporting evidence. Notably, both joinder and multi-contract or multi-party claims are subject to the same more detailed submission requirements described above. (Arts. 7(2)-(4); 8(2)-(3)).

3) Proof of Authority

Article 17, "Proof of Authority," requires party representatives to submit proof of their authority at the request of the tribunal or the Secretariat any time after the commencement of the arbitration. This Article has similar goals of promoting efficiency while ensuring that only legitimate claims are brought, and was intended as an additional safeguard to previous Article 21(4) (which now appears as Article 26(4)), which states that parties may appear through "duly authorized representatives."

Traditionally, Article 21(4) had been viewed as referring to the authority of counsel to represent a party. Drafters of the new Rules note that Article 17 encompasses more complex scenarios, including where parties have not signed the arbitration agreement or relevant contracts; or where one party disputes the authority of a representative. According to the drafters, it is in the tribunal's interest to have the parties lay out in detail who will be representing each party and under what authority, in order to ensure that any decision is in fact binding and cannot be disputed on a jurisdictional basis after the fact. Thus, parties should now be prepared to submit evidentiary proof of their authority to *bring* a claim.

4) Case Management

The new Rules give the Tribunal express case management responsibilities, including a mandatory case management conference to establish the procedures for the arbitration (Art. 24.1). The prominent role and importance of case management is emphasized by the inclusion in the 2012 Rules of Appendix IV, which includes a section dedicated to case management. Some of the suggested case management strategies include: identifying issues that can be decided on the basis of documents alone, without a hearing; limiting document disclosure to those documents that are material to the case; and allowing the parties to continue settlement discussions. The emphasis is thus firmly on the cost-effective and expeditious conduct of ICC arbitration proceedings.

5) Emergency Arbitrator

For the first time, the Rules contain a provision for an emergency arbitrator (Art. 29 and Appendix V). These provisions provide an alternative to recourse to national courts for interim and conservatory measures before the Tribunal has been appointed. It remains to be seen whether parties will choose to follow these procedures. Note that they only apply to arbitration agreements executed after 1 January 2012, provided that the parties do not opt out of these provisions.

6) Costs

While the Rules currently in force provide that the "final Award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties" (1998 ICC Rules, Article 31(3)), the new Rules go so far as to state that, in fixing the allocation of the costs of the arbitration in the final award, the Tribunal may take into account "the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner." (Art. 37.5)

Although ICC awards have previously discussed parties' conduct in relation to costs, the ICC has now incorporated an express rule that dilatory and wasteful tactics are a factor to be considered in allocating costs.

Conclusion

In sum, the 2012 Rules incorporate a great number of refinements that reflect the practice that has developed in ICC arbitrations since the 1998 Rules were adopted. They also include entirely new provisions - such as those relating to complex arbitrations and emergency arbitrators - designed to solve very specific problems that have come to light as ICC arbitration has increased in popularity.

The revised ICC Rules go into effect January 1, 2012, unless the parties agree to refer to the old rules.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Arlen Pyenson

Counsel – New York

Phone: +1.212.803.4057

Email: apyenson@crowell.com