Kluwer Arbitration Blog

The Revised ICC Rules of Arbitration

Annalise Nelson (Associate Editor) · Thursday, September 15th, 2011

As discussed by Paul Friedlandhere, on September 12, 2011, the International Chamber of Commerce issued its revisedRules of Arbitration. The new rules, which update the 1998 Rules and will take effect on January 1, 2012, are the result of a two-year effort by a special task force that gathered input and consolidated best practices from members of the ICC, Court members, the ICC Secretariat and practitioners.

The revisions are wide-ranging, and represent an effort to codify certain practices already well-established by tribunals, to streamline certain other procedures, to take into account the increasing complexity of arbitrations involving multiple parties or multiple contracts, and to encourage arbitrators and parties to foster efficiency and limit the costs of proceedings.

I had the opportunity to speak with Dan González, Co-Head of the International Arbitration practice at Hogan Lovells US LLP and an experienced advocate/arbitrator throughout the Americas, Europe and the UK, who walked me through the major changes to the revised Rules and some of the implications of these changes. According to Dan, “In the over twelve years since the ICC updated its rules, there’s been an immense growth in the number and complexity of arbitrations. Rather than continue dealing with increasing complex issues as they came up, the ICC affirmatively decided it was time to update the Rules and wisely sought substantial input from practitioners, arbitrators and others over the course of the past several years.”

Dan highlighted some of the major changes to the Rules:

• Multi-parties and multi-contracts arbitration: The revised Rules include a number of new provisions that detail procedures for handling complex disputes, including provisions that facilitate joinder of additional parties, claims between multiple parties, and claims arising out of multiple contracts. These provisions largely reflect practices that have already been used by parties in the past.

• Emergency arbitrators: The emergency relief provisions are entirely new to the revised Rules. Under the 1998 Rules, parties seeking interim or conservatory relief prior to the composition of the Tribunal would seek relief before a local court. The revised Rules now provide procedures for the appointment of an emergency arbitrator to grant interim relief, in the form of an interim Order, before the Tribunal is constituted. When the Arbitral Tribunal is constituted, the interim Order can be maintained, modified or terminated. It remains to be seen how parties will respond to this new provision and if more or less conflicts will exist with local courts. The emergency arbitrator procedure will only apply to arbitration agreements concluded after January 1, 2012, and only to

the extent that parties do not opt out of the provisions or have agreed to be bound by other pre-arbitral relief provisions.

• Jurisdiction challenges: This is another entirely different provision of the revised Rules. Unlike the 1998 Rules, under which the ICC Court is required to make a prima facie finding on jurisdiction, now jurisdictional issues usually will be determined directly by the Tribunal, unless the Secretary General of the Court decides to refer a case to prima facie decision on the existence of the arbitration agreement. The new provision streamlines the procedure for determining jurisdiction, and also more directly reflects the world-wide notion that the arbitrators should rule on their own jurisdiction.

• Time and Costs: Tribunals and the parties are now expressly required to conduct the arbitration in a cost-effective manner. Tribunals must conduct a mandatory case management conference at the outset, and the provisions now explicitly give arbitrators more liberty in awarding costs to consider how the parties behaved over the course of the arbitration. The new provisions on case management remain purposely broad, giving the arbitrators more latitude to control the parties by means most effective given the particular context of the parties and the specific complexities of the case.

• Impartiality, independence and availability of arbitrators: The Rules now expressly include the requirement that arbitrators remain impartial and independent. Arbitrators are also required to sign a statement attesting to their availability. This broader attestation by the arbitrators demonstrates the ICC's recognition that arbitrators should maintain a clear appearance of impartiality and independence throughout the proceedings and that they must attest to having the time available to efficiently handle the arbitrations for which they are confirmed. This revision is an effort to manage efficiency and other issues throughout the course of the proceedings, not just when they become a problem.

• Sovereign parties and investment arbitration: With investment treaties on the rise, many investment disputes have traditionally been earmarked for ICSID arbitrations or subject to UNCITRAL proceedings. The revisions in ICC Rules could encourage parties to opt for the ICC as an alternative institution. Only time will tell on the success of the ICC's revisions in this respect—a client's experiences and satisfaction (or lack thereof) with other investment arbitration proceedings will affect whether they seek out different institutions in the future.

Hogan Lovells has prepared a number of helpful charts comparing the revised provisions of the Rules to the 1998 ICC Rules, as well as to the current AAA and LCIA rules, which are availablehere.

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