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Briefing note on ICC Rule changes

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Amendment to the International Chamber of Commerce Rules of International Arbitration

The International Chamber of Commerce has issued a revised set of rules for International Arbitration, due to come into force from 1 January 2012 (the "2012 Rules").

The 2012 Rules are clearly an attempt by the ICC to respond to the business needs of the international community. The amendments show a recognition of the need for methods designed to deal with the complexity of international arbitration while simultaneously seeking to increase efficiency and decrease the cost of the dispute resolution process. Notable amendments include:-

• methods for dealing with disputes involving multiple contracts and parties;
• updated case management procedures;
• obligation on an arbitrator to declare impartiality and availability; and
• provision for an emergency arbitrator to order urgent measures.

Multiple Contracts and Parties

International commercial relationships tend to involve multiple parties and multiple contracts and an effective dispute resolution system should allow for this. The 2012 rules go some way to doing this by introducing new provisions for the joinder of additional parties and extending the rules on consolidation of arbitrations.

Pursuant to Article 7, a party may join an additional party to an existing arbitration by submitting a Request for Joinder to the Secretariat. This can be done without the consent of the additional party if the application is made prior to the confirmation or appointment of an arbitrator.

Pursuant to Article 10, a party that is involved in more than one arbitration made under the same arbitration agreement, between the same parties, or in connection with the same legal relationship may apply to the court to have them consolidated into a single arbitration. The application may be made at any stage while the arbitrations are pending under the ICC Rules.

Unfortunately, the tight time limit imposed in the joinder provision may result in its underutilisation. Obtaining the consent of a party one wishes to join to an arbitration is likely to prove difficult. Therefore, if a party wishes to join an additional party once the arbitrator has been confirmed or appointed, they may find this provision of little. In multiparty disputes, the consolidation provision may prove the practical (and more popular) provision.

Where a party is joined, the rules allow for the additional party to nominate an arbitrator jointly with either the claimant(s) or the respondent(s) (presumably "as appropriate", although this is not stated expressly). In practice this could mean that a party who is being sued by the respondent for a contribution would have to jointly nominate an arbitrator with the party suing him, which seems unfair. However, it is difficult to see how else this provision could have been formulated, and if the parties cannot agree there the Court may intervene pursuant to Article 12(8).

Updated Case Management Procedures

The 2012 Rules are a signal of the ICC's desire to create a more efficient and cost-effective arbitration process.

Article 22 creates a positive duty on both the arbitral tribunal and the parties to conduct the arbitration in an expeditious and cost effective manner. In a step that will be familiar to those accustomed to the Civil Procedure Rules (which apply in the Courts of England and Wales), the ICC have included a mandatory requirement for the arbitral tribunal to convene a case management conference in which the parties must be consulted on any procedural measures that should be adopted. This will give the parties an opportunity to explore options for reducing time and cost associated with the arbitration. Appendix 4 sets out a non-exhaustive list of procedural measures that may be adopted including establishing time limits for production of statements and evidence and conducting hearings by telephone or video conference.

There is a clear directive from the ICC that the time and costs of the arbitration should be proportionate to what is at stake in the dispute, and the tribunal will be expected to actively manage the arbitration to ensure this is achieved. Furthermore, the amended rules make it clear that the parties' conduct of the arbitration will be a factor to be taken into consideration when making a costs award. These amendments are welcome.

Disclosure by the Arbitrator

The 2012 rules extend the disclosure requirements of an arbitrator who, previously, was required to sign a statement purely of 'independence'. Instead, pursuant to Article 11, the arbitrator must sign a statement of acceptance, availability, impartiality and independence. This statement is provided to the parties who are given the opportunity to comment.

Requiring a statement of impartiality acknowledges that 'independence' in an arbitrator may not be sufficient to eliminate bias. It brings the ICC provision in line with some other institutions, such as the LCIA, which already require both independence and impartiality.

Another important amendment is requiring the arbitrator to indicate 'availability' (codifying current ICC practice). This will assist to ensure that the arbitrator has the time to conduct the arbitration and focus the minds of the parties on timing for proceedings from the outset. This is another provision which may be used to try and ensure that an arbitration conducted under the 2012 rules is conducted efficiently.

Emergency Arbitrators

One of the most notable amendments within the 2012 rules is the provision for the appointment of an emergency arbitrator to order urgent measures. Under the previous rules, an application for urgent measures prior to the constitution of the arbitral tribunal could only be made through the

Courts. Now, an application for urgent measures may be made through an emergency arbitrator appointed by the Secretariat.

The Rules create a temporary solution for parties that require immediate relief, prior to the formation of the arbitral tribunal. Although the order of the emergency arbitrator is binding on the parties (albeit enforcement would be a matter for the courts of the seat of the arbitration) it is not binding on the arbitral tribunal which can modify or annul the order. The rule does not preclude a party seeking urgent interim measures from a Court.

Although the emergency arbitration provisions will be attractive for parties who have chosen arbitration precisely because they want to avoid using the courts (for example, for confidentiality reasons), the system could be undermined because the right to apply to courts for interim measures is preserved; and the Rules include an 'opt out' provision. There is a danger that parties will prefer to opt out of the emergency arbitrator provision in favour of the "safety blanket" of access to the courts.

Conclusion

The 2012 ICC Rules are welcome. They seek to address growing frustrations and criticism that international arbitration is unnecessarily expensive and time consuming. As always, it will only be once the Rules are tested that we will be able to see their effectiveness and as ever, much will depend upon the willingness of the parties and the tribunals to adhere to the rules. However, the amendments are undoubtedly a step in the right direction.

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