MEYER FABRE
AVOCATS

Newsletter – Fall 2011

12 September 2011: Release of the New ICC Rules of Arbitration.

On 12 September 2011, the International Chamber of Commerce ("ICC") launched a much-expected revised version of its Rules of Arbitration, which will come into force on 1st January 2012 and will apply to all ICC arbitrations initiated from that date – except the provisions relating to the "*emergency arbitrator*", which shall not apply if the arbitration agreement was concluded before the entry into force of the revised Rules.

Since the last revision in 1998, the need was felt to adapt the existing rules to the latest evolutions in the arbitration practice, the growing complexity of international transactions, and the demands for greater transparency and efficiency. While many modifications are simply intended to clarify and refresh the language of the Rules and adapt to recent IT developments, a few more substantial innovations will be described in this Newsletter, as well as provisions intended to consolidate or improve practices developed by the ICC Court, the arbitrators and the parties to ICC arbitrations.

The new Rules remain faithful however to the essential features of ICC arbitration, such as the terms of reference and the role of the ICC Court and its Secretariat in the constitution of the arbitral tribunal, the monitoring of the arbitral process and the scrutiny of the award.

Two major innovations

The most significant novelties introduced in the revised Rules relate to the "*emergency arbitrator*" and to complex arbitrations involving multiple parties and/or multiple contracts.

- **Emergency arbitrator**

Where there is a need for "*urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal*" a party may now apply for such measures to be issued by an "*emergency arbitrator*" (Article 29), following an expedited procedure designed to

last no longer than three weeks, which is detailed in an annex to the revised Rules (Appendix V). An application for emergency measures can be made before the filing of the request for arbitration and until the file is transmitted by the ICC Secretariat to the arbitral tribunal. The emergency arbitrator's decision is in the form of an order that is binding upon the parties, but may be modified, terminated or annulled by the arbitral tribunal once constituted.

The creation of a mechanism for the issuance of emergency measures was seen as a must and places the ICC proceedings in line with other institutional rules such as those of the Stockholm Chamber of Commerce (Appendix II), the Singapore International Arbitration Centre (Schedule 1), the London Court of International Arbitration (Article 9), and American Arbitration Association (Article 37).

Importantly, the newly created emergency procedure is "*not intended to prevent any party from seeking urgent interim or conservatory measures from a competent judicial authority*" (Article 29(7)). Several factors may actually play against a wide recourse to the emergency arbitrator provisions. First of all, in their arbitration agreement, the parties are free to opt out of the emergency arbitrator mechanism or agree to another pre-arbitral procedure (Article 29(6), (b) and (c)). Moreover, the significant costs involved may be a deterrent, especially in small cases (a minimum amount of $40,000 must be paid by the requesting party when filing its application for emergency measures, to cover the ICC administrative expenses and the emergency arbitrator's fees and expenses) (Appendix V, Article 7). Finally, doubts exist as to the legal status of the order for emergency measures as well as its enforceability before the courts. For all these reasons, parties may prefer to apply to the courts for interim or conservatory relief, particularly if such relief can be obtained in a country where effective and relatively inexpensive emergency procedures are available, as in France.

- **Complex arbitrations**

Another achievement of the revised Rules is to set out detailed provisions dealing with the issues raised by complex disputes involving several parties or several agreements. Whereas the 1998 Rules covered only the issue of the constitution of the arbitral tribunal in multi-party disputes (Article 10 of the 1998 Rules, now incorporated in Article 12), the revised Rules, partly codifying existing practices of the ICC Court, now specifically address and regulate the joinder of additional parties (Article 7), the filing of claims between multiple parties (Article 8), claims arising out of or in connection with multiple contracts (Article 9) and the consolidation of arbitrations (Article 10). In essence, the new Rules' objective is to prevent the development of parallel proceedings which generally result in a waste of time and

costs, if not into inconsistent decisions. To benefit from these new provisions, however, parties will have to consider potential parties and claims at a very early stage (decisions may have to be made before the appointment of any arbitrators, or at the latest before the signature or approval of the Terms of Reference).

Promoting the efficiency of the arbitration process

One of the main goals of the revision is to avoid unnecessary delay and expense in the arbitral process. Several amendments are intended to serve this purpose.

- **Increased efficiency at the commencement of the arbitration**

With a view to streamline the first stage of the proceedings, the new Rules now require both parties to set out at the outset, i.e. in the Request for Arbitration and in the Answer, "*the basis upon which the claims* (or counterclaims) *are made*" and the amounts at stake (Article 4(3) (c) and (d), Article 5 (5) (a) and (b)).

Objections to the existence, validity and scope of the arbitration agreement will no longer necessarily be submitted to the *prima facie* consideration of the ICC Court. Article 6(3) of the revised Rules provides that such objections "*shall be decided directly by the arbitral tribunal, unless the Secretary General refers the matter to the Court*".

Article 13(4) of the revised Rules allows the ICC to constitute the arbitral tribunal in an expedited manner, bypassing in appropriate circumstances the role of the National Committees in the appointment of arbitrators.

- **Increased efficiency during the arbitration proceedings**

An express duty is now placed on the tribunal and the parties to "*make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute*" (Article 22(1)). The arbitral tribunal and the parties are encouraged to use case management techniques for controlling time and cost as described in Appendix IV (bifurcating the proceedings or rendering partial awards, controlling the production of documents, limiting the length and scope of written submissions and witness evidence, using telephone or video conferencing, encouraging settlement of the dispute, etc.).

Along the same lines, Article 24(1) now requires the tribunal to convene a "*case management conference to consult the parties on procedural measures that may be adopted*" in order to ensure an effective management of the arbitration. This conference is to be convened "*when drawing up the Terms of Reference or as soon as possible thereafter*".

Importantly, when deciding on the allocation of the costs, the arbitral tribunal is now officially encouraged to take into account "*the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner*" (Article 37(5)).

Finally, under Article 27(b) of the revised rules, the tribunal is now required to inform the Secretariat and the parties of "*the date*" (as opposed to "*the approximate date*") by which it expects to submit its draft award to the Court for approval.

Improvements and consolidation of existing arbitration practices

- **Arbitrators' extended disclosure obligation**

The new Rules now impose on the arbitrators a duty to be and remain *impartial* and independent (independence being the only express requirement under the 1998 Rules), thus addressing concerns about the increasing number of challenges and bringing ICC Rules in line with other institutional rules and arbitration laws (e.g. Article 1456 of the French Code of Civil Procedure as recently amended). Accordingly, and confirming a recent practice of the Secretariat regarding the availability requirement, any prospective arbitrators must now sign a statement of "*acceptance, availability, impartiality and independence*", and disclose in writing "*any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality*" (Article 11(2)).

- **Confidentiality**

Arbitral proceedings are not necessarily confidential *per se*. The new Rules allow any party to apply to the arbitral tribunal for a specific order concerning "*the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration*" (Article 22(3)), whereas the 1998 Rules only referred to "*measures for protecting trade secrets and confidential information*" (Article 20(7) of the 1998 Rules).

This addition, which was mainly intended to encourage states and state entities to opt for the ICC for the resolution of investment treaty disputes, may also be of interest to private businesses wishing to keep the arbitration confidential.

- **Model clauses**

In connection with the revised Rules and with the ICC ADR Rules published in the same booklet, the ICC proposes quite sophisticated standard and suggested dispute resolution clauses. As noted in the comments following the proposed clauses, the parties may wish, and would indeed be well advised, to expressly stipulate the place of the arbitration, which should preferably be chosen in an arbitration friendly jurisdiction. In this respect, and by way of conclusion, it should be emphasized that Paris definitely deserves its pro-arbitration reputation, particularly since the recent coming into force of the new French arbitration law on 1st May 2011, which, as the revised ICC Rules, seeks to encourage the efficiency of arbitration as dispute resolution mechanism.

You can find the 2012 Rules of Arbitration on the ICC website:
http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/2012_Arbitration%20and%20ADR%20Rules%20ENGLISH.pdf

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