

New ICC Arbitration Rules

On January 1, 2012, the newest version of the International Chamber of Commerce (ICC) Rules of Arbitration will enter into force (the “new Rules” or “2012 Rules”).

Supported by a task force of approximately 175 members, a drafting committee of 20 worked for nearly three years to revise the Rules, which had last been revised in 1998. The drafting committee was also assisted by the ICC Commission on Arbitration, a consultative body with more than 500 members from 90 countries. The 2012 Rules were approved by the ICC World Council in June in Mexico City, and were “launched” throughout the fall of 2011 via comprehensive conferences sponsored by the ICC in Paris, New York, Hong Kong, Singapore, Dubai, and Miami.

The ICC’s International Court of Arbitration is one of the major institutions for resolving international commercial disputes. In 2010, 793 requests for arbitration, concerning 2,145 parties from 140 countries and territories, were filed with the ICC Court.¹

I. Will the New Rules Apply to Me?

With one exception—the “Emergency Arbitrator Provisions” discussed below—the 2012 Rules will apply automatically to all ICC arbitrations commenced after January 1, 2012. This will be the case even where the parties’ contractual agreement to arbitrate under the Rules of Arbitration of the ICC predates the entry into force of the 2012 Rules.²

II. What Changes Can I Expect?

According to Peter Wolrich, Chairman of the ICC Commission on Arbitration: “The new Rules meet the growing complexity of today’s business transactions, the needs surrounding disputes involving states, and the demand for greater speed and cost-efficiency.”³ In practical terms, this translates into several innovations in the new Rules.

A. Expanded Permission for the Use of Technology in Arbitral Proceedings and Other Efficiency Initiatives

Whereas the prior version of the Arbitration Rules stated that communications from the ICC Secretariat or an arbitral tribunal could be made via fax, telegram, or telex, the 2012 Rules state simply that notification may be given by email “or any other means of telecommunication

¹ International Chamber of Commerce, *Facts and Figures on ICC Arbitration-2010 Statistical Report* (February 2011), available at <http://www.iccwbo.org/court/arbitration/index.html?id=41190>.

² Although the 2012 Rules do not so state, presumably they will not apply if an existing arbitration agreement specifies a particular prior version of the Rules of Arbitration of the ICC.

³ International Chamber of Commerce, *ICC launches new rules of arbitration* (12 September 2011), available at <http://www.iccwbo.org/index.html?id=45658>.

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that provides a record of the sending thereof.⁴ As under the previous Rules, notice may also be provided in hard copy, via “delivery against receipt, registered post, [or] courier.”⁵ Notably, initial notification of a request for arbitration may also be given via email.⁶

Once a case is underway, the 2012 Rules offer tribunals flexibility to incorporate technology into the proceedings. Pursuant to Article 24 of the new Rules, tribunals are required to “convene a case management conference to consult the parties on procedural measures that may be adopted” to ensure efficient case management.⁷ Suggested techniques for efficient case management include “[u]sing telephone or video conferencing for procedural and other hearings where attendance in person is not essential”⁸ and using “IT that enables online communication among the parties, the arbitral tribunal and the Secretariat of the Court.”⁹ The ICC’s *Techniques for Controlling Time and Costs in Arbitration*, which are incorporated by reference into the new Rules, state that the parties “can also be offered the use of the online ICC service NetCase, which enables correspondence and documents for the arbitration to be stored and exchanged within a secure online environment hosted by the ICC.”¹⁰

In addition to saving time and costs by using technology, the new Rules suggest that the parties consider: limiting the scope of document requests and production; limiting the length of the pleadings, witness statements, and expert reports; narrowing by party agreement the list of issues that a tribunal need decide; and “[i]dentifying issues to be decided solely on the basis of documents rather than through oral evidence or legal argument at a hearing.”¹¹

Should one of the parties unduly increase the costs or length of a proceeding, the tribunal may take this into account

in its costs award. “In making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner.”¹²

B. Expanded Confidentiality Provisions

Confidentiality of proceedings is widely recognized as one of the advantages to using arbitration, as opposed to litigation, to resolve disputes. Though the prior version of the Arbitration Rules stated that tribunals could take measures to protect confidential information and trade secrets, the 2012 Rules go further, providing also that “[u]pon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matter in connection with the arbitration”¹³

C. Addition of an Optional Expedited Process for Obtaining Emergency Relief

Perhaps the biggest change to the Arbitration Rules is the introduction of the Emergency Arbitrator Provisions, a set of rules that permit a party “that needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal [to] make an application for such measures pursuant to” the rules set forth in Appendix V of the 2012 Rules.¹⁴

Though the prior version the Arbitration Rules recognized a tribunal’s authority to order preliminary measures to preserve the status quo, it provided no mechanism for obtaining such relief until a tribunal was constituted, unless the parties had specifically opted-in, at the time of contracting, to an additional set of rules (which rarely happened). This meant that the only recourse for emergency relief was to national courts, which sometimes proved unsatisfactory for one or both parties. The new Rules change the presumption from an opt-in framework to an opt-out framework, meaning that the ICC may consider requests for emergency relief even if the arbitration clause is silent on this issue.

4 Rules of Arbitration of the International Chamber of Commerce in force as from 1 January 2012, Art. 3(2) (2012 Rules).

5 *Id.*

6 *Id.* (stating that “[a]ll notifications or communications from the Secretariat and the arbitral tribunal” may be notified by email).

7 See 2012 Rules, Arts. 24(1), 22(2).

8 2012 Rules, Appendix IV(f).

9 *Id.*

10 International Chamber of Commerce, *Techniques for Controlling Time and Costs in Arbitration*, ICC Publication No. 843 (2007).

11 2012 Rules, Appendix IV.

12 2012 Rules, Art. 37(5).

13 2012 Rules, Art. w22(3).

14 2012 Rules, Art. 29(1).

However, the Emergency Arbitrator Provisions will not apply automatically to every ICC arbitration initiated after January 1, 2012. The Emergency Arbitrator Provisions do not apply if: (1) the arbitration agreement predated the entry into force of the 2012 Rules; (2) the parties decide to “opt-out” of the Emergency Arbitrator Provisions; or (3) the parties have agreed to some other procedure to provide the type of relief achievable under the Emergency Arbitrator Provisions.¹⁵

For parties to contracts (containing an ICC arbitration clause) which predate the entry into force of the new Rules, this will raise questions of both (1) whether to amend their contracts in order to bring the Emergency Arbitrator Provisions into play, and (2) the extent of the amendment necessary to do so.

Benefits of Applying for Emergency Relief. By using the Emergency Arbitrator Provisions, parties may, among other things, secure important evidence or prevent shifting of assets by an opposing party that wishes to frustrate a claim. It must be noted, however, that (like all other ICC proceedings), Emergency Arbitrator cases proceed on the basis of notice. An Emergency Arbitrator cannot issue an order without having notified the respondent and given it an opportunity to respond to the request for emergency relief. Even if the Emergency Arbitrator proceedings force a respondent to do so very quickly, a determined respondent may still be able to shift assets and ultimately frustrate a claim.

Timeframe. Upon invocation of the new provisions, the President of the ICC Court¹⁶ will appoint an Emergency Arbitrator within two working days.¹⁷ Any challenges to the Emergency Arbitrator must be submitted within three days of receiving notification of the appointment.¹⁸ In setting a timetable to hear the parties’ arguments on the application, the Emergency Arbitrator has discretion to set deadlines in the manner he deems appropriate.¹⁹ However, this discretion is limited by the fact that the Emergency Arbitrator must issue an order within 15 days of receiving the file.²⁰ This

deadline is extendable at the discretion of the President of the ICC Court.²¹

Effect of Emergency Order. Pursuant to Article 29.2, the parties “undertake to comply with any order made by the emergency arbitrator.”²² However, an Emergency Arbitrator order is not a final arbitration award that can be enforced directly through national courts under the New York Convention. An order by the Emergency Arbitrator does not bind the arbitral tribunal, which may modify, terminate, or annul any order made by the Emergency Arbitrator.²³

Cost. Pursuant to Appendix V, Art. 7.1, the applicant for emergency relief “must pay an amount of US\$40,000”²⁴ This fee may be increased by the President of the ICC Court. Ultimately, however, the Emergency Measures applicant may be relieved of its burden to bear this cost; an Emergency Arbitrator possesses discretion to determine the proportion of the costs to be borne by each party.²⁵ Upon request by one of the parties, the arbitral tribunal may reconsider this allocation of costs.²⁶

Restrictions. Though a party may submit an application for emergency arbitrator proceedings *before* an arbitration proceeding has commenced, the President of the ICC Court will terminate Emergency Arbitrator proceedings if, within ten days of receipt of an application, the Secretariat of the ICC has not yet received a request for arbitration.²⁷ In addition, as stated above, the Emergency Arbitrator Provisions will not apply to every ICC arbitration initiated after January 1, 2012.

D. Express Guidance for Multiparty and Multicontract Arbitrations

The final important innovation in the new Rules concerns disputes involving multiple parties and multiple contracts, which were not clearly addressed by the prior Rules and led to considerable confusion and some inconsistency. Articles 7 through 10 of the new Rules address these issues.

¹⁵ 2012 Rules, Art. 29(6).

¹⁶ The current President of the ICC Court of Arbitration is John Beechey, of the United Kingdom.

¹⁷ 2012 Rules, Appendix V at Art. 2(1).

¹⁸ 2012 Rules, Appendix V at Art. 3.

¹⁹ 2012 Rules, Appendix V at Art. 5.

²⁰ 2012 Rules, Appendix V at Art. 6(4).

²¹ *Id.*

²² 2012 Rules, Art. 29(2).

²³ 2012 Rules, Art. 29(3).

²⁴ 2012 Rules, Appendix V at Art. 7(1).

²⁵ 2012 Rules, Appendix V at Art. 7(3).

²⁶ 2012 Rules, Art. 29(4).

²⁷ 2012 Rules, Appendix V at Art. 1(6).

Joinder of Additional Parties (Art. 7). Before any arbitrator has been confirmed or appointed, any party may request joinder of an additional party by submitting a request for arbitration against the additional party to the ICC Secretariat.

Claims Between Multiple Parties (Art. 8). Where there are more than two parties, any party may make claims against any other party to the arbitration. However, “no new claims may be made after the Terms of Reference are signed or approved by the Court without the authorization of the arbitral tribunal ... ”²⁸

Multiple Contracts (Art. 9). Claims arising out of multiple contracts, and under multiple arbitration agreements, may be brought within a single arbitration proceeding.

Consolidation of Arbitrations (Art. 10). Multiple (already pending) arbitrations may be consolidated into a single proceeding where: “(a) the parties have agreed to consolidation; or (b) all of the claims in the arbitrations are made under the same arbitration agreement; or (c) where the claims in the arbitrations are made under more than one arbitration agreement, the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible.”²⁹

III. What Should I Do Next?

To prepare for the entry into force of the 2012 Rules, parties to existing international contracts should first review those contracts to determine which (if any) contain an agreement to settle disputes through ICC arbitration. They should then consider the following questions. As always, we are more than happy to help you find the answers to any of the questions set out below.

Should I amend my contract in order to take advantage of the Emergency Arbitrator Provisions? There is both an affirmative and defensive side to this question, and there may be some contracts that you want to

amend and others that you do not want to amend. If you do amend your contract to take advantage of the Emergency Arbitrator Provisions, be aware that with the tight deadlines applicable under the Emergency Arbitrator Provisions, there is a premium on quick responses. Parties would be wise to have counsel in place if they sense a dispute.

What does my ICC arbitration clause say about multiparty and multicontract disputes? In light of the new Rules, is there anything in my existing clause that would create confusion? Should I amend my clause? If so, what should the amendment be? Remember that if you do decide to amend your arbitration clause, you will likely be opting in to the new Emergency Arbitrator Provisions.

In case a dispute arises, do I have documents stored efficiently? Parties that are close to a dispute may want to consider the type of database or document management system that will most efficiently suit their needs, and whether they would ultimately like to take advantage of the service hosted by the ICC mentioned above.

If you have any questions about any of the topics discussed in this Advisory, please contact your Arnold & Porter attorney or either of the following attorneys:

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²⁸ 2012 Rules, Art. 8(1).

²⁹ 2012 Rules, Art. 10.