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ARBITRATION NEWSLETTER

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New international chamber of commerce arbitration rules

After a two-and-a-half year long effort, led by 175 arbitration practitioners from 41 different countries, the International Court of Arbitration of the International Chamber of Commerce (hereafter the "ICC") unveiled on 12 September 2011 its revised arbitration Rules which will enter into force on 1 January 2012.

These new rules update the version in force since 1 January 1998 and could have been inspired by the Olympic motto "higher, faster, stronger".

If these new rules do not modify the general approach of the arbitral procedure, they however bring significant changes around three goals. First of all, the new rules are particularly adequate to deal with complex arbitrations involving multiple contracts and more than two parties, which reflects the unescapable evolution of disputes brought before arbitral tribunals (I). Then, the growing complexity of arbitration disputes also created the need for efficient emergency measures, now found in the new Rules (II). Finally, the new Rules aim at reducing the time and cost of arbitration by modernising the proceedings and reinforcing confidentiality (III).

I. "HIGHER": AN ARBITRATION SPECIALLY DESIGNED FOR COMPLEX DISPUTES

Taking into account years of practice under the previous rules, the new ICC Rules now include new provisions dealing with the settlement of complex disputes involving more than two parties or based on multiple contracts.

Whereas the 1998 rules were sibylline in cases involving multiple parties (former article 10), the new Rules now offer a whole section entitled "Multiple Parties, Multiple Contracts and Consolidation".

Claims between multiple parties: Claims may now be made by a party against any other party under certain reservations stated by the text and subject to the authorisation of the arbitral tribunal after the signature of the Terms of Reference or to the approval of the International Court of Arbitration (article 8).

Multiple contracts: Similarly, in the case of multiple contracts, claims arising out of or in connection with more than one contract may be made in a single arbitration, irrespective of whether such claims are made under one or more than one arbitration agreement under the Rules (article 9).

Joinder of additional parties: The new Rules also deal with the joinder of additional parties. A party may ask, if it so wishes, to join an additional party to the arbitration (article 7). It must be observed that no joinder may be awarded after the confirmation or the appointment of an arbitrator, unless all parties, including the additional party, otherwise agree.

Consolidation of arbitrations: The Court may, at the request of one of the parties, consolidate two or more pending arbitrations under the Rules into a single arbitration when certain circumstances are met, specifically: with the parties' agreement, when the claims arise from the same arbitration agreement or when the Court finds that several arbitration agreements are "compatible" (article 10).

II. "FASTER": A TRULY FASTER ARBITRATION

If a single novelty should be noted from the revision of the ICC Rules, it would certainly be the introduction of the "Emergency Arbitrator".

New Article 29 of the ICC Rules sets forth an "Emergency Arbitrator" to whom the parties may request urgent interim or conservatory measures that cannot wait for the constitution of the arbitral tribunal. The Emergency Arbitrator's decision shall take the form of an order, but shall not bind the arbitral tribunal.

A party wishing to have these emergency measures granted shall submit its Application for Emergency Measures to the Secretariat of the International Court of Arbitration (hereafter the "Secretariat").

However, the recourse to the emergency arbitrator will not apply in the following three cases. First, if the arbitration agreement was concluded before the date on which the Rules came into force, i.e. before 1 January 2012, the parties shall not benefit from these measures. This procedure shall also be excluded if the parties have agreed to opt out of the provisions concerning the emergency arbitrator or if they have agreed to another pre-arbitral procedure that provides for the granting of conservatory, interim or any such measures.

It should finally be specified that the provisions concerning the emergency arbitrator do not prevent any party from seeking urgent interim or conservatory measures from a competent judicial authority at any time prior to making an application for such measures and in appropriate circumstances thereafter pursuant to the Rules. Indeed, any application for such measures from a competent judicial authority shall not be deemed to be an infringement or waiver of the arbitration agreement.

III. "STRONGER": A MUCH MORE EFFICIENT ARBITRATION

It is now expressly provided that the arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute.

Accordingly, the arbitral tribunal may after consulting the parties and obtaining their agreement, adopt procedural measures as it considers appropriate to ensure effective case management.

The Rules encourage the use of IT and expressly state that all notifications or communications from the Secretariat and the arbitral tribunal may be made by email or any other means of telecommunication that provides a record of the sending thereof.

Measures related to the confidentiality of the arbitral procedure have also been reviewed by the new Rules. In addition to the measures the arbitral tribunal could already take in order to protect trade secrets and confidential information, the tribunal can, from now on, make orders concerning the confidentiality of the arbitration proceedings or of any other matter in connection with the arbitration.

Finally, it is still provided that the arbitrator must be and remain independent of the parties involved in the arbitration. The new Rules add the word "impartial", and the previous statement is now entitled "statement of acceptance, availability, impartiality and independence". The latter contains, as it used to, the obligation to disclose to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence or that could give rise to reasonable doubts as to the arbitrator's impartiality, this obligation remaining during the whole arbitration.

The new ICC Rules, if they are not revolutionary, aim at highlighting the advantages of the arbitral procedure, i.e. flexibility and rapidity, and intends to reassure parties and arbitration practitioners on their concern for a cost-effective case management. These changes have been wished for by the latter, who should now find in the new Rules additional tools that render case management easier. No doubt that this modernisation, which follows the reform of the French arbitration law, will contribute to the reputation of Paris, where the ICC is headquartered, as the home of international arbitration.

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