



JONES DAY
COMMENTARY

2012 ICC RULES OF ARBITRATION COME INTO FORCE

On January 1, 2012, a new version of the ICC Rules of Arbitration (the “2012 ICC Rules”) came into force. They will apply to all new cases that the ICC has received since January 2, 2012, regardless of the date of the arbitration agreement under which the arbitration is brought.¹

The 2012 ICC Rules contain a number of changes to the previous (1998) version of the ICC Rules of Arbitration (the “1998 ICC Rules”). We will summarize some of the most significant changes below, following which we will briefly discuss the drafting of ICC arbitration clauses in light of the 2012 ICC Rules.

CHANGES TO ACHIEVE GREATER SPEED AND COST-EFFICIENCY

One of the objectives of the ICC Task Force, which from October 2008 to May 2011 was in charge of revising the ICC Rules,² was to address the ongoing criticism regarding the costs and the duration of international arbitrations, in particular ICC arbitrations. The need to achieve greater speed

and cost-efficiency was thus a central preoccupation of the ICC Task Force in light of comments from a number of users of its services. To address these concerns, the 2012 ICC Rules include the following changes:

- A change in the procedure for jurisdictional objections. Under the 1998 ICC Rules, the ICC Court had to take a *prima facie* decision on jurisdiction whenever a jurisdictional objection was raised or no Answer submitted.³ Under the 2012 ICC Rules, by contrast, such a decision will be taken only when the Secretary-General refers the matter to the ICC Court, which will happen only exceptionally (e.g., in multi-party and multi-contract cases).⁴
- An obligation for prospective arbitrators to confirm, in their “statement of acceptance,” that they have sufficient availability to conduct the arbitration, and to indicate the periods during which they will be unavailable during the next 12 to 18 months.⁵
- Increased powers for the ICC Court to make direct appointments of arbitrators instead of acting on proposals by national committees,⁶ thus avoiding any delay or deadlock in the appointment

process.⁷ Nevertheless, the ICC Court can be expected to continue to make the overwhelming majority of its appointments based on proposals by national committees.

- An obligation on the arbitral 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.”⁸
- An obligation on the arbitral tribunal to convene, at an early stage in the proceedings, a “case management conference,” at which the parties will be consulted on “procedural measures.”⁹ Such measures may include the “case management techniques” listed in the new Appendix IV to the 2012 ICC Rules.
- An obligation on the arbitral tribunal to declare the proceedings closed as soon as possible after the later of (a) the last hearing concerning matters to be decided in an award or (b) the filing of the last authorized submissions concerning such matters, and at the same time to inform the ICC Secretariat *and the parties* of the date by which the arbitral tribunal expects to submit its draft award to the Court for approval.¹⁰
- The explicit granting of power to arbitral tribunals to take into account “the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner” when deciding which party should bear the costs of an arbitration.¹¹

It can be expected that these changes will over time result in a welcome decrease in the overall length of ICC arbitrations and will improve their cost-efficiency.

THE EMERGENCY ARBITRATOR

The 2012 ICC Rules have also introduced new “Emergency Arbitrator Provisions,” in Article 29 and Appendix V. These give a party the option to apply for interim measures, in the period before the arbitral tribunal has been constituted, to an “emergency arbitrator” instead of having to apply to national courts for such relief.

Previously, there had already existed the “Rules for a Pre-Arbitral Referee Procedure,” which also allowed parties

to apply for interim measures before the arbitral tribunal had been constituted. However, the Rules for a Pre-Arbitral Referee Procedure applied only where the parties had expressly agreed to them. By contrast, the Emergency Arbitrator Provisions apply automatically, without the need for parties to agree to them. To the contrary, parties that do not want them to apply will need to *opt out* of them.

The Emergency Arbitrator Provisions will apply only if the following three conditions are satisfied:

1. The arbitration agreement between the parties was concluded before January 1, 2012;¹²
2. The parties have not agreed to opt out of the Emergency Arbitrator Provisions;¹³ and
3. The parties have not agreed to another pre-arbitral interim measures procedure (e.g., the Rules for a Pre-Arbitral Referee Procedure).¹⁴

In addition, the Emergency Arbitrator Provisions will apply only to “parties that are either signatories of the arbitration agreement under the Rules that is relied upon for the application or successors to such signatories.”¹⁵ In other words, the Emergency Arbitrator Provisions cannot be invoked against a person who has not signed the arbitration agreement, even where that person might ultimately be found by an arbitral tribunal to be bound by that agreement.¹⁶

Where the Emergency Arbitrator Provisions do apply, the procedure is essentially as follows:

- The party wanting the interim measures must file an “Application for Emergency Measures” with the ICC Secretariat;¹⁷
- Within a maximum of two days of receiving the Application, the President of the ICC Court will appoint an emergency arbitrator.¹⁸ However, he/she will not do so if the arbitral tribunal has already been constituted.¹⁹ The emergency arbitrator must be independent and impartial²⁰ and cannot go on to become a member of the arbitral tribunal;²¹
- The emergency arbitrator, once he/she has received the file, will have a maximum of 15 days to take his/her decision, which will take the form of an “Order,” not an award.²²

The emergency arbitrator's Order will last until (at the latest) the time when the arbitral tribunal issues its award, unless the arbitral tribunal decides to extend its effect.²³ However, the arbitral tribunal is in no way bound by the emergency arbitrator's Order and can "modify, terminate or annul" it whenever it wishes.²⁴

The cost of an application under the Emergency Arbitrator Provisions will in general be limited to a one-off fee of USD 40,000, payable at the time that the Application is filed with the ICC Secretariat.²⁵ However, this fee, which will cover the ICC's administrative expenses and the emergency arbitrator's fees and expenses, may in exceptional circumstances be increased by the President of the ICC Court.²⁶

The Emergency Arbitrator Provisions thus fill a significant lacuna in ICC arbitration: parties to ICC arbitration agreements will no longer need to incur the expense, delay, and risks of applying to state courts for interim measures in the period before the arbitral tribunal has been appointed.

MULTI-PARTY AND MULTI-CONTRACT DISPUTES

Multi-party and multi-contract disputes (*i.e.*, disputes involving more than two parties or more than one contract) raise some of the most difficult issues in international arbitration. Yet the 1998 ICC Rules contained little guidance on how such arbitrations should be handled, except, in its Article 10, the rule regarding the appointment of arbitrators when there were more than two parties on the Claimant's or Respondent's side. By contrast, the 2012 ICC Rules contain clearer guidance on such issues, which to some extent confirm the practice that the ICC Court had developed in a few cases in recent years. That practice was, however, in flux and truly known only to a few insiders of ICC arbitrations. The 2012 ICC Rules now set out the admissibility requirements for multi-party and multi-contract disputes to proceed under its Rules, without thereby extending the ambit of the relevant arbitration agreement. In particular:

Joinder. Article 7 provides a mechanism for joining into an arbitration a person who is not yet a party to an arbitration (*i.e.*, an "additional party") by filing a "Request for Joinder" (which follows the format of a Request for Arbitration). A

Request for Joinder can be made by any existing party to the arbitration at any time up until any arbitrator has been confirmed or appointed by the ICC Court.²⁷ However, the fact of joining an additional party into an arbitration does not in itself confer jurisdiction on the arbitral tribunal with respect to that party. The additional party will still be able to argue, for example, that it is not bound by the arbitration clause.

Cross-claims. Article 8 allows for cross-claims between multiple parties (*e.g.*, claims by one respondent against another) up until the moment when the Terms of Reference have been signed (and with the arbitral tribunal's permission thereafter). Again, claims will be subject to jurisdictional objections.

Multiple Contracts. Article 9 makes it clear that claims arising under different contracts (*e.g.*, a shareholders' agreement and a joint venture agreement) can be made in the same arbitration, regardless of whether the claims are made under the same arbitration agreement, provided, of course, that the arbitration agreements are compatible²⁸ and that all parties have agreed to a single arbitration. Again, the parties will be able to raise jurisdictional objections.²⁹

Consolidation. Article 10 allows the Court (at the request of a party) to consolidate two or more ICC arbitrations into a single arbitration where *either* (a) the parties agree to that, (b) all of the claims are made under the same arbitration agreement, or (c) the claims are made under *different* arbitration agreements but "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."

Constitution of Arbitral Tribunal. Article 12 provides rules for the constitution of three-member arbitral tribunals in multi-party disputes. The multiple claimants and/or respondents are to jointly nominate an arbitrator.³⁰ Where an additional party is joined into the arbitration, the additional party "may" jointly nominate an arbitrator with the claimant(s) or respondent(s).³¹ In the absence of such a joint nomination, the Court "may appoint each member of the arbitral tribunal."³² This may, depending on the circumstances, mean that the ICC Court would itself appoint all three members of the

arbitral tribunal (*i.e.*, instead of confirming any nomination made by a party).

CONFIDENTIALITY

To the surprise of some users of arbitration, the confidentiality of the arbitral process is not protected under all arbitration laws, let alone under all arbitration rules. To wit, the 2012 ICC Rules do not contain any general confidentiality undertaking for either parties or arbitrators, nor did their predecessor versions.³³ It is a matter for the parties to agree on whatever degree of confidentiality they wish to associate to (future) arbitral proceedings. The 2012 ICC Rules do, however, now grant arbitral tribunals the express power, upon the request of any party, to “make orders concerning the confidentiality of the arbitration proceedings” and to “take measures for protecting trade secrets and confidential information.”³⁴

There remains some uncertainty as to the circumstances under which arbitral tribunals may use this power. Can they make such orders at their sole discretion? Or can they only do so where the arbitration clause (expressly or impliedly) provides for an obligation of confidentiality? There are as yet no clear answers to these questions.

Thus, parties who want the existence of the arbitration, all materials and information exchanged in the arbitration, and of any orders or awards made in the arbitration to remain confidential may need to add appropriate language.

DRAFTING ICC ARBITRATION CLAUSES

How do the 2012 ICC Rules affect the drafting of an ICC arbitration clause? In two-party and single contract disputes, not at all, and it will be noted that the ICC standard arbitration clause remains unchanged.³⁵

Where multi-party and multi-contract transactions are at stake, the new provisions on multi-contract and multi-party arbitrations of the 2012 ICC Rules will have to be carefully considered when drafting, for example, an umbrella arbitration agreement to be signed by all parties to the overall transaction and to which disputes arising under all contracts are subject. In the absence of specific provisions, parties to multi-party agreements and/or to multiple contracts can, however, equally rely on the ICC standard arbitration clause.

In any type of case, where (for any reason) the parties prefer that the Emergency Arbitrator Provisions should not apply, this should be expressly stated in the arbitration agreement, as explained above. To this effect, the ICC has proposed the following language, which is to be added to the standard ICC arbitration clause: “The Emergency Arbitrator Provisions shall not apply.”

LAWYER CONTACT

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ENDNOTES

- 1 2012 ICC Rules, Art. 6(1).
- 2 The Task Force comprised more than 180 members from 41 countries and was chaired by Peter Wolrich, the Chairman of the ICC Commission of Arbitration. Michael Bühler, arbitration partner in Jones Day's Paris Office and co-head of the Jones Day International Litigation and Arbitration Practice, was co-chair of the ICC Task Force.
- 3 1998 ICC Rules, Art. 6(2).
- 4 2012 ICC Rules, Art. 6(3). For discussion of multi-party and multi-contract cases, see below.
- 5 2012 ICC Rules, Art. 11(2). Such information has had to be provided since 2009, following a change of the ICC Court's practice under the new chairmanship of John Beechey.
- 6 2012 ICC Rules, Art. 13(4).
- 7 In the past, there had been a few exceptional incidents that led to significant delays in constituting arbitral tribunals, given the then limited powers of the ICC Court for directly appointing sole arbitrators or presidents of arbitral tribunals.
- 8 2012 ICC Rules, Art. 22(1). This should help avoid standard procedures being routinely applied to an arbitration, irrespective of what is at stake in the particular case.
- 9 2012 ICC Rules, Art. 24(1). The case management conference may be conducted in person or by video conference, telephone, or "similar means of communication."
- 10 2012 ICC Rules, Art. 27. This provision should help avoid excessive delays in rendering the award, once the proceedings are finished.
- 11 2012 ICC Rules, Art. 37(5).
- 12 2012 ICC Rules, Art. 29(6)(a). As explained above, the 2012 ICC Rules otherwise apply to any arbitration commenced after January 1, 2012, regardless of the date of the arbitration agreement.
- 13 2012 ICC Rules, Art. 29(6)(b).
- 14 2012 ICC Rules, Art. 29(6)(c).
- 15 2012 ICC Rules, Art. 29(5).
- 16 The latter could, however, happen only if the prima facie test of Art. 6(3) of the 2012 ICC Rules has been passed at the level of the Secretary General/ICC Court. The prima facie test is not sufficient for the Emergency Arbitrator Provision to apply against a nonsignatory of the arbitration agreement.
- 17 2012 ICC Rules, App. V, Art. 1.
- 18 2012 ICC Rules, App. V, Art. 2(1).
- 19 2012 ICC Rules, App. V, Art. 2(2). This is because, where the arbitral tribunal is already in place, it is in a position (and is indeed best placed) to take a decision on the interim measures application.
- 20 2012 ICC Rules, App. V, Art. 2(5).
- 21 2012 ICC Rules, App. V, Art. 2(6).
- 22 This will render it less likely that the emergency arbitrator's decision can be enforced pursuant to the New York Convention. However, other methods of enforcement exist. In addition, 2012 ICC Rules, Art. 29(2) provides that the parties "undertake to comply with any order made by the emergency arbitrator." A party disregarding such an order could therefore find itself confronted by an award of damages.
- 23 2012 ICC Rules, App. V, Art. 6(6).
- 24 2012 ICC Rules, Art. 29(3).
- 25 2012 ICC Rules, App. V, Art. 7(1). It is meant to cover the ICC's administrative expenses and the fees and out-of-pocket expenses of the emergency arbitrator.
- 26 2012 ICC Rules, App. V, Art. 7(2).
- 27 2012 ICC Rules, Art. 7(1).
- 28 See 2012 ICC Rules, Article 6(4) (ii) (a).
- 29 See 2012 ICC Rules, Article 6(4) (ii) (b).
- 30 2012 ICC Rules, Art. 12(6). This provision is unchanged from Art. 10 of the 1998 ICC Rules.
- 31 2012 ICC Rules, Art. 12(7).
- 32 2012 ICC Rules, Art. 12(8).
- 33 The ICC Court and its Secretariat are, of course, subject to confidentiality, see 2012 ICC Rules Appendix I, Art. 6. It is, however, often said that arbitrators, by nature of their function, need to keep the existence and content of an arbitration confidential, and in normal practice will do so.
- 34 2012 ICC Rules, Art. 22(3).
- 35 www.iccarbitration.org or www.iccwbo.org.