



THE NEW [2012] ARBITRATION RULES OF INTERNATIONAL CHAMBER OF COMMERCE [“ICC”]

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ABSTRACT

The purpose of this article is to explain the principle characteristics of the new ICC Arbitration Rules that will come into force on 1st of January 2012 and to analyze how they differ from the prior version. The author focuses to substantial amendments, major procedural innovations, new introduced mechanisms and de-regulated rules of existing ICC principles. In the mean time, the need and reasons for introduction of the new rules are explained in order to provide practical understanding of actual ICC Arbitration mechanism.

Keywords: *International Chamber of Commerce, ICC, International Arbitration, New ICC Rules, 2012 ICC Arbitration Rules, Arbitration Rules of International Commerce, Alternative Dispute Resolution, Arbitration, World Business Organization, International Commerce., Terms of Reference, Scrutiny, Case Management, Efficiency in the Arbitration Process.*

I. INTRODUCTION:

The International Chamber of Commerce^[1] ["ICC"] has a prominent role in the field of world business by promoting trade and investment, open markets for goods and services, and the free flow of capital since 1919. In a brief definition, the main aim of ICC is to assure effective and consistent actions in the economic and legal fields in order to contribute to the harmonious growth and the freedom of international commerce^[2]. Over the years, the ICC has grown into a far-flung international organization with members in more than 150 countries and National Committees^[3]. ICC's international network assured a multidimensional understanding of new patterns of the business and uncontested contribution to the international commerce.

Additionally, the International Court of Arbitration ["ICC Court"] which was founded in 1923 is remarkably improved the ICC's value and provided a unique functionality to the organization. Nearly for a century, the ICC has been providing significant juridical supervisions in terms of providing dispute resolution mechanisms in line with international business requirements due to the need of justice free from state interference.

Indeed, since the ICC Court was first established, there has been unprecedented growth in the use of arbitration to resolve international commercial disputes. Shifting patterns of economic development and rapid development of international trade assured that the international arbitration became a standard and a routine method to resolve business disputes. The ICC Court is comprised members from around 90 countries and recently the Court supervises more than 1500 pending cases^[4].

II. ARBITRATION RULES OF THE ICC:

Nowadays, ICC is known as one of the famous institutions for the resolution of international commercial disputes and its rules of arbitration are one of the most respected and implemented sources of the international business community.

[1] The ICC is established in Paris as an "association" under the law of 1901 governing non-profit association by the contribution of Belgium, France, Italy, the United Kingdom and the United States.

[2] <http://www.iccwbo.org/>

[3] Derains Y., Schwartz, E.A, "A Guide to the ICC Rules of Arbitration" , Kluwer Law International Publications, 2005, pg. 2

[4] <http://www.mondaq.com>

The ICC's first Rules of Arbitration were published in English and French^[5] in 1922. After establishment of the Court of Arbitration, the Arbitration Rules are amended respectively in 1927, 1931, 1933, 1939, 1947, 1955, 1975 and 1988.

The ICC rules of arbitration dated 1998 were issued in response to the ICC's evolving arbitration experience and legal developments in the field. However, fast global developments and globalization required expectation of rapid, cost-effective and efficient dispute resolution in the process of ICC Arbitration. Within this scope, ICC Arbitration Rules have been the subject of criticism by the international business community.

Accordingly, the preparations of new arbitration rules are commenced in 2009. The ICC Commission on Arbitration which contains 620 dispute resolution specialists from 90 countries provided their experiences and advices for a more efficient arbitration rules codification. Additionally, a sub-committee to be constituted from 200 members drafted the New ICC Arbitration Rules in comply with international business community expectations. The new rules were unveiled at an ICC Conference in Paris from 12th to 13th September 2011.

III. THE NEW PROVISIONS THAT ARE INTRODUCED BY 2012 ICC ARBITRATION RULES:

A. Provisions regarding the Case Managements of the Arbitration:

Majority of the changes that are accomplished in the new ICC Arbitration Rules aims to make arbitration procedure faster, cheaper and more efficient. In comply with this purpose, Article 22, 24, 27, 37 and Appendix IV of the new arbitration rules put forward innovative provisions to ensure efficiency of the arbitration process. Within this scope, Article 22(1) set forth, 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.

According to Article 22(2) of the new arbitration rules, in order to ensure effective case management, the arbitral tribunal is authorized to adopt such procedural measure as it considers appropriate, provided that they are not contrary to any agreement of the parties. This amendment ensures adoption of required procedural rules in line with peculiarities and value of the cases; thereof by implementation of this provision the arbitral tribunal can adopt appropriate procedural measures in line with complexity of the case as well.

[5] English and French are ICC's two working languages.

It is a fact that the confidentiality is a substantial argument for majority of the arbitration cases. Therefore required measures shall be ensured by the arbitral tribunal to protect arbitration parties. Within this scope Article 22(3) is de-regulated in line with confidentiality requirements. Accordingly, upon the request of any party the arbitral tribunal is authorized to make orders concerning the confidentiality of the arbitration proceedings or any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.

One of the unique features of ICC arbitration process in ensuring that the award ultimately rendered addresses all of the issues in dispute is a document called the Terms of Reference, which is to be prepared by the Arbitral Tribunal at the outset of the arbitration. No document of this type is required under any of the major international arbitration rules, whether ad hoc or institutional^[6]. The procedural measures regarding the Terms of References are de-regulated by the new rules as well in order to provide efficiency in the process. In line with this aim Article 24 of the new rules set forth that, the parties are required to attend an early case management conference at the time when the arbitration's Terms of Reference are drawn up, or shortly afterwards. Additionally numerous case management techniques are introduced in Appendix IV^[7] of the ICC 2012 Rules and in the ICC 's report on Techniques for Controlling Time and Costs in Arbitration^[8]. The case management referred to in Appendix IV includes but not limited with the following techniques:

- Bifurcating the proceedings or rendering one or more partial awards on key issues.
- Identifying issues that can be resolved by agreement between the parties or their experts.
- Identifying issues that can be resolved entirely on the basis of the production of documents, without the need for oral evidence.
- Establishing reasonable time limits for the production of evidence.
- Limiting the length and scope of written submissions as well as written and oral witness evidence.
- Using telephone or video conference for procedural and other hearings
- Organizing pre-hearing conferences

[6] Derains Y., Schwartz, E.A, "*A Guide to the ICC Rules of Arbitration*" , Kluwer Law International Publications, 2005, pg. 6

[7] http://www.iccwbo.org/uploadedFiles/TimeCost_E.pdf

[8] http://www.iccwbo.org/uploadedFiles/TimeCost_E.pdf

- Informing the parties that they are free to settle either by negotiation or through any form of amicable dispute resolution (ADR) methods.

Concerning award drafting process, some new techniques are introduced by the new rules as well. According to Article 27 of the rules; once arbitral proceedings are closed, the tribunal is required to inform the Secretariat of the ICC Court of the date by which it expects to send its draft award to the ICC Court for approval^[9]. This provision aims to avoid time consumption in the process of both award drafting and scrutiny that was taking long time in some complex cases. Additionally, the expeditious and cost effective case management provision that is introduced by Article 22(1) is reflected for final stage of the arbitration process by Article 37(5). As a result of new provision, 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.

B. Emergency Arbitrator & Urgent Measures:

The lack of appropriate legal measures in terms of emergency situations are criticized during the implementation of 1998 ICC Arbitration rules. Taking into account that functional emergency measures are set forth by several arbitration institutions^[10], the need to introduce similar provisions are required by the international community.

As a response of these expectations and critiques, substantial amendments are set forth by Article 29 of the new arbitration rules regarding the emergency arbitrator. When a party needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal, the new ICC rules provide opportunity for appointment of an emergency arbitrator to deal with such issues. The expedited timetable for the appointment of such emergency arbitrator is set forth in Appendix V^[11] to the ICC 2012 Rules.

On the other hand the emergency arbitrator procedure is only applicable to arbitration agreements concluded after 1st of January 2012, and the parties

[9] ICC arbitration carries out another peculiar procedural measure which is called scrutiny of the award by the Court. The scrutiny process is regulated by Article 33 of the Rules. Accordingly, before signing any award, the arbitral tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, may also draw attention to points of substance. No award shall be rendered by the arbitral tribunal until it has been approved by the Court as to its form.

[10] The Stockholm Chamber of Commerce [<http://www.chamber.se/about-the-region.aspx>] and Singapore International Arbitration Centre [<http://www.siac.org.sg/>] has been performing the emergency arbitration procedures as well.

[11] <http://www.iccwbo.org/court/arbitration/id4199/index.html>

may opt out of it or agree to substitute other procedures for such interim measures. Although orders issued by the emergency arbitrator bind the parties, such orders do not bind the tribunal, which, when constituted, may modify, terminate or annul the emergency arbitrator's order.

Furthermore, according to Article 29(7) the emergency arbitrator procedure does not prevent parties from making applications to national courts for interim measures. Within the scope of these provisions new rules provide an additionally opportunity to the parties in terms of interim measures by introducing emergency arbitrator.

C. Multiple Parties, Multiple Contracts and Consolidation:

In the process of implementation of 1998 ICC Rules the arbitral tribunals confronted with problems where more than two parties are involved to the dispute^[12]. Taking into account that majority of the disputes arise out among more than two parties, the lacks of the provisions dealing with multiple parties were not in line with recent international business requirement. Thereby, the multiple parties, multiple contracts and consolidation are set forth by Article 6, 7, 8, 9 and 10 of the new Arbitration Rules.

As it is known, the arbitration is a consensual process, and the new rules do not alter this fundamental principle. The flexibility provided by the new rules remains subject to the ICC Court's prima facie satisfaction that an arbitration agreement binding all parties may exist is a fundamental principle that is set forth by Article 6(4).

It is a fundamental principle of arbitration law that any submission to arbitration must be based on the agreement of the parties. Hence, the new rules dealing with multiple parties, joinder of additional parties, and consolidation of the arbitrations are all stated to be subject of Article 6(3) to Article 6(7), which require the Court to be satisfied that parties are party to an arbitration agreement.

According to Article 6(3) of the new rules, if any party against which a claim has been made does not submit an answer or raises one or more pleas concerning the existence, validity or scope of the arbitration agreement or concerning whether all of the claims made in the arbitration may be determined together in a single arbitration, the arbitration shall proceed and any question of jurisdiction or of whether the claims may be determined together in that

[12] For detailed information regarding the problems in terms of multi party arbitration: ESEN,E. "*Uluslararası Ticari Tahkimde Tahkim Anlaşmasının Üçüncü Kişilere Teşmili*" Beta Yayınları, 2008

arbitration shall be decided directly by the arbitral tribunal, unless the Secretary General refers the matter to the Court for its decision pursuant to Article 6(4).

The provisions regarding the joinder party are set forth by Article 7 of the new ICC Rules. On this basis, a party may join an additional party to the arbitration by submitting a 'Request for Joinder' of such party to the Secretariat prior to the confirmation or appointment of any arbitrator, or at any time after that date, provided that all parties to the arbitration, including the party to be joined, have consented to the joinder.

Claims between multiple parties are introduced by Article 8 of the new ICC rules. In this respect, in arbitrations involving multiple parties, any party may make a claim against any other party provided that 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.

In addition to above defined provisions, the multiple contracts claims arising out of more than one contract are regulated under the Article 9 of the new arbitration rules. Accordingly, claims arising out of or in connection with more than one contract may be made in a single arbitration.

A significant innovation in connection with consolidation is set forth by Article 10 of the new ICC rules. In this respect, the ICC Court may consolidate separate arbitrations, either with the consent of all parties or where all claims in the arbitrations are made under a single arbitration agreement, and even where the claims arise under multiple arbitration agreements, as long as the arbitrations are between the same parties and arise from the same legal relationship, and the arbitration agreements are compatible.

D. Amendments regarding the Arbitrators:

The new arbitration rules oblige arbitrators to be "*impartial*" as well as "*independent*" by provisions of Article 11(1). These requirements correspond with the International Bar Association's (IBA) Guidelines on Conflicts of Interest in International Arbitration^[13]. As a matter of fact, ICC has been confronted several criticisms in terms of availability of the arbitrators and conflict of interest arising out the limited number of the arbitrators specialized on several international arbitration issues.

Additionally, a new mechanism introduced by the new ICC Arbitration Rules in terms of arbitrators' availability and convenience as well. According to Article 11(2) of the new rules, before appointment or confirmation arbitrators

[13] http://www.ibanet.org/ENews_Archive/IBA_July_2008_ENews_ArbitrationMultipleLang.aspx

are required to sign a statement of acceptance, availability, impartiality and independence.

There to in line with performance of the arbitral tribunal a substantial provision is introduced by Article 22(4); the arbitral tribunal hereunder should act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.

E. Constitution of the Arbitral Tribunal:

The general conditions related to the constitution of the Arbitral tribunal de-regulated between Article 12 to 13 of the new ICC arbitration rules. As a matter of fact, where the Court is to appoint an arbitrator, it shall make the appointment upon proposal of a National Committee or Group that it considers to be appropriate. If the Court does not accept the proposal made, or if the National Committee or Group fails to make the proposal requested within the limit fixed by the Court, the Court may repeat its request, request a proposal from another National Committee or Group that it considers to be appropriate or appoint directly any person whom it regards as suitable.

Moreover, a new mechanism is introduced regarding the arbitration cases where a party is a sovereign state or state entity, the ICC Court may appoint arbitrators directly instead of relying upon the proposal of the ICC's National Committees.

Taking into account that the arbitrator appointment procedure were taking long period for some particular cases, these new provisions would ensure avoidance of time consumption and direct supervision of the Court in the said process, whenever it is needed.

F. Other Innovative Steps Provided by ICC 2012 Rules:

The ICC Court claims exclusive authority to administer arbitration by Article 1 of the ICC 2012 Rules. This provision effectively prohibits the use of hybrid arbitration arrangements, such as ad hoc arbitrations administered by the ICC Court, or arbitrations conducted under the ICC Rules but administered by another institution.

Under the 1998 Rules, where a party raises a jurisdictional challenge the Court makes a prima face decision as to whether the arbitration may proceed. However, according to new ICC rules such a decision will be made by directly arbitrators, unless the Secretary General of the ICC refers the matter to the Court.

Consequently, new ICC arbitration rules contain a number of textual improvements as well. For example, new rules adopted a gender –neutral approach with “*President*” replacing “*Chairman*” under Article 3(2).

IV. CONCLUSION:

It is a fact that, the ICC 2012 Rules introduced more flexibility and cost efficiency in the administration of ICC arbitrations and speed up all arbitration process. The new rules take genuine steps to improve ICC arbitration and to deal with community’s criticisms related to the ICC procedure. The implementation of the new rules will indicate whether ICC arbitration becomes rapid or cost-effective because of the changes to the rules. However, in theory the amended procedural provisions seem in line with expectations of ICC users.

The changes codify several existing practices and expand the arbitral forum to resolve more complex arbitrations, whilst preserving the main features of ICC arbitration such as Terms of Reference, the close supervision of arbitrations by the ICC Court, scrutiny procedure and approval of arbitral awards by the ICC Court.

The major innovations that took place in the new arbitration rules are conspicuous measures in terms of, multi-party arbitration, multi-contracts, joinder parties, consolidation and emergency arbitrator. While unlikely to be a panacea, these rules certainly set a new high water mark for dealing with multi party arbitration, multi party contracts and related dimensions of the issue. Hence these provisions are likely to have long term effects on international arbitration practices.

Consequently, the new ICC Arbitration Rules will be implemented by arbitral tribunal as of 1st of January 2012. The effects of the amendments would be observed by both international community and the ICC users soon. However, taking into account the innovative patterns of international business and fast global developments, the law always will be quite far being a panacea neither now nor in the future.

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