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New rules or old hat?

by David Toscano

Parties to arbitrations may not find the International Chamber of Commerce's new rules a big improvement

Following an extensive review of the current 1998 rules and feedback from its national committees, the International Chamber of Commerce (ICC) has issued new Arbitration Rules that will apply from 1 January 2012.

The preamble boldly states that the changes "respond to today's business needs". It is clear that the ICC has tried to do two things:

- to bring its rules into line with those used by other international arbitration institutions; and
- to implement a more cost-effective, expeditious and efficient procedure for the resolution of disputes.

Anyone with experience of the ICC process will know that, currently, these characteristics are rarely found in the arbitration procedures that it provides.

Key changes

The most significant changes to the Rules are as follows:

(1) Emergency arbitrator

Parties will be able to apply to a temporary emergency arbitrator for urgent interim and protective measures in order to secure evidence. The emergency arbitrator would be constituted within two working days and empowered to make an interim order (not an award) within 15 days. Failure to comply with the order will carry costs consequences.

This is a new addition to the ICC rules. However, a similar provision has been used – with some success, according to anecdotal sources – by the Singapore International Arbitration Centre (SIAC).

The new ICC rule tackles the existing practice where people involved in arbitration apply to the national courts in the relevant jurisdiction for urgent relief – which parties felt was disingenuous when they had agreed to arbitration of their disputes.

Whether people will see real value in this option is questionable, given that any order would only be enforceable within the arbitration itself and the minimum ICC fee for an emergency arbitrator is US$40,000.

(2) Multiparty and multicontract arbitrations

In updating its Rules, the ICC recognises that today's commercial relationships often involve more than one contract and more than two parties. Under the present regime, there is a risk of parallel proceedings and possibly inconsistent decisions regarding the same dispute.

The new rules will allow:

- the joinder of additional parties and claims between multiple parties if this is requested before the arbitrators have been confirmed;
- the hearing of claims that arise out of several arbitration agreements in a single set of proceedings; and
- the consolidation of multiple related arbitrations between the same parties.

It is hoped that these welcome changes will not only help to avoid inconsistent decisions but also save time and cost in the process. Consolidation will still be limited by the need to obtain the parties' consent but this does at least give the parties an opportunity to direct the arbitration to meet the scope and extent of their underlyingcontractual relations.

(3) Appointment of an Arbitrator

Arbitrators will now have to confirm in a statement before appointment that they will act impartially and independently, in line with similar provisions in the UNCITRAL (United Nations Commission on International Trade Law) and LCIA (London Court of International Arbitration) Rules, and the IBA (International Bar Association) guidelines on conflicts of interest in international arbitrations.

That statement must also include the arbitrators' availability. The hope is that this will reduce delays over the issue of awards by discouraging the most popular arbitrators from taking on too many matters.

A further key change is that the ICC Court will be able to appoint arbitrators directly without obtaining a proposal from a national committee or group, especially in cases where one or more of the parties is a state or state entity. This should be welcomed both by businesses involved in international investment arbitration and by states worried that national committees favour the interests of the private sector in the appointment process.

(4) Efficient case management

Parties involved in arbitration want their dispute dealt with expeditiously and in a cost-effective manner. This is recognised in the new Rules, with arbitrators and parties now being required to conduct their proceedings according to such standards.

There are a number of new case management tools, including, for instance, case management conferences. These will be mandatory in order to set appropriate timetables when drawing up the terms of reference and may be followed by further case management conferences to ensure effective case management.

In addition, when ruling on costs, an arbitral tribunal can consider the parties' case management conduct in the proceedings. The parties will also be encouraged to identify issues that can be resolved by agreement between them or their experts, or which can be dealt with by way of partial award.

These changes bring the ICC up to date with the processes that have been in place in most common law jurisdictions for some time. Businesses may well think that they represent the bare minimum to be expected from international arbitration.

(5) Arbitral tribunal to rule on questions of jurisdiction

This is a small but important change as, at present, it is the ICC Court that rules on the jurisdiction of an arbitral tribunal. The change should not only mean that challenges to jurisdiction will be decided more speedily but it will also give an important basic power of self-determination to the tribunal, reflecting the approach in English and Scottish arbitration and adjudication.

Is all this really new?

None of the changes to the Rules are particularly novel. SIAC has used emergency arbitrators since 2010 and arbitral parties will recognise most of the other major changes from procedures that are currently in use in their own jurisdictions.

While it has been noted with jest that the new Rules will remove the current reference to communications by telex and telegram, it is clear that the ICC has made an effort to bring their processes in line with those of other institutional and ad hoc structures. Whether it is enough to attract more parties to ICC arbitration remains to be seen.

The changes are unlikely to impress the insurance and reinsurance market though who traditionally have preferred ad hoc processes where they can pick from a pool of expert arbitrators who are familiar with policy wordings and their application.

The elephant in the room remains the time and cost of ICC arbitrations. A recent Chartered Institute of Arbitrators survey showed that the average costs for a UK claimant are £1.54m, with proceedings lasting on average between 17 and 20 months. Given that the Rules aim to "respond to today's business needs", arbitral parties will want both those figures reduced. Sadly, while ICC arbitration remains heavily bureaucratic, along with the requirement for substantial upfront fees, it seems unlikely that the new rules will have enough in them to achieve that important goal.

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