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The New ICC Arbitration Rules – What You Need to Know

By [Soloman Lam](#) and [Michael Schafler](#)

On January 1, 2012, the International Chambers of Commerce's newly revised Rules of Arbitration (the "2012 ICC Rules") took effect. The new rules apply to all ICC arbitrations going forward, unless the parties agree to adopt the rules that were in effect when their arbitration agreement was executed.

This is the ICC's first revised set of arbitration rules in thirteen years; the last revision was in 1998. Since then, both the use and practice of international arbitration have expanded significantly, and the revisions are designed to bring the rules up to speed with current commercial and dispute resolution needs.

The revisions seek to address three developments in international arbitration: the increasing complexity of disputes, the desire for more effective case management, and the occasional need for urgent interim measures.

The following is a primer of the most significant features of the 2012 ICC Rules.

Application for an emergency arbitrator: This is a new feature introduced by the ICC. Under Article 29 and Appendix V, a party urgently seeking interim or conservatory measures and that cannot wait for the constitution of an arbitral tribunal may apply for an emergency arbitrator. The emergency arbitrator's decision will take the form of an order that binds the parties. However, the decision does not bind the arbitral tribunal, which can modify, terminate or annul the order.

Parties can agree to opt out of the emergency arbitrator rules or agree to another pre-arbitral procedure that allows for interim measures. It is important to note that the emergency arbitrator

rules do not apply to arbitration agreements that were concluded before January 1, 2012, even if the claim arose after that date.

New rules dealing with multi-party or multi-contract arbitration: Previously, the ICC had no specific rules for dealing with multiple arbitration agreements, consolidating arbitrations, or enjoining additional parties to an arbitration. The only rule under the previous regime that dealt specifically with multiple parties was about the procedure under which parties to a multi-party arbitration may nominate the arbitrators.

Now, to accommodate the increasing complexity of international arbitration and the growing diversity of disputes subject to arbitration, the ICC has introduced the following new rules:

- **Joinder of additional parties (Article 7):** A party that wishes to bring an additional party into the arbitration may submit a Request For Joinder to the Secretariat of the ICC. The party seeking the joinder must make the request before the confirmation or appointment of any arbitrator.
- **Claims between multiple parties (Article 8):** The rules now state that if the arbitration has multiple parties, any party may claim against any other party before the Terms of Reference have been signed, even if the claims are subject to different arbitration agreements.
- **Multiple contracts (Article 9):** Claims arising out of, or in connection with, multiple contracts may be adjudicated at a single arbitration, regardless of whether the claims are made under one or multiple arbitration agreements under the ICC's rules.
- **Consolidation of arbitrations (Article 10):** The ICC International Court of Arbitration (the "ICC Court") may consolidate multiple arbitrations into one proceeding, provided that: (a) all the parties agree; or (b) all the claims are made under the same arbitration agreement; or (c) the claims are made under

multiple arbitration agreements but the parties are the same and the agreements are compatible.

New confidentiality orders: The ICC 2012 Rules give the arbitral tribunal greater flexibility and authority to impose confidentiality on the proceedings.

Under the old regime, the only rule dealing with the confidentiality of arbitration proceedings was a rule allowing the arbitral tribunal to take measures protecting trade secrets and confidential information. Confidentiality of the arbitration itself had to be contracted between the parties.

Now, under Article 22(3) of the new rules, a party may request the arbitral tribunal to make orders concerning the confidentiality of the proceedings or of any other matters relating to the arbitration. Confidentiality no longer has to be by agreement.

More effective case management: Scattered throughout the ICC 2012 Rules are revisions to make the arbitration process more efficient and robust. For example, Article 24 of the new rules requires the arbitral tribunal to convene a case management conference when drawing up the Terms of Reference (or as soon as possible thereafter), and to establish a procedural timetable for the arbitration.

As well, Article 22 now obligates the parties to conduct the arbitration "in an expeditious and cost-effective manner", and the extent to which they do so may be taken into consideration in awarding costs (Article 37(5)).

Jurisdictional challenges are now generally heard by the arbitral tribunal itself: Under the old rules, any challenge to the existence, validity or scope of an arbitration agreement had to be determined on a *prima facie* basis by the ICC Court. Now, Article 6 of the ICC 2012 Rules provides that such challenges will be heard alongside the other issues before the arbitral tribunal. The Secretary General of the ICC nonetheless retains the

discretion to refer the jurisdictional challenge to the ICC Court.

Impartiality of an arbitrator: Where under the old rules, arbitrators only needed to be independent, the ICC 2012 Rules add that every arbitrator must also be impartial (Articles 11, 13 and 14). To that extent, every arbitrator must sign a statement of acceptance, availability, independence and impartiality prior to being appointed or confirmed. An arbitrator must also disclose any circumstances concerning his or her independence or impartiality which may arise during the arbitration.

REMARKS

The redrafting of the ICC Rules is just the latest development in a broader trend of tailoring international arbitration procedures to the needs and realities of large-scale commercial dispute resolution in an information age. In 2010, for example, the International Bar Association updated its Rules on the Taking of Evidence to allow for greater confidentiality protections and guidance on electronic disclosure, and to encourage a clear and more economical process for taking evidence. Also in 2010, the United Nations Commission on International Trade Law ("UNCITRAL") revised its arbitration rules (previously untouched since 1976) to allow for the efficient resolution of complex multi-party disputes, as well as to clarify the availability of interim measures and provide for the establishment of procedural timetables.

The response from the international arbitration community to the ICC 2012 Rules, as well as to the IBA and UNCITRAL's revisions of their own respective procedures, has been very positive. These developments should result in even more parties resorting to the arbitration model to resolve their disputes.

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