

New ICC Arbitration Rules

On 12 September 2011, the ICC Court published its third revision of the ICC arbitration rules. The principal amendments address multi-party arbitration, controlling time and costs in arbitration, and introduce an emergency arbitrator procedure.

Unless parties stipulate otherwise, the new rules (the **2012 Rules**) will automatically apply to all arbitrations under the auspices of the International Chamber of Commerce (the **ICC**) commenced after 1 January 2012 (save for the emergency arbitrator provisions – see further below).

The revision process took three years and involved a 200 member task force from 41 different countries.

Whilst retaining the fundamental features of the current ICC rules (such as the Terms of Reference and the *ad valorem* fee structure), the 2012 Rules introduce a number of new provisions aimed at accommodating the evolving needs of international arbitration users.

Multi-party and Multi-contract Disputes

The 2012 Rules introduce a comprehensive framework for multi-party and multi-contract disputes to address the increasing complexity of transactions. Tribunals are now vested with broader powers to join new parties and consolidate parallel arbitrations.

The 2012 Rules provide that:

- any party will be able to request that an additional party be joined to proceedings, but must do so before the arbitrators have been confirmed (Article 7.1);
- in multi-party arbitrations, claims can be brought by any party against any other (Article 8.1);
- disputes arising from multiple contracts can be resolved in a single arbitration in certain circumstances (Article 9); and
- consolidation may be possible where: (1) a request is received from the parties; (2) disputes arise under the same arbitration agreement; or (3) the claims relate to "compatible" arbitration agreements involving the same parties (Article 10).

Key Issues

Multi-party and multi-contract disputes

Controlling time and costs

Emergency arbitrator procedure

Confidentiality

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Controlling Time and Costs

Jurisdictional Challenges

Previously, challenges to the jurisdiction of the tribunal were first determined by the International Court of Arbitration (the **ICC Court**), who decided whether a *prima facie* arbitration agreement may exist. Under the 2012 Rules, the arbitration will proceed and the tribunal will resolve jurisdictional questions, unless Secretary General refers the matter to the ICC Court (Article 6(3)).

Appointment of Arbitrators

The 2012 Rules enshrine the recent development that arbitrators must submit a statement of availability before being confirmed (Article 11.2).

The new Rules now include the usual formulation found in most other institutional rules and arbitration legislation by adding the requirement of "impartiality" to "independence" (Article 11.2).

The ICC Court will now be able to appoint directly any person considered suitable to the arbitral panel where a National Committee fails to make an appointment within the stipulated time (Article 13.3), or the President certifies that it is "*necessary and appropriate*" (Article 13.4). Further circumventing the role of National Committees, direct appointment will also be possible where one or more of the parties is a State or State entity.

Case Management Procedures

Under the 2012 Rules, obligations will be imposed on arbitrators and parties to "*take every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute*" (Article 22.1). Arbitrators will be required to convene case management conferences to consult the parties on procedural measures (Article 24.1). Examples of case management techniques are set out in the 2012 Rules, thus offering guidance and emphasising their importance (Appendix IV).

Failure to abide by this new efficient and cost-cutting ethos could have negative consequences for the parties: tribunals can take into account the extent to which parties conducted the arbitration in an expeditious and cost-effective manner when addressing the question of costs (Article 37(5)). The ICC Court will be able to consider the timeliness of the submission of draft awards for approval when setting arbitrators' fees (Appendix III Article 2(2)).

Emergency Arbitrator Procedure

Parties seeking urgent conservatory or interim measures who are unable to await the constitution of the arbitral tribunal will no longer need to apply to national courts for relief. New emergency arbitrator provisions allow parties to apply for such measures at any time before the file is transmitted to the arbitral tribunal, regardless of whether a request for arbitration has yet been submitted (Article 29.1).

Parties will be bound by the orders of emergency arbitrators. However the arbitral tribunal, once constituted, will be able to modify or annul any such order. Tribunals can also decide the reallocation of costs arising in connection with compliance or non-compliance with these orders (Article 29.3).

The emergency arbitrator provisions will not apply where: (1) arbitration agreements were entered before the 2012 Rules come into force; (2) parties agree to opt out of the provisions; or (3) other pre-arbitral procedures providing for the grant of interim measures have been chosen (Article 29.6).

An application will cost US\$40,000 (Appendix V Article 7.1), although this sum may be recoverable by the successful party.

The application will need to be followed by a Request for Arbitration within ten days to avoid the termination of the emergency proceedings (Appendix V Article 1.6).

Confidentiality

Although the 2012 Rules, like the current rules, do not prescribe that the proceedings and materials submitted in the arbitration shall be confidential (unlike, for example, the LCIA Rules), the tribunal may make an order to this effect upon the request of a party. However, if confidentiality is wanted, it would be prudent to stipulate this in the agreement to arbitrate.

Copies of the 2012 Rules can be found on the ICC website [here](#).

This Client briefing does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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