Introduction to ICC Arbitration

The International Chamber of Commerce International Court of Arbitration ("ICC Court of Arbitration", or the "Court ") is one of the most experienced and reputable institutions for international commercial arbitration. Since its inception, the Court has administered more than 19,000 cases involving parties and arbitrators from some 180 countries. What is the ICC Court of Arbitration? What are the typical procedures and unique features of an ICC arbitration? This briefing will give you some ideas.

What is the ICC Court of Arbitration?

Overview

The International Chamber of Commerce (the "ICC") was established in 1919 by entrepreneurs who called themselves "the merchants of peace". It holds itself out as the world business organization , a representative body that speaks on behalf of enterprises from all sectors in every part of the world. There are several commissions of the ICC producing rules and policies, among which arbitration is the largest.

The ICC Court of Arbitration was established in 1923. The Court is based in Paris and has offices all over the world. In Asia, it has an office of Secretariat in Hong Kong and a representative office in Singapore. The ICC Court of Arbitration aims to be a truly international arbitration institution. For example, in 2011, the 796 Requests for Arbitration filed with the Court in concerned 2,293 parties from 139 countries and independent territories; the places of ICC arbitrations were located in 63 countries throughout the world, and arbitrators of 78 nationalities were appointed or confirmed.

Role of The Court

The Court is not a court in the judicial sense of the term. Its primary role is to administer arbitrations according to the ICC Rules of Arbitration (the "Rules"). Specifically, its functions include: (a) fixing the place of arbitration; (b) assessing whether there is a prima facie ICC Arbitration agreement; (c)taking certain necessary decisions in complex multi-party or multi-contract arbitrations; (d) confirming, appointing and replacing arbitrators; (e) deciding on any challenges filed against arbitrators; (f) monitoring the arbitral process; (g) scrutinizing and approving all arbitral awards; (h) setting, managing and, if necessary, adjusting costs of the arbitration; (i) overseeing emergency arbitrator proceedings.

The Secretariat of the Court

The Secretariat of the Court (the "Secretariat") assists the Court in performing its functions and is responsible for the day-to-day administration of ICC arbitrations.

There are over 80 members of the Secretariat. Around a half of them are lawyers. They are divided into eight case-management teams, each of which is led by a Counsel and comprises two or three deputy counsels plus administrative assistants. Seven teams are based in Paris and one is in Hong Kong operating under the same management structure as other teams. Each team deals principally with cases relating to certain regions or language groups.

The Asia Office located in Hong Kong was established in late 2008. In 2010, it was handling some 120 Asia-related arbitrations, and half of all new arbitrations from the region were filed directly in Hong Kong.

What are the typical procedures and unique features of an ICC arbitration?

On 12 September 2011, the Court published its third revision of the ICC Rules of Arbitration (the "2012 Rules"). Unless parties stipulate otherwise, the 2012 Rules 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).

Arbitration Clause

The standard arbitration clause provided by the ICC reads: "All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules."

It is advisable that parties also stipulate in the clause the place and language of arbitration, and the number of arbitrator(s).

Request for Arbitration (Article 4)

A party wishing to commence an arbitration must submit a Request for Arbitration (the "Request") to the Secretariat (either in France or in Hong Kong), together with a non-refundable advance payment of US$3,000 as the initial filing fee. The date on which the Request is received by the Secretariat is deemed to be the date of commencement of the arbitration proceedings. The Request will be assigned to one of the eight case management teams.

Answer to the Request (Articles 5(1) – 5(4))

The Secretariat will notify the respondent of the Request and invite it to file an answer to the Request (the "Answer") within 30 days of its receipt of the Request from the Secretariat. An extension of time can be granted in some circumstances.

Counterclaim and Reply to the Counterclaim (Articles 5(5) & 5(6))

Any counterclaims made by the respondent shall be submitted with the Answer. If the respondent files counterclaims with its Answer, the Secretariat will invite the claimant to file a reply to the counterclaims within 30 days of receipt of the counterclaims from the Secretariat.

Provisional Advance (Article 36)

After receipt of the Request, the ICC Secretary General may request from the claimant payment of a provisional advance on costs. The amount paid will be later credited to the claimant's share of the advance on costs shared in equal shares by the parties and fixed by the Court in an amount likely to cover the fees and expenses of the arbitrators and the ICC administrative costs for the dispute in question.

Joinder of Additional Parties (Article 7)

A party wishing to join an additional party to an arbitration may do so by submitting its Request for Joinder to the Secretariat at any time before an arbitrator is confirmed or appointed in the proceedings. No additional party may be joined after the confirmation or appointment of any arbitrator, unless all parties, including the additional party, otherwise agree. The Secretariat may fix a time limit for the submission of a Request for Joinder. The requesting party must pay a non-refundable filing fee of US$3,000.

Conservative and Interim Measures (Article 28)

A party may consider whether to protect its position or the status quo by applying to the arbitral tribunal (if the tribunal is formed), or to a competent judicial authority (before an arbitral tribunal is formed and in appropriate circumstances even after the file is transmitted to the arbitral tribunal), for interim or conservatory measures. If such an application is made to the arbitral tribunal, any such measure may be granted subject to appropriate security being furnished by the requesting party.

Emergency Arbitrator Proceedings (Article 29)

Parties seeking urgent conservatory or interim measures who are unable to await the constitution of the arbitral tribunal can file an Application for Emergency Measures. Parties are allowed 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. If a Request is not yet submitted, the Application for Emergency Measures will need to be followed by a Request for Arbitration within ten days.

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. In addition, an application will cost US$40,000, although this sum may be recoverable by the successful party.

It is worth noting that the emergency arbitrator provisions will not apply where: (1) arbitration agreements were entered before 1 January 2012; or (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.

Jurisdictional Challenge (Article 6)

In a case where the respondent raises jurisdictional objections, or does not submit an Answer, the case will proceed and any jurisdictional issues will be decided by the arbitral tribunal, unless the Secretary General refers the case to the Court for a prima facie assessment. Previously, all challenges to the

jurisdiction of the tribunal were first determined by the Court, which usually took a month or more. The screening process under the 2012 Rules is designed to save time and cost.

Number of Arbitrator(s) (Article 12(2))

In the absence of party agreement, the court shall appoint a sole arbitrator, save where it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators, for example where a large amount is in dispute, or where the case is complex.

Nomination and Appointment of Sole Arbitrator (Articles 12(2) & 12(3))

Where the parties have agreed that the dispute shall be resolved by a sole arbitrator, they may, by agreement, nominate the sole arbitrator for confirmation. If the parties fail to nominate a sole arbitrator within 30 days from the date when the claimant's Request for Arbitration has been received by the other party, or within such additional time as may be allowed by the Secretariat, the sole arbitrator shall be appointed by the Court.

Nomination and Appointment of Three-Arbitrator Tribunal (Articles 12(4)-12(8))

Unless the parties agree otherwise, each of the two opposing sides in the dispute may nominate, in the Request and the Answer, respectively, a co-arbitrator for confirmation. Where the parties have not agreed on the number of arbitrator(s) and the court decides that a three-arbitrator tribunal shall hear the case, the claimant shall nominate an arbitrator within 15 days from the receipt of the notification of the decision of the Court, and the respondent shall nominate an arbitrator within 15 days from the receipt of the notification of the nomination made by the claimant. Failing of such nomination, the Court will appoint a co-arbitrator for the defaulting party.

As for the president of a three-member tribunal, the court appoints him/her unless the parties have agreed upon another procedure for such appointment, in which case the nomination will be subject to confirmation. Should such procedure not result in a nomination within 30 days from the confirmation or appointment of the co-arbitrators or any other time limit agreed by the parties or fixed by the Court, the third arbitrator shall be appointed by the Court.

Disclosure of Prospective Arbitrators (Article 11(2))

Before appointment or confirmation, a prospective arbitrator shall sign a statement of acceptance, availability, impartiality and independence. The prospective arbitrator shall disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality.

Appointment and Confirmation of Arbitrators (Article 13)

In appointing or confirming the arbitrators, the Court shall consider the prospective arbitrator's nationality, residence and other relationships with the countries of which the parties or the other

arbitrators are nationals and the prospective arbitrator's availability and ability to conduct the arbitration in accordance with the Rules.

As a default rule, the sole arbitrator or the president of the arbitral tribunal shall be of a nationality other than those of the parties. However, in suitable circumstances and provided that none of the parties objects within the time limit fixed by the Court, the sole arbitrator or the president of the arbitral tribunal may be chosen from a country of which any of the parties is a national.

Challenge of Arbitrators (Article 14)

A challenge of an arbitrator shall be submitted to the Secretariat, with a written statement specifying the facts and circumstances on which the challenge is based. It must be submitted either within 30 days from receipt of the notification of the appointment or confirmation of the arbitrator, or within 30 days from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based if such date is subsequent to the receipt of such notification.

The Court shall decide on the admissibility and, at the same time, if necessary, on the merits of a challenge after the Secretariat has afforded an opportunity for the arbitrator concerned, the other party or parties and any other members of the arbitral tribunal to comment in writing within a suitable period of time. Such comments shall be communicated to the parties and to the arbitrators.

Place of Arbitration and Place of Hearing (Article 18)

The place of the arbitration shall be fixed by the Court, unless agreed upon by the parties. The arbitral tribunal may, after consultation with the parties, conduct hearings and meetings at any location it considers appropriate, unless otherwise agreed by the parties.

Language of Arbitration (Article 20)

In the absence of an agreement by the parties, the arbitral tribunal shall determine the language or languages of the arbitration, due regard being given to all relevant circumstances, including the language of the contract.

Procedural Rules (Article 19)

The proceedings before the arbitral tribunal shall be governed by the Rules. Where the Rules are silent, the parties are free to agree to apply any rules they choose, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration. For example, in practice the parties sometimes choose to apply International Bar Association Rules on the Taking of Evidence in International Arbitration. In the absence of an agreement by the parties, the arbitral tribunal can decide on the applicable rules.

Terms of Reference (Article 23)

As a distinctive feature of ICC arbitration, the Tribunal is required to draw up a Terms of Reference after receiving the file and consulting the parties. The Terms of Reference include details of the parties, a summary of claims and a list of issues. It is intended to set the framework for the arbitration

process and assist the parties to delineate and focus on the issues in dispute. The Terms of Reference, signed by the parties and the Tribunal, should be submitted to the Court within two months of the date on which the file was transmitted to the Tribunal.

Case Management Conference and Procedural Timetable (Article 24)

Under the 2012 Rules, the arbitral tribunal is required to convene a case management conference with the parties when drawing up the Terms of Reference or as soon as possible thereafter. The purpose of this innovation is to enable the parties and the arbitral tribunal to discuss the procedure for the case and any appropriate case management techniques that could improve efficiency. Case management conferences may be conducted through a meeting in person, by video conference, telephone or similar means of communication.

During or following such conference, the arbitral tribunal shall establish the procedural timetable that it intends to follow for the conduct of the arbitration. The procedural timetable and any modifications thereto shall be communicated to the Court and the parties.

Rendering of Award (Articles 31 and 33)

When the Tribunal is satisfied that the parties have had a reasonable opportunity to present their cases, the Tribunal will declare the proceedings closed. After the close of proceedings, the Tribunal will draw up a draft award, which is submitted to the Court. Where there are three arbitrators, the award must be made by a majority decision. If there is no majority, the award shall be made by the Chairman of the Tribunal alone.

Another distinctive feature of ICC arbitration is that the Court will scrutinize the award for mistakes of form or substance. No award will be rendered until it has the approval of the Court. However, while the Court can require the Tribunal to incorporate changes to its award as to form, the Tribunal can disregard any comments as to substance.

Costs and Fees (Articles 2 & 4 of Appendix III Arbitration Costs and Fees)

The arbitrator’s fees and expenses are fixed exclusively by the Court as required by the Rules. Separate fee arrangements between the parties and the arbitrator are not allowed. ICC’s administrative costs and the arbitrators’ fees are fixed according to a scale of costs based on the monetary value of the claims. The administrative cost is fixed for a certain amount in dispute. As for the arbitrator's fee, the Court provides formulae for minimum and maximum fees, so the parties can estimate the range of costs as soon as the value of the claims is known. For example (all the amounts below are in USD):

If the amount in dispute is $500,000 to $1,000,000, an arbitrator's fee is between $9,857 and $64,130, while the amount of administrative expenses is between $14,165 and $21,715. Thus the total is between $24,022 (in the scenario of $500,000 in dispute, sole arbitrator and minimum arbitrator's fee applied) and $214,105 (in the scenario of $1,000,000 in dispute, three-arbitrator tribunal and maximum arbitrator's fee applied).

If the amount in dispute is $5,000,000 to $10,000,000, an arbitrator's fee is between $32,767 and $187,400, while the amount of administrative expenses is between $45,015 and $57,515. Thus the total is between &77,782 (in the scenario of $5,000,000 in dispute, sole arbitrator and minimum arbitrator's fee applied) and $619,715 (in the scenario of $10,000,000 in dispute, three-arbitrator tribunal and maximum arbitrator's fee applied).

If the amount in dispute is $50,000,000 to $100,000,000, an arbitrator's fee is between $63,767 and $351,300, while the amount of administrative expenses is between $95,515 and $99,215. Thus the total is between $159,282 (in the scenario of $50,000,000 in dispute, sole arbitrator and minimum arbitrator's fee applied) and $1,153,115 (in the scenario of $100,000,000 in dispute, three-arbitrator tribunal and maximum arbitrator's fee applied).

In setting the arbitrator's fees, the Court shall take into consideration the diligence and efficiency of the arbitrator, the time spent, the rapidity of the proceedings, the complexity of the dispute and the timeliness of the submission of the draft award, so as to arrive at a figure within the limits specified or, in exceptional circumstances, at a figure higher or lower than those limits.

Time Limit for the Final Award (Article 30)

The final award must be rendered within six months of the Terms of Reference, although extensions of time are possible.

Confidentiality (Article 22(3))

Although the 2012 Rules still do not prescribe that the proceedings and materials submitted in the arbitration shall be confidential, 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.

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Patrick Zheng has extensive experience in international dispute resolution, particularly in international arbitration and alternative dispute resolution. He had been working at CIETAC for 8 years and handled more than 300 cases as a case manager and arbitrator. He is a panel arbitrator of CIETAC, HKIAC, KCAB and SIAC.

As a counsel, Patrick has acted as advocate before arbitral tribunals in various systems such as CIETAC, HKIAC, SIAC, LCIA and has an extensive track record working with many state-owned enterprises, mainland and international companies including mandates from the International Finance Corporation and China National Petroleum Corporation. He got his first law degree in Fudan University and two masters degrees from UIBE and UC Berkeley. He is qualified in China and New York.

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Jason re-joined Clifford Chance, based in Paris, after spending 5 years as Secretary General at ICC International Court of Arbitration (Paris) and Director of Dispute Resolution Services of the ICC. He was previously a Clifford Chance Partner from 1999 to 2007 and has over 20 years of arbitration and dispute resolution experience as counsel, advocate and arbitrator in international arbitration proceedings.

At the ICC, Jason played a key role leading a number of important strategic initiatives, notably establishing the ICC Secretariat's presence in Hong Kong and Singapore, the creation of the ICC's Hearing Centre in Paris and most recently the revision of the ICC Rules of Arbitration, which came into effect in early 2012.

Jason is a Solicitor of the Supreme Court of England and Wales and a Barrister and Solicitor of the High Court of New Zealand, he is a Fellow of the Chartered Institute of Arbitrators and was the Member for New Zealand of the International Court of Arbitration of the ICC from 1999 until 2007. Jason speaks fluent English and French.

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