

The New ICC Rules of Arbitration

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Danish Association of Arbitration

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Jan Heiner Nedden, M.M.





Overview

1. Some background on ICC arbitration and the Rules revision
2. The main new features
3. Efficiency
4. Multi-party and multi-contract
5. Former lacunas – now addressed



1. Some background on ICC arbitration and the Rules revision

- ICC Court founded in 1923
- More than 18 300 cases administered to date
- Over 1 500 pending cases (2010: 793 new cases filed)
- 1 331 arbitrators from 73 countries confirmed in 2010
- Over 98 different places of arbitration in 53 countries
- 2 145 parties from 140 different countries
- In 10% of cases at least one of the parties is a State or State-owned entity
- In 2010, 30.6% of new cases involved more than two parties



1. Some background on ICC arbitration and the Rules revision *(cont.)*

- Current Rules in place since 1 January 1998
- Rules revision process started in 2008
- Prompters:
 - Bi-polar setting often became multi-polar
 - Involvement of State (related) entities
 - New means of communication
 - Aim to make proceedings more time and cost efficient
 - Lacunas in the 1998 Rules
- ICC Commission for Arbitration established “*Task Force on the Revision of the ICC Rules of Arbitration*”; Chairman Peter Wolrich, Co-Chairs Michael Bühler and Laurie Craig
- Drafting Sub-Committee



2. The main new features

- Motto: “*Do not touch what has been working nicely*”
- Codification of current Court practice
- Now 41 instead of 35 articles, 2 new annexes
- Exclusivity: Precision that only ICC Court may administer cases under the Rules
- Broader scope of application: “*disputes*” and no longer only “*business disputes*”
- Emergency arbitrator (Art. 29 and Appendix V)
- Provisions on management of time and costs
- Principle of efficiency underlying various provisions
- Modified mechanism/scope for jurisdictional objections



2. The main new features *(cont.)*

- Multi-party and multi-contract provisions
- Joinder provisions
- Costs provisions for multiple party situations
- New option for appointment method
- Additional conflict of interests standard: Impartiality
- Specific declaration regarding an arbitrator's availability
- New provision on remission of awards



3. Efficiency

- Request for Arbitration (Art. 4) shall now include:
 - Details “*of any person(s) representing claimant*”
 - “*other contact details*”
 - Precise indication as to the contracts and arbitration agreement(s) on which claims are based
 - As well as the relief sought with monetary quantifications
 - Particulars, observations and proposals concerning the number of arbitrators, their choice, as well as the place of arbitration, the applicable law and the language of arbitration
 - Any other documents/information that may “*contribute to the efficient resolution of the dispute*”



3. Efficiency *(cont.)*

- The Answer (Art. 5) shall now include:
 - Essentially inverts information as Request
 - Specificities of counterclaims
 - Similar information is to be provided in relation to additional parties whose joinder is sought
- Proof of authority (Art. 17) may be requested by the Secretariat or the Arbitral Tribunal



3. Efficiency *(cont.)*

- Jurisdictional objections or absence of the Answer (Articles 6(3) and 6(4))
 - General rule: jurisdictional decision is to be taken by the Arbitral Tribunal without *prima facie* review by the ICC Court
 - Exception: Secretary General refers matter to the ICC Court
 - New particularities of *prima facie* review:
 - If more than two parties: whether an arbitration agreement may exist between all of them
 - If more than one contract: whether arbitration agreements are compatible and whether parties may have agreed to determine them in one single arbitration



3. Efficiency *(cont.)*

- Case management conference (Art. 24(1))
 - Establishment of efficient case management means
 - Involvement/presence of the parties, not only their counsel
- Case management techniques (Appendix IV)
- Procedural timetable instead of a provisional timetable (Art. 24(2))
- General obligation of the Arbitral Tribunal and the parties to “*make every effort to conduct the arbitration in an expeditious and cost-effective manner*” (Art. 22(1))
- Obligation of the Arbitral Tribunal to inform the parties and the Secretariat of the date by which it expects to submit a draft award for scrutiny (Art. 27)
- Arbitral Tribunal may consider the parties’ conduct in connection with its cost decision (Art. 37(5))



4. Multi-party and multi-contract

Joinder (Art. 7)

- Codifies previous Court practice, but goes further
- Subject to provisions and requirements in Art. 4(3) c) – f), 4(4)–(5), 5(1)–(4), 6(3)–(7), 8 and 9
- Must be made by an existing party (no “*intervention*” possible), payment of filing fee mandatory
- There must be a claim against additional party
- Additional party is treated like a “normal” Respondent and may make claims against any other party and raise jurisdictional objections
- Only possible until confirmation/appointment of any arbitrator (otherwise only if all parties agree)
- Additional party participates in constitution of Arbitral Tribunal



4. Multi-party and multi-contract (*cont.*)

Claims between multiple parties (Art. 8) or multiple contracts (Art. 9)

- Art. 8 applies to all claims not covered by Art. 4 and 5
- Art. 9 allows in principle for bringing
 - claims based on multiple contracts in one arbitration
 - even if they are based on multiple arbitration agreements
- Art. 9 applies independent of whether all parties are parties to the respective agreements (this does not mean that they may all be heard in one arbitration!)



4. Multi-party and multi-contract (*cont.*)

Claims between multiple parties (Art. 8) or multiple contracts (Art. 9)

- Allows for cross-claims, subject to the limitations of
 - Art. 6(3) (determination in a single arbitration) in case the basis of the cross-claims is the same arbitration agreement as principal/counterclaims
 - Art. 6(4) (connectivity and compatibility) in case the basis for the cross-claims is a different arbitration agreement and/or a different contract
 - Scope of arbitration agreement may be an issue in case the cross-claims are based on a different contract without an arbitration clause
- Art. 7, 8 and 9 do not provide for the jurisdictional issues!



4. Multi-party and multi-contract (*cont.*)

Consolidation (Art. 10)

- Codifies previous Court practice, but goes further
- New: possible after signing of Terms of Reference and even if there are distinct parties in the proceedings
- Requires
 - either a consent by all parties
 - or, if a decision by the ICC Court is required,
 - that all claims are made under the same arbitration agreement;
 - or, additionally, if claims are made under more than one arbitration agreement,
 - that connectivity and compatibility requirements are met



4. Multi-party and multi-contract (*cont.*)

Consolidation (Art. 10) (cont.)

- The ICC Court will consider “*any circumstances*” and, *inter alia*, whether arbitrators have been confirmed/appointed and whether different persons have been confirmed/appointed

Advance on costs (Art. 36)

- Specific costs provisions allowing to adequately address (separate/multiple) advance(s) on costs for counter-claims, sets of claims, cross-claims (Art. 36(4))
- Difference to advance on costs in a bi-polar case: the advance(s) are not shared equally
- Total amount of individual advances will not be higher than in a regular bi-polar case



5. Former lacunas – now addressed

- Confidentiality – power of the Arbitral Tribunal to issue orders on confidentiality (Art. 22(3))
- Default time limit for joint nomination of the President of the Arbitral Tribunal by the co-arbitrators (Art. 12(5))
- Extended possibilities for the Court to appoint arbitrators directly, *i.e.* when a State party is involved or a National Committee does not perform (Art. 13(4))
- Possibility for Arbitral Tribunal to take cost decisions at any point during the proceedings (Art. 37(3))
- Withdrawal of the case (Art. 37(6))
- Remission of awards by State courts (Article 35(4))



Jan Heiner Nedden, M.M.
Brooktorkai 20
D-20457 Hamburg

nedden@hanefeld-legal.com
www.hanefeld-legal.com

T +49 40 180 482 93-0
F +49 40 180 482 93-9