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# The New International Chamber of Commerce (ICC) Arbitration Rules

The International Chamber of Commerce (ICC) Arbitration Rules (the "ICC Rules") have been amended for the first time in 14 years. The new ICC Rules took effect on 1 January 2012. In this update, we highlight four major changes to the ICC Rules and their likely ramifications on parties to arbitration. Each of these changes will be examined in greater detail in subsequent updates.

## 1. Hybrid Arbitration Agreements

In the new ICC Rules:

i) The International Court of Arbitration (the "Court") is made the only body authorised to administer arbitrations under the ICC Rules [Article 1(2)].

ii) Agreeing to arbitration under the ICC Rules means that parties agree for the arbitration to be administered by the Court [Article 6(2)].

These changes were made in reaction to ***Insigma Technology Co. Ltd. v Alstom Technology Ltd. [2009] SGCA 24***, which concerned a hybrid arbitration clause that provided for disputes to be resolved under the ICC Rules and for the arbitration to be administered by the Singapore International Arbitration Centre ("SIAC"). The Singapore Court of Appeal upheld the hybrid arbitration clause in large part because the SIAC said it was willing to administer such an arbitration which specified ICC Rules.

After ***Insigma v Alstom***, there was concern that such hybrid arbitration clauses may become popular. The amended Articles 1(2) and 6(2) seek to discourage other institutions from administering arbitrations using the ICC Rules. Mr. John Beechey, the Chairman of the ICC Court, has said that the ICC would similarly refuse to administer arbitrations under the rules of other institutions.

This is a welcomed development as hybrid arbitration clauses are actually fraught with difficulties although they may appear cost effective (and hence attractive). We will discuss this in greater detail in subsequent updates. In the meantime, we recommend that existing hybrid arbitration clauses that specify either the ICC Rules or ICC administration (but not both) should be redrafted and new agreements should avoid such clauses.

## 2. Emergency Arbitrator

Emergency Arbitrator ("EA") provisions are a completely new feature in the ICC Rules. A Party may now apply for an EA to grant urgent interim or conservatory relief. The application must be received by the Secretariat before the file is transmitted to the tribunal [Article 29(1)]. The Party must ensure however that a Request for Arbitration is received by the Secretariat within 10 days of the EA application [Appendix V Article 1(6)]. Thereafter, any party to the arbitration may challenge the appointment of the EA within three days of the notification of

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appointment or the date on which the party making the challenge was informed of the facts that form the basis of the challenge, whichever is later (Appendix V Article 3).

The applicant must first pay US$40,000 for the EA proceedings [Appendix V Article 7(1)], although the Court may subsequently choose to divide the costs between the parties [Appendix V Article 7(3) read with 7(1)]. The President of the ICC may increase the fees at any time and failure to pay the increased costs within the time limit set by the Secretariat automatically terminates the EA proceedings [Appendix V Article 7(2)].

The benefit of the EA provisions is that parties needing urgent interim or conservatory relief no longer need to wait for the constitution of the tribunal or for the court to grant such relief, which may take a long time. The EA provisions are also useful in a multi-party arbitration where the EA can make orders against multiple parties instead of necessitating multiple applications to various national courts for each party.

The EA provisions are certainly a big step in the right direction but some arbitration practitioners were hoping for more robust EA provisions.

## 3. Multi-Party Proceedings

30% of ICC arbitrations involve more than two parties and at least one ICC arbitration a year involves up to 20 parties. The 1998 ICC Rules did not explicitly cater for multiple parties but this has now been addressed in the new Articles 6 to 10.

Parties to an arbitration can now apply to join a third party before the confirmation or appointment of the arbitrator [Article 7(1)]. However, for such an arbitration to proceed, the Court must on the face of it be satisfied that there may be an arbitration agreement that binds all the parties [Article 6(4)(i)]. Any of the parties may refuse to participate in the arbitration; if this happens, the arbitration will still continue without that party [Article 6(8)]. Any party may make claims against the other parties in a multiparty arbitration [Article 8(1)].

Claims arising out of multiple contracts and/or multiple arbitration agreements may be made in a single arbitration (Article 9) if the Court is satisfied that the arbitration agreements under which those claims are made are compatible and that the parties have agreed that the claims may be determined together in a single arbitration [Article 6(4)(ii)].

The Court may also consolidate multiple arbitrations (Article 10) at the request of a party in any one of the following 3 circumstances:

i) all parties agree to consolidation;
ii) all of the claims are made under the same arbitration agreement; or
iii) the arbitrations are between the same parties, the disputes arise in connection with the same legal relationship and the Court finds the arbitration agreements to be compatible.

Ideally, multi-party provisions avoid having many different arbitrations dealing with the same subject matter, parties or claims, thus saving time and costs in the process. There are concerns however that the prerequisites in the new ICC Rules for multi-party proceedings are so restrictive that relatively few arbitrations can achieve a joinder of a third party or consolidation of several proceedings.

## 4. Increasing Cost Effectiveness and Efficiency of Arbitration

Article 6(3) provides that the arbitration is to proceed even in situations where the respondent does not submit an answer to the claim or challenges the existence, validity or scope of the arbitration agreement or jurisdiction of the tribunal. Previously, in such instances, the arbitration could only proceed if the Court was on the face of it satisfied that the arbitration agreement existed. As a result, 31% of ICC arbitrations from 2006 to 2010 were halted under the old ICC Rules, although only 10% of those arbitrations eventually resulted in negative decisions (that the arbitration agreement did not exist). Removing the requirement for the existence of an arbitration agreement should significantly reduce time wastage by allowing arbitrations to proceed concurrently with any decisions on jurisdictional or procedural issues.

Article 22(1) now explicitly places an obligation on the parties to conduct the arbitration in an "*expeditious and cost-effective manner*". Optional case management techniques are set out in Appendix IV of the new ICC Rules. Unnecessarily wasting time and costs may be a consideration of the Tribunal when making an award on costs [Article 37(5)]. In addition to the general obligation to save time and costs in Article 22(1), parties must attend a Case Management Conference for the Tribunal to consult the parties on procedural measures [Article 24(1)] and set a procedural timeline [Article 24(2)]. Such measures should help to save time and costs.

Indeed, the amount of time and costs that complex arbitration cases involve is serious enough to cause some parties to avoid arbitration after one bad experience. It is therefore timely that the new ICC Rules try to address this issue. Be that as it may however, good arbitrators and conscientious lawyers can do far more to manage delays and reduce costs than any amendments to the Rules can provide.

## Conclusion

The recent amendments to the ICC Rules certainly address many of the concerns that practitioners have had although they do not go as far as some would have liked. In that regard, it must always be remembered that the ICC has the unenviable task of balancing the desire for efficiency with the principle that arbitrations are voluntarily entered into by the parties and cannot be forced upon parties who never agreed to arbitrate. Only time will tell if the new ICC Rules have achieved the right balance.

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