

ARBITRAL RULES CHANGES - A SUMMARY

Introduction

Arbitration remains a popular method for resolving international commercial disputes. In the face of increasing competition between arbitral institutions, and indeed from national courts, a number of institutions offering arbitral services have, in recent years, revised their arbitration rules (which, in some cases, had been virtually unchanged for decades). Such changes are intended to improve the efficacy of the arbitral process and increase the options available to arbitrating parties.

Executive Summary

The revised rules have introduced changes to a number of areas, including challenges to arbitration agreements, processes for dealing with multi-party (and multi-contract) disputes, costs, case management, and expedited/emergency provisions.

Key changes introduced by the recent revisions include:

- Emergency arbitrator procedure;
- Provisions for the joinder of third parties and consolidation of arbitrations;
- Costs consequences for parties who cause undue delays or unnecessary expense, or who fail to conduct the arbitration expeditiously and cost effectively.

The choice of governing arbitral rules may have a significant impact on the options available to arbitrating parties. It is thus crucial that parties entering into an arbitration agreement are clear on precisely what provisions and powers are included in their chosen arbitral rules.

Summary of Key Revised Rules

UNCITRAL

On 12 July 2010, UNCITRAL published its revised Rules which amended the rules adopted in 1976. The revised rules came into effect on 15 August 2010.

Key changes include:

- Conduct of arbitration - the Respondent must file a response to the Notice for Arbitration within 30 days of receiving the same. The response may include a notice of arbitration against any other party which is a party to the arbitration agreement (Article 4).
- Appointment of tribunal - the time period for parties to seek to agree the appointing authority has been reduced from 60 to 30 days – after which period absence of agreement entitles any party to request the Secretary General of the PCA to designate the appointing authority (Article 6).

- Multi-party arbitrations - where multiple parties are unable to agree upon the constitution of the arbitral tribunal, the appointing authority can be requested by any party to constitute the tribunal, and may revoke any appointment already made and appoint or reappoint each of the arbitrators and designate one of them as the presiding arbitrator (Article 10).
- Liability of arbitrators - waiver of any claim (except for one based upon “intentional wrongdoing”) by the parties against the arbitrators and appointing authority (Article 16).
- Joinder of third parties - enables any party to the proceedings to request the tribunal to join one or more third party to be joined as a party to the arbitration proceedings, provided that such third party is also a party to the arbitration agreement (Article 17).
- Interim measures - Tribunal’s powers relating to interim measures are amplified so as to include injunctive relief/preservation of evidence, set out the test for the grant of interim measures, and highlight costs/damages consequences in the event that interim measures are subsequently found to have been unjustified (Article 26).
- Arbitrators’ fees - Arbitrators fees may be reviewed by the appointing authority (or, if there is none, then the Secretary General of the PCA), and may be adjusted if they are not “reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances” (Article 41).

ICC

On 1 January 2012, the new ICC Arbitration Rules (revising the previous 1998 Rules) came into effect. The changes were intended to reflect the ICC’s experience in administering arbitrations and to improve efficiency in the light of the growing complexity of arbitration.

Key changes included:

- Challenge to arbitration agreement - objections to the existence, validity or scope of an arbitration agreement to be referred directly to the arbitral tribunal rather than necessarily to the ICC Court (Article 6).
- Joinder of parties – joinder is available if a party makes a written request to the Secretariat of the ICC Court prior to the appointment of the arbitrator. Once any arbitrator is appointed or confirmed, joinder will require the agreement of all parties, including the additional party (Article 7).
- Consolidation - possible if (1) the parties agree; (2) all the claims in the arbitrations are made under the same arbitration agreement; or (3) where the claims are made under multiple arbitration agreements, the arbitrations involve the same parties, the disputes arise in connection with the same legal relationship, and the arbitration agreements are compatible (Article 10).
- Multi-contract arbitrations - Claims arising out of more than one contract can be made in a single arbitration (Article 9)
- Emergency arbitrator: Parties may now seek the appointment of an emergency arbitrator where urgent relief is required before an arbitral tribunal can be fully constituted (Article 29)
- Costs - Failure by a party to make every effort to conduct the arbitration expeditiously and cost-effectively can result with in being penalized with costs (Article 37).

London Court of International Arbitration

The new LCIA Arbitration Rules will come into effect on 1 October 2014.

Key changes include:

- Emergency arbitrator procedure – introduction of procedure providing parties with the option to seek emergency relief from an arbitrator before the arbitral tribunal has been constituted (Article 9B);
- Guidelines for legal counsel - each party shall ensure that all its legal representatives have agreed to comply with the general guidelines contained in the Annex to the LCIA Rules, as a condition of such representation. Sanctions for breaches of those guidelines include a written reprimand; a written caution as to future conduct in the arbitration; and any other measure necessary to maintain the general duties of the Arbitral Tribunal (Article 18.6).
- Formation of tribunal - LCIA Court now has the ability, in exceptional circumstances, to appoint a tribunal of more than three arbitrators (Article 5.8);
- Duties of arbitrators - new Rules include a new far-reaching requirement that potential arbitrators must confirm that they are “ready, willing and able to devote sufficient time, diligence and industry to ensure the expeditious and efficient conduct of the arbitration”(Article 5.4);
- Conduct of arbitrations - various articles have been amended to promote more speedy arbitrations (including reduced time limits for challenges to arbitrators, requirement that tribunals set out a timetable for delivery of an award and hand down that award as soon as reasonably possible, and encouragement for the holding of a case management conference (although the revised rules stop short of requiring such a conference to take place), along with costs consequences for parties who negatively impact on this;
- Multi-party arbitrations and consolidation (including the ability of both the arbitral tribunal and the LCIA Court to consolidate two or more arbitrations in certain circumstances).

Other institutions and rules

The following institutions have also made changes to their arbitration rules in recent years:

- WIPO - In 2013, the World Intellectual Property Organisation (WIPO) Arbitration and Mediation Center (Center) undertook a review of the WIPO Mediation, Arbitration, Expedited Arbitration and Expert Determination Rules. The revised Rules (which amended the 1994 version of the Rules, as amended in 2002) took effect from 1 June 2014. The changes were intended to focus on accommodating certain external developments in arbitration law, including taking account of the 2010 revision of the UNCITRAL Arbitration Rules. Key changes included: new provisions relating to the joinder of additional parties to proceedings; introduction of a power to order, under certain conditions, the consolidation of a new (expedited) arbitration with pending proceedings; and the availability of emergency relief.
- SIAC – the Singapore International Arbitration Centre (“SIAC”) made revisions to its rules in both 2010 and 2013, with the most recent version of the rules coming into effect on 1 April 2013 (following previous versions in 1991, 1997 and 2007). Key changes in the 2010 version included the introduction of an expedited arbitration procedure; ability of a tribunal to impose sanctions for breaches of confidentiality; and new rules on emergency

and interim relief prior to the constitution of the tribunal. The 2013 revision included the establishment of a Court of Arbitration (which would deal with matters such as challenges to arbitrators, challenges to jurisdiction, and expedited procedures), along with the addition of new powers for tribunals.

- HKIAC – the revised rules of the Hong Kong came into force on 1 November 2013. The new rules contain provisions for emergency relief prior to the constitution of the tribunal, and also include provisions relating to multi-party (and multi-contract) disputes.

Concluding remarks

The recent rule changes made by the major arbitral institutions are in large part a reaction to user concerns that the arbitral process is becoming more cumbersome. It remains to be seen whether the desired impact will be achieved by such changes, or whether a more significant “change of mindset” amongst arbitrators and lawyers is required.

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