accepted at conclusion of the contract. The OLG Düsseldorf (Baurecht 1995, 286 L) held that in such a case the critical value could be an excess of more than 20% of the lump sum price. However, the Federal Court (NJW 1996, 401/Baurecht 1996, 250; ZfBR 1996, 82) more recently made clear that no inflexible percentage margin exists as to adjustment of lump sum agreements. Limiting such remedy in extreme cases of frustration of contract the Federal Court took the view that even a mutual error by the parties in calculation of the price cannot justify a price adjustment.

FRANCE

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THE NEW (1998) RULES OF ARBITRATION OF THE INTERNATIONAL CHAMBER OF COMMERCE

Introduction

The International Chamber of Commerce (the "ICC") will soon issue the first major revision of its Rules of Arbitration (the "ICC Rules") in more than 20 years. The revised Rules, which are due to come into effect on 1 January 1998, were adopted by the ICC Council on 8 April 1997, at its Congress in Shanghai. The 1998 ICC Rules will govern any arbitrations commenced on or after 1 January 1998, unless the parties have agreed to submit to the ICC Rules in effect on the date of their arbitration agreement (Article 6(1) of the new ICC Rules). This article will review briefly the principal amendments that will result from this revision.[2]

Arbitrations under the ICC Rules are overseen by the International Court of Arbitration of the ICC (the "Court") which was founded in 1923. The Court does not itself settle disputes brought before it. This is done by arbitrators, who are appointed on a case-by-case basis. Rather, the Court ensures the application of the ICC Rules and administers and supervises arbitrations conducted under the Rules by, among other things, appointing arbitrators, fixing the place of arbitration if the parties have not agreed on this matter, scrutinising draft arbitration awards, and determining the fees of arbitrators

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[2] Bonds may also be provided by subcontractors with the obligee of the bond being the general contractor.

and certain other costs of the arbitration. The Court is assisted in its task by a Secretariat which deals directly with the parties and arbitrators.

The ICC Rules are probably the most widely used rules for the arbitration of international business disputes. At any given moment, the amounts in dispute in ICC arbitrations total about US$ 20 billion. Almost 900 arbitrations are currently in progress under the ICC Rules. In 1996 alone, a record of 433 new ICC cases were filed, involving 1,145 parties from some 95 countries.

The ICC revises its Rules of Arbitration from time to time so as to adapt them to the current needs of the international business community. Thus, the ICC Rules were revised in 1955, 1975, and 1988. The 1998 Rules will be the first major revision of the Rules since 1975, the 1988 amendments having been of a relatively limited nature.

THE PRINCIPAL AMENDMENTS TO THE ICC RULES

Recognising the importance both of stability in such a widely used set of rules and the need for evolution to take account of changing commercial and legal realities, the ICC decided that the new revision of the ICC Rules should have among its objectives:

(1) reducing delays in the conduct of ICC arbitrations,

(2) reducing uncertainties in the conduct of the arbitration procedure, and

(3) eliminating certain perceived lacunae in the current Rules,

while at the same time maintaining the fundamental characteristics of ICC arbitration, such as the "universality" of ICC arbitration (i.e. the Rules being accessible to parties from every legal culture), the role of the ICC Court, Terms of Reference and the scrutiny of draft arbitration awards by the Court.

The approach of the ICC Working Group on Revision of the ICC Rules was to take a middle path between what may be termed the "common law" approach of attempting to have rules which would explicitly cover virtually every conceivable contingency and the "civil law" approach of setting down broad principles so as to allow for the greatest possible flexibility in the handling of specific situations.

The changes made in the ICC Rules are numerous and extensive. The principal amendments shall be discussed by reference to the three purposes or objectives described above.

1. Reduction of delays in the conduct of ICC arbitrations

To reduce delays in arbitration, the ICC Rules were amended in the following respects, among others:

(a) Certain limited responsibilities of the Court in the constitution of an

arbitral tribunal are delegated to the Secretary General of the Court so that decisions in these areas need not await sessions of the Court. Thus, the Secretary General may now confirm the appointment of arbitrators in cases where no issue has been raised as to their independence (Article 9(2)).

(b) The requirements for the initial submissions in an ICC arbitration, namely, the Request for Arbitration and the Answer, have been relaxed to enable the file in the case to be sent to the arbitrators more quickly. It is no longer necessary for the Request to include "a statement of the Claimant's case" (which parties frequently considered to mean a complete exposé of all elements of the case). The new ICC Rules now require that there be "a description of the nature and circumstances of the dispute giving rise to the claims" and the relief sought. (Articles 4(3)(b) and (c).) Similarly, the Answer must no longer contain the "defence" of the Defendant (called the "Respondent" in the new ICC Rules), but rather its "comments as to the nature and circumstances of the dispute giving rise to the claims" and its "position as to the relief sought" (Article 5(1)(b) and (c)). On the other hand, the parties are now required to comment in the Request and the Answer on the applicable rules of law, the place of arbitration and the language of the arbitration (Articles 4 and 5).

(c) The arbitration may now proceed once the Claimant has paid a provisional advance on costs in an amount fixed by the Secretary General (Article 30(1)). Under the current ICC Rules, the advance on costs has, in principle, to be paid in equal shares by both parties before the arbitration file may be sent to the arbitral tribunal, which results in delay where one party is late in paying, or fails to pay, its share.

(d) The obligation to define in the Terms of Reference "the issues to be determined" by the arbitral tribunal, which has sometimes been disregarded in practice because, among other things, it is often a time-consuming exercise, and is no longer absolutely mandatory (Article 18(1)(d)).

(e) When drawing up the Terms of Reference, or as soon as possible thereafter, the arbitrators are required to prepare a provisional timetable for the proceedings and to communicate it to the Court and the parties (Article 18(4)). This requirement is designed to encourage arbitrators to give more attention to organising the procedure from the outset and thus to limit the risk of delay later in the proceedings.

(f) There is no longer an absolute requirement that the advance on costs fixed by the ICC Court be paid in full before the Terms of Reference become operative and the arbitrators are authorised to proceed.

(g) When the arbitral tribunal is satisfied that the parties have had a reasonable opportunity to be heard, the tribunal will be obliged to declare the proceedings closed. Thereafter, no further submissions may be made unless authorised by the arbitral tribunal (Article

22(1)). The introduction of the notion of closing the proceedings, which is borrowed from procedure in civil law countries, is intended to limit delays in the completion of a case.

(h) Once the arbitral tribunal has declared the proceedings closed, it will be required to give an indication of the approximate date by which the draft award will be submitted to the ICC Court (Article 22(2)).

2. Reduction in uncertainties in the conduct of the procedure

The current ICC Rules contain only a very few provisions which deal with the arbitration procedure. In order to reduce ambiguities in, and the unpredictability of, ICC arbitration procedure, it was felt desirable to elaborate to a certain extent on procedural matters in the ICC Rules. Accordingly, the new ICC Rules have been amended to deal with the following matters, among others:

(a) To allow the Court to decide, without prejudice, to the admissibility or merits of a plea concerning the existence, validity or scope of the arbitration agreement, that the arbitration shall proceed if it is *prima facie* satisfied that an arbitration agreement under the ICC Rules "may" exist (Article 6(2)). (The current ICC Rules provide as a standard "where there is no *prima facie* agreement . . .".) This change will make it very difficult in future to convince the Court not to submit questions of jurisdiction to the arbitral tribunal itself for decision.

(b) To grant explicitly to the arbitral tribunal the authority, after consultation with the parties, to conduct hearings and meetings elsewhere than at the place of arbitration, provided the parties have not agreed to deny it this authority (Article 14(2)). This is, arguably, a significant enlargement of the arbitral tribunal's power as the parties will have to agree in order to prevent the arbitral tribunal from holding hearings or meetings elsewhere. The arbitral tribunal may also conduct its deliberations at any location it considers appropriate, without even having to consult the parties (Article 14(3)). These new additions may be especially useful when the place of arbitration is, for example, in a country where the security situation is rather uncertain.

(c) To explicitly authorise the arbitral tribunal to order any interim or conservatory measure it deems appropriate, subject to appropriate security being furnished (Article 23(1)). Under the existing rules, the arbitral tribunal has no explicit power to order, for example, that one party (typically, the claimant) provide security for the payment of the other party's legal and other costs in an arbitral procedure, a situation which led the House of Lords in the *Ken-Ren* case[3] to decide that the English courts could, in certain circumstances, make an order for

[3] *Coppée-Lavalin SA/NV* v. *Ken-Ren Chemicals and Fertilizers Ltd.* and *Voest-Alpine* v. *Ken-Ren Chemicals and Fertilizers Ltd.*, H.L., [1994] 2 All ER 449.

"security for costs" in regard to an ICC arbitration taking place in England. English law on the point has now been changed by the 1996 Arbitration Act, and the new ICC Rules should prevent a Ken-Ren-type situation from arising elsewhere. On the other hand, this change is likely to increase the requests for such measures from ICC arbitral tribunals.

(d) To authorise the arbitral tribunal, in the absence of any agreement by the parties as to the law to be applied to the merits, to apply such "rules of law" as it determines to be appropriate, without being required to refer to any conflict of laws rules or being limited to selecting the law of any national legal system (Article 17(1)). This will make it more important, in certain cases, for parties to specify the law to be applied to the merits in their agreements containing ICC arbitration clauses.

(e) To explicitly require the arbitral tribunal to act fairly and impartially and ensure that each party has a "reasonable opportunity" to present its case (Article 15(2)). It is appropriate to set out this rule explicitly so that it can readily be referred to when necessary. (The UNCITRAL Model Law (Article 18) calls for each party to be given a "full opportunity" of presenting his case, a formulation which was considered to be subject to abuse by parties wishing to set aside an arbitral award.)

(f) To authorise the arbitral tribunal, in its discretion, to admit new claims and counterclaims after the signing of the Terms of Reference even if the new claims or counterclaims fall outside the limits of the Terms of Reference (Article 19). This is a major change in the ICC Rules which may especially affect the conduct of large, factually complex arbitrations, such as those which may arise in the construction field. The relevant Article of the current ICC Rules on the subject has often been criticised as being overly rigid and antithetical to the efficient administration of justice. The new formulation should help to mute criticism about retaining the Terms of Reference as an obligatory element of ICC arbitration.

(g) To authorise the arbitral tribunal to summon any party to provide additional evidence (Article 20(5)). Under the present Rules, it is not clear that the arbitral tribunal has such inquisitorial power.

(h) To provide satisfactory procedures for the appointment of arbitrators where there are multiple parties, whether claimant(s) or respondent(s) (Article 10). Traditionally, the ICC Rules, like other rules of international arbitration, have been drafted on the assumption that there is a single claimant and a single respondent. (Article 2(ii) eliminates this assumption in the new ICC Rules.) This has given rise to problems where there are multiple parties. In such cases, it may be difficult to ensure that the parties are treated equally in the appointment of arbitrators. The alleged denial of equality of treatment in the appointment of arbitrators was the basis for the

well-known *Dutco*[4] decision by the French *Cour de Cassation* (Supreme Court) which set aside a Paris Court of Appeal's decision that had upheld the ICC practice of requiring multiple respondents to nominate, or have appointed on their behalf, one arbitrator when the arbitral tribunal consisted of three arbitrators. To address these problems under the new ICC Rules, the Court has the discretion (not the obligation) to appoint all members of the arbitral tribunal in multi-party cases. The Court would certainly exercise this discretion, for example, where the place of arbitration is France and probably whenever there is a French respondent.

(i) To provide greater transparency in the event an arbitrator is challenged, by having the comments of such arbitrator, as well as those of any other arbitrator and the other party communicated to the parties and to the arbitrators.

3. Making up for certain perceived lacunae in the current ICC rules

To make up for certain perceived lacunae in the current Rules, new provisions are added which deal with the following matters, among others:

(a) To provide expressly that business disputes which are not of an international character shall be settled by arbitration under the ICC Rules (Article 1(1)) if the parties so agree. According to Appendix II of the current Rules, the ICC was not obliged to accept such cases. This change is designed to ensure, for example, that companies of the same nationality may engage in arbitration against each other in the case of perceived difficulties with the courts of their own country (apparently, not an uncommon problem) and to eliminate jurisdictional disputes about whether, for example, an arbitration between two companies of the same nationality, where at least one is under foreign control, may be submitted to ICC arbitration.

(b) The arbitral tribunal may take measures to protect trade secrets and confidentiality (Article 20(7)). Although confidentiality is often assumed to exist in arbitration, in the absence of such measure, it is uncertain to what extent, if at all, the arbitral tribunal and the parties are bound by an obligation of confidentiality. The decision of the Australian High Court in *Esso Australia Resources Ltd.* v. *Plowman* in 1995,[5] which concluded that parties are not bound by an implied duty of absolute confidentiality regarding document and information obtained in private arbitration, has sent both arbitral institutions and

[4] *BKMI Industrienlagen GmbH* v. *Dutco Construction Co. (Pvt.) Ltd.*, No. 89-28.708Y; *Siemens AG* v. *Dutco Construction Co. (Pvt.) Ltd.*, No. 89-18.726Y combined, *Cour de Cassation* 1st Civil Chamber, 7 January 1992. See the author's commentary on this case in *French Supreme Court Nullifies ICC Practice for Appointment of Arbitrators in Multi-Party Arbitration Cases* [1993] ICLR 222.

[5] *Esso Australia Resources Ltd.* v. *Plowman*, High Court of Australia, 7 April 1995, No. 95/014, XXI Y.B.Com.Arb. 137 (1996).

the drafters of arbitration clauses scurrying to secure a greater degree of confidentiality.

(c) After the closing of the proceedings, instead of replacing an arbitrator who has died, resigned or been removed, the Court may decide that the remaining arbitrators shall continue the arbitration, forming what has been termed a "truncated tribunal" (Article 12(5)). While this innovative procedure is unlikely to be resorted to frequently, its availability should reduce the risk of unjustified delay caused by the wilful failure of an arbitrator to fulfil his responsibilities.

(d) To provide that decisions by the arbitral tribunal about the allocation between the parties and assessment of legal fees and other costs which are not to be fixed by the Court may be taken at any time during the proceedings (Article 31(2)). Under the current Rules, decisions as to such costs can be made only in the final award. One purpose of the new procedure is to allow the arbitral tribunal, by making partial awards as to such costs, to discourage frivolous claims and defences.

(e) To provide for waiver of a party's right to object to the arbitrators' conduct of the proceedings, or various other relevant rules or requirements, if the party has thereafter proceeded with the arbitration without raising an objection (Article 33).

(f) To grant the arbitral tribunal the power, for a limited time, to correct and interpret any award (Article 29). Under the present ICC Rules, an arbitral tribunal has not explicitly had this power.

(g) To relieve the arbitrators and the Court from liability for any act or omission in connection with an arbitration (Article 34). While the absolute immunity accorded by the text of this article may appear extreme, it may be anticipated that, in practice, this provision will be subject to qualification under the applicable national law.

CONCLUSION

In general, the amendments are those which have seemed necessary or advisable in light of the Court's extensive experience (some 3,500 cases over the past ten years) and evolving commercial and legal realities. They will make the ICC Rules among the most modern and advanced rules of international arbitration, thereby representing the "state of the art" in the field. As the ICC Rules are so widely used and respected, these changes can be expected to influence the drafting of other international arbitration rules and the conduct of international arbitration generally.

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