

## **A Revision to the ICC Arbitration Rules**

By Hernán Oriolo

Abeledo Gottheil Abogados

The International Chamber of Commerce (“ICC”) has made a revision to its Rules of Arbitration, which took effect beginning March 1st, 2017. In what follows, we note the most relevant aspects of this revision.

Among the most salient points of the revision that took effect beginning March 1st, 2017 is the incorporation of an expedited or abbreviated procedure (henceforth “AP”) now contemplated under Article 30 of the revised version of the Rules. This Article refers to the rules contained in Appendix VI of the Rules, which explicates the AP in greater detail.

The AP applies automatically, as is established by Article 30 (2) of the Rules, if the amount in dispute is less than two million dollars. After receiving the Answer to the Request for Arbitration, or upon the expiration of the period for such Answer, or at any time thereafter, the Secretary of the ICC will inform the parties that the rules of the AP shall apply (Article 1 (3) of Appendix VI).

As provided for by Article 30 (2) (b) of the revised Rules, the parties may agree that the AP will apply to their dispute even if the amount of the dispute exceeds two million dollars.

For its part, Article 30 (3) (a) of the revised Rules establishes that the AP shall not apply to (i) arbitration agreements entered into before March 1st, 2017 (unless the parties specifically agree to be subject to the AP); (2) arbitration agreements agreed to after March 1st, 2017 in which the parties have opted to exclude the application of the rules relating to the AP; and (3) when the Court, acting of its own accord or upon a request of one of the parties that was made before the formation of the arbitral tribunal, determines that it is inappropriate, in accordance with the circumstances of the case, to apply the rules of the AP.

In accordance with Article 2 (1) of Appendix VI, if the AP should be applicable due to the amount in dispute, the Court of the ICC can appoint a sole arbitrator, even if the arbitration agreement establishes that three or more arbitrators be appointed. For its

part, section (2) of this Article establishes that the parties may nominate, by common agreement, a sole arbitrator within a period to be set by the Secretary of the ICC. In the absence of an agreement among the parties, the Secretary shall appoint a sole arbitrator.

It should therefore be kept in mind that, if the parties wish to have the dispute resolved by an arbitral tribunal composed of three members, this clause would remain partially without effect, unless the parties expressly exclude the application of the rules of the AP (as is allowed by Article 30 (3) (b) of the Rules).

In accordance with Article 1 (4) of Appendix VI, the Court may, in any moment during the arbitral proceedings, on its own initiative or at the request of a party, and after consulting the parties and the arbitral tribunal, decide that the rules of the AP no longer apply to the case. In this event, unless the Court considers it appropriate to replace and/or reconstitute the arbitral tribunal, the appointed arbitrator shall remain in place. In other words, even if the Court were to decide that the AP was not applicable, the arbitral tribunal could nonetheless remain comprised of a sole arbitrator.

Under the AP, the submission of the Terms of Reference treated in Article 23 of the Rules is not required (Article 3 (1) of the Appendix). Whereas, as a general principle, in the normal proceedings under the ICC Rules, new claims were not to be permitted after the signing of the Terms of Reference, the AP establishes that new claims will not be able to be made after the arbitral tribunal is convened, unless the new claims are authorized by the tribunal (Article 3 (2) of the Appendix).

With respect to the Case Management Conference treated by Article 24 of the Rules, it is also applicable under the AP. However, in the case of the AP, Article 3 (3) of the Appendix establishes that this conference will take place within 15 days after the file has been delivered to the arbitral tribunal. Nonetheless, the Court can extend such period upon a petition from the arbitral tribunal or if, according to its own initiative, the Court considers such an extension necessary.

Under the AP, the arbitral tribunal will have ample discretion in determining its procedures. In accordance with Articles 3 (4) and (5) of the Appendix, the arbitral tribunal can decide not to permit the production of documents, to limit the number, length, and scope of written submissions and written witness evidence (whether it be from fact witnesses or from experts), or to decide the dispute exclusively with the documents submitted by the parties, without holding hearings or examining witnesses

or experts. If a hearing should take place, the rules of the AP specify that it can be conducted by videoconference, telephone, or similar means of communication instead of being held in person.

The AP establishes (Article 4 (1) of the Appendix) a time limit for the issuance of an award by the arbitral tribunal. This limit has been set at a period of six months from the date when the Case Management Conference occurs. This period can be extended by the Court.

It is hoped that the arbitrations conducted under the rules of the AP will be less onerous than the normal arbitral proceedings of the ICC. In the case of the arbitrators, their fees will be reduced by approximately 25%, while the fees of the ICC are the same for both proceedings.

In relation to the procedure applicable to normal arbitrations, one aspect to emphasize is the reduction of the time set for the issuance of the Terms of Reference, which was reduced from 60 to 30 days from the delivery of the file to the arbitral tribunal.

Additionally, there has been a modification to Article 11 (4) of the Rules, which previously established that the Court of the ICC would not communicate its reasons justifying the appointment, confirmation, recusal, or replacement of the arbitrators. Under the new version of the Rules, nothing prevents the Court of the ICC from communicating to the parties its reasons for adopting such decisions.

With respect to administrative expenses, the new scale, which is effective as of January 1st, 2017, has been increased.

In sum, the major of the change in this revision appears to be intended to improve the efficiency of the resolution of disputes concerning amounts less than two million dollars and/or those in which the parties agree to submit themselves to the AP.

Under the AP, the preliminary audience is held 15 days after the sole arbitrator receives the case, the Terms of Reference is eliminated, the sole arbitrator can dispense with verbal audiences, decide solely on the basis of the documents that are presented to him or her, thus limiting the opportunities for producing documents, and the time the arbitrator has to render a ruling is reduced. In case the parties do not wish to be governed by the AP, they should opt to exclude it from the writing of the arbitral clause.