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Alert Memo

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ICC Unveils New Arbitration Rules

On September 12, 2011, the International Chamber of Commerce ("ICC") released a revised set of its Rules of Arbitration (the "Rules"). With certain limited exceptions, the Rules will apply to any arbitration commenced after January 1, 2012, unless the parties agree otherwise. The Rules are the culmination of the work of the Task Force on the Revision of the ICC Rules of Arbitration, created in October 2008 and comprising over 175 members from at least 41 countries, and a smaller drafting committee of approximately 20 members, which consulted with ICC national committees around the world and the ICC Commission on Arbitration.

The new Rules preserve the hallmarks of ICC arbitration, including by providing for arbitrators to prepare Terms of Reference to guide the conduct of proceedings and the ICC Court's scrutiny of awards, and generally reflect a codification of best practices developed under the current rules. Several significant changes have been made, however. In addition to language changes clarifying that the Rules apply to investor-state arbitrations as well as purely commercial arbitrations, provisions have been added concerning three principal subjects.

1. Improving Time & Cost Efficiency

The new Rules were drafted with an eye to promoting the overall efficiency and cost effectiveness of ICC arbitration. The changes in this category include:

- directing tribunals to convene a "case management conference," either in person, by telephone or by videoconference, when the Terms of Reference are drafted or as soon as possible thereafter (Article 24)

- a list of possible case management techniques, collected in a new Appendix IV

- permitting the ICC Court to impose time limits on the National Committees for proposing arbitrators, or to bypass the National Committees entirely if a Committee takes too long to make a proposal or if direct appointment is "necessary and appropriate" (Article 13(3)-(4))

- expressly allowing the arbitral tribunal, in awarding costs, to take into account whether the parties acted expeditiously and cost-effectively (Article 37(5)), and

- providing for the ICC Court to consider the "diligence and efficiency" of the arbitrators and the "timeliness of the submission of the draft award" in determining the arbitrators' fees (Appendix III, Article 2(2)).

2. Multi-Party, Multi-Contract Arbitration and Consolidation

The current ICC rules contain few provisions regarding arbitrations involving multiple parties and/or multiple contracts. As the number of disputes falling into this category has increased, however, common norms and practices developed that eventually acquired general acceptance. The new Rules essentially codify these practices, which include:

- clarifying that an existing party to an ICC arbitration may request "joinder" of another party that has agreed to arbitrate, but only if the request is made before the appointment of an arbitrator (Article 7)

- providing a framework for arbitrations involving claims between multiple parties and/or involving multiple contracts (Articles 8 and 9)

- retaining the ICC's role in making determinations, on a *prima facie* basis, to jurisdictional challenges before the tribunal is constituted (Article 6(4)), and

- permitting consolidation of two or more arbitrations (a) where all parties consent; (b) where the claims arise under the same agreement, even if the parties to the different arbitrations are not the same; and (c) where there are claims arising under different agreements, but only if the parties are the same, the disputes arise "in connection with the same legal relationship," and the Court finds that the different arbitration agreements are "compatible" (Article 10).

There will therefore remain some uncertainty under the Rules as to the circumstances in which arbitrations arising out of more than one agreement will be consolidated. Thus, at the contract drafting stage, if parties want to ensure consolidation of such arbitrations, they should include identical arbitration clauses in each agreement and explicitly provide for consolidation in the various clauses.

Notably, the Rules contemplate that a non-party to an arbitration may not attempt to "intervene" in an existing arbitration, even if it is a party to the arbitration agreement under which the existing arbitration was commenced. In that case, it must commence a separate arbitration and, if appropriate, request consolidation of the two arbitrations.

3. Emergency Arbitrator Provisions

Perhaps the most significant additions to the Rules are provisions permitting an "emergency arbitrator" to issue interim or conservatory relief before the full constitution of

the arbitral tribunal (Article 29). While there is a "pre-arbitral referee" procedure under the current rules, parties are required to affirmatively "opt in" to this procedure in their agreement to arbitrate, and it was therefore not extensively used. Under the new Rules, the emergency arbitrator provisions will apply by default, unless the parties affirmatively "opt out" of them. However, the new emergency arbitrator provisions make clear that they are not intended to discourage or prevent applications to national courts for provisional relief. Thus, it remains permissible under the Rules for a party to apply to a competent judicial authority for interim or conservatory measures before the tribunal is constituted.

Appendix V to the Rules sets forth the emergency arbitration procedures. A party may request the ICC Court to appoint an emergency arbitrator even if no arbitration has yet been commenced, but a request for arbitration must then be filed within ten days. Further, a $40,000 fee is due immediately upon application, although the emergency arbitrator may ultimately decide to reallocate costs following his or her decision. Only parties to arbitration agreements (or their successors) may request appointment of an emergency arbitrator; thus, the emergency arbitrator provisions do not apply to investment treaty disputes.

The emergency arbitrator's decision – which must be rendered no later than 15 days following receipt of the file – is considered an "order," not an "award," meaning that it is not scrutinized by the ICC Court prior to its delivery to the parties. It remains unclear whether the order may be enforced as an award under the New York Convention, but in any event, after the tribunal is constituted, it may modify, terminate or annul the order. The arbitral tribunal also retains jurisdiction to decide any claim arising out of compliance or non-compliance with the order.

The emergency arbitrator provisions will apply only to agreements to arbitrate concluded after January 1, 2012. Where a request for arbitration is submitted after that date concerning an agreement to arbitrate entered into prior to 2012, the emergency arbitrator rules will not be available to and will not be imposed on the parties.

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If you have any questions about the above, please feel free to contact any of your regular contacts at the firm or any of our partners, counsel and senior attorneys listed under "Litigation and Arbitration" in the "Practices" section of our website at http://www.clearygottlieb.com.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

CLEARY GOTTLIEB

Office Locations

NEW YORK
One Liberty Plaza
New York, NY 10006-1470
T: +1 212 225 2000
F: +1 212 225 3999

WASHINGTON
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
T: +1 202 974 1500
F: +1 202 974 1999

PARIS
12, rue de Tilsitt
75008 Paris, France
T: +33 1 40 74 68 00
F: +33 1 40 74 68 88

BRUSSELS
Rue de la Loi 57
1040 Brussels, Belgium
T: +32 2 287 2000
F: +32 2 231 1661

LONDON
City Place House
55 Basinghall Street
London EC2V 5EH, England
T: +44 20 7614 2200
F: +44 20 7600 1698

MOSCOW
Cleary Gottlieb Steen & Hamilton LLC
Paveletskaya Square 2/3
Moscow, Russia 115054
T: +7 495 660 8500
F: +7 495 660 8505

FRANKFURT
Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
T: +49 69 97103 0
F: +49 69 97103 199

COLOGNE
Theodor-Heuss-Ring 9
50688 Cologne, Germany
T: +49 221 80040 0
F: +49 221 80040 199

ROME
Piazza di Spagna 15
00187 Rome, Italy
T: +39 06 69 52 21
F: +39 06 69 20 06 65

MILAN
Via San Paolo 7
20121 Milan, Italy
T: +39 02 72 60 81
F: +39 02 86 98 44 40

HONG KONG
Bank of China Tower
One Garden Road
Hong Kong
T: +852 2521 4122
F: +852 2845 9026

BEIJING
Twin Towers – West (23rd Floor)
12 B Jianguomen Wai Da Jie
Chaoyang District
Beijing 100022, China
T: +86 10 5920 1000
F: +86 10 5879 3902

BUENOS AIRES
CGSH International Legal
Services, LLP-
Sucursal Argentina
Avda. Quintana 529, 4to piso
1129 Ciudad Autonoma de Buenos Aires
Argentina
T: +54 11 5556 8900
F: +54 11 5556 8999

SÃO PAULO
Cleary Gottlieb Steen & Hamilton
Consultores em Direito Estrangeiro
Rua Funchal, 418, 13 Andar
São Paulo, SP Brazil 04551-060
T: +55 11 2196 7200
F: +55 11 2196 7299