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The New Arbitration Rules of the International Chamber of Commerce: a step towards international commercial mediation?

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On September 12, 2011, the International Chamber of Commerce ("ICC") launched in Paris the new Rules of Arbitration that will enter into force on January 1, 2012 (the "New Rules"). These Arbitration Rules, whose last revision took place in 1998, were adopted by the ICC World Council in June 2011.

On July 1, 2001 the ICC had enacted the "ICC ADR Rules" as a result of discussion between dispute resolution experts and representatives of the business community from seventy-five countries. The purpose of the ICC ADR Rules was to offer to the business partners a means of resolving disputes amicably, in the way best suited to their needs (Foreword to those Rules). It was pointed out that, as an "amicable" method of dispute resolution, ICC ADR were to be distinguished from ICC arbitration whose two services remained distinct, each administered by a separate secretariat based at the ICC headquarters in Paris. It was also mentioned in the said foreword that arbitration and ADR were two "alternative" means of resolving disputes that may although be, in certain circumstances, complementary: for instance, it is possible for parties to provide for arbitration in the event of a failure to reach an amicable settlement; similarly, parties engaged in an arbitration may turn to ICC ADR if their dispute seems to warrant a different, more consensual approach. The ICC ADR Rules had replaced the 1988 ICC Rules of "Optional Conciliation".

Do therefore the New Rules affect or have any impact, whether significant or not, on the ICC ADR Rules and, more generally, on the development of international commercial mediation?

It must be preliminary born in mind that ICC arbitration is an institutional and administered arbitration procedure. The International Court of Arbitration of the ICC does not itself resolve disputes; it administers the resolution of disputes by arbitral tribunals in accordance with its arbitration rules and is the only body authorized to do so, including for the scrutiny and approval of arbitral awards ((Art. 1 para. 2 of the Rules). Under said rules arbitral tribunals, once constituted and the file received, have a duty to draw up their "Terms of Reference" on the basis of the most recent submissions of the parties (Art. 23 of the Rules whose content remains unchanged). Such a document, which need to be signed by the parties and the arbitrators within a certain time-limit, include *inter alia* all necessary information on the parties, a summary of their respective claims and relief sought by each of them, a list of issues to be determined and all particulars of the applicable procedural rules (Art. 23 para. 1 of the Rules).

When drawing up the Terms of Reference or as soon as as possible thereafter, the arbitral tribunal has to convene a “case management conference” to consult the parties on procedural measures that need to be taken in order to ensure “effective case management” (Art. 24 para. 1 and 22 para. 2 of the rules under their new content). Such measures may include one or more of the cases management techniques described in the (new) Appendix IV.

This Appendix provides various examples of case management techniques that can be used by arbitral tribunals and parties, most of which being of procedural nature (bifurcation of proceedings, decision on documents only, production of documentary evidence, limitation of submissions, video-conferencing, pre-hearing conference, etc.). Emphasis is put on the need of appropriate control of time and costs in all arbitration cases.

Among these techniques “settlement of disputes” is mentioned. Two proposals are made in this respect: the first is for the arbitral tribunal to inform the parties that they are free to settle all or part of the dispute either by negotiation or through any form of amicable dispute resolution methods such as mediation under the ICC ADR Rules; the second is, where agreed between the parties and the arbitral tribunal, for the latter to take steps to facilitate settlement of the dispute, provided such steps are not inconsistent with its duty to make every effort to make sure that its award is enforceable at law (Appendix IV para. h(i) and h(ii)).

Another suggested technique is to identify issues that can be resolved by agreement between the parties or their experts (Appendix IV para. b)

The New Rules also provide, in respect of management conferences, that these may be conducted through meeting in person, by video conference, telephone or similar means of communication; in the absence of an agreement of the parties, the arbitral tribunal has to determine the means by which the conference will be conducted; moreover, the arbitral tribunal may request the parties to submit case management proposals in advance of a case management conference and may request the attendance at any case management conference of the parties in person or through an internal representative (Art. 24 para. 4 of the New Rules).

From the above, the following considerations can be made.

1. A link is now established between ICC arbitration and ICC ADR. ADR techniques, especially mediation, can therefore be considered as an option in an ICC arbitration, at least at an early stage of the proceedings, namely at the “Case Management Conference”. However, it is not a clear and straightforward recognition of mediation as such, save an indirect mention by way of a reference in an appendix to the New Rules. It is nevertheless better than nothing as compared, for instance, to the Swiss Rules of International International Arbitration that do not contain any reference to mediation.

2. It is worth pointing out the introduction, in the New Rules, of the relatively new concept of “case management” of disputes, unknown in the previous rules. This expresses the concern of the promoters of arbitration proceedings, especially ICC arbitration, to offer to the business community procedures that can be not only tailor-made as appropriate for each dispute but also efficient and cost-effective. In 2007, the ICC issued Publication 843 which set out “Techniques for Controlling Time and Costs in Arbitration with a view to improve efficiency in arbitration through time and costs saving. The many suggestions made in this report include, for instance, the utility and timing of a case-management conference allowing the arbitral tribunal and the parties to

identify the issues raised by the case and the procedural steps necessary to resolve them or the importance of avoiding repetition when presenting arguments. ICC Publication 843 also sets out the “arbitral tribunal’s role in promoting settlement” (para. 43). It provides that arbitral tribunals should consider informing the parties that they are free to settle all or part of the dispute at any time during the course of the ongoing arbitration, either through direct negotiations or through any form of ADR proceedings, such as, for example, the ICC ADR Rules.

Article 24 of the New Rules – through Appendix IV para. h – incorporates therefore the possibility that is given to the parties to consider mediation when managing their case towards resolution. In this respect, it is worth mentioning that mediation is not seen as a main tool, emphasis being more put on procedural techniques usually practised in arbitration proceedings.

3. Two remarks can be me made from the preceding paragraph. First of all, mediation is essentially considered as a technique which primarily aims at “controlling time and costs”. It is actually viewed as a mere remedy to lengthy and costly arbitrations. Second, mediation is defined as an “amicable dispute resolution method” or “technique” but without any further explanation. One has to refer to the “Guide” to ICC ADR which defines mediation as “the settlement technique in which the Neutral acts as a facilitator to help the parties to arrive at a negotiated settlement of their dispute. The Neutral is not requested to provide any opinion as to the merits of the dispute.” However, there is no indication on the tools used by the Neutral and the skills that are required for this purpose.

4. The role played by the arbitrators regarding mediation is strictly limited. Like some codes of civil procedure, the arbitrator shall limit himself to inform the parties about the possibility to resort to mediation. But in practice, the arbitrator does not explain what is the mediation process and the tools that are used in that respect. In addition, the arbitrator is bound by the procedural rules which prescribe not to place himself in position, when facilitating settlement, that would endanger his primary function of adjudicating the dispute.

5. One positive provision of the New Rules, is the power of arbitrators to request, at the case management conference, the attendance of the parties in person or through an internal representative as mentioned above (Art. 24 para. 4 of the New Rules). This can be viewed as effort to give space, even in a process of judicial nature, to people involved in a dispute in order to allow them the opportunity to state their personal needs and interests in a broader context, favouring thereby discussion and possible amicable settlement.

6. Lastly, although being self-evident, it is the duty of any arbitrator to identify, above all, all of those issues that can be resolved by agreement of the parties, whether on points of procedure or on points of substance (Appendix IV para. b).

In conclusion, the New Rules open a small door to alternative towards mediation but making clear that such a process belong solely within the parties’ liberty of decision, whilst arbitrators mainly remain in their primary function to settle the dispute according to the law, alternatively having the capacity to inform the parties about said process.

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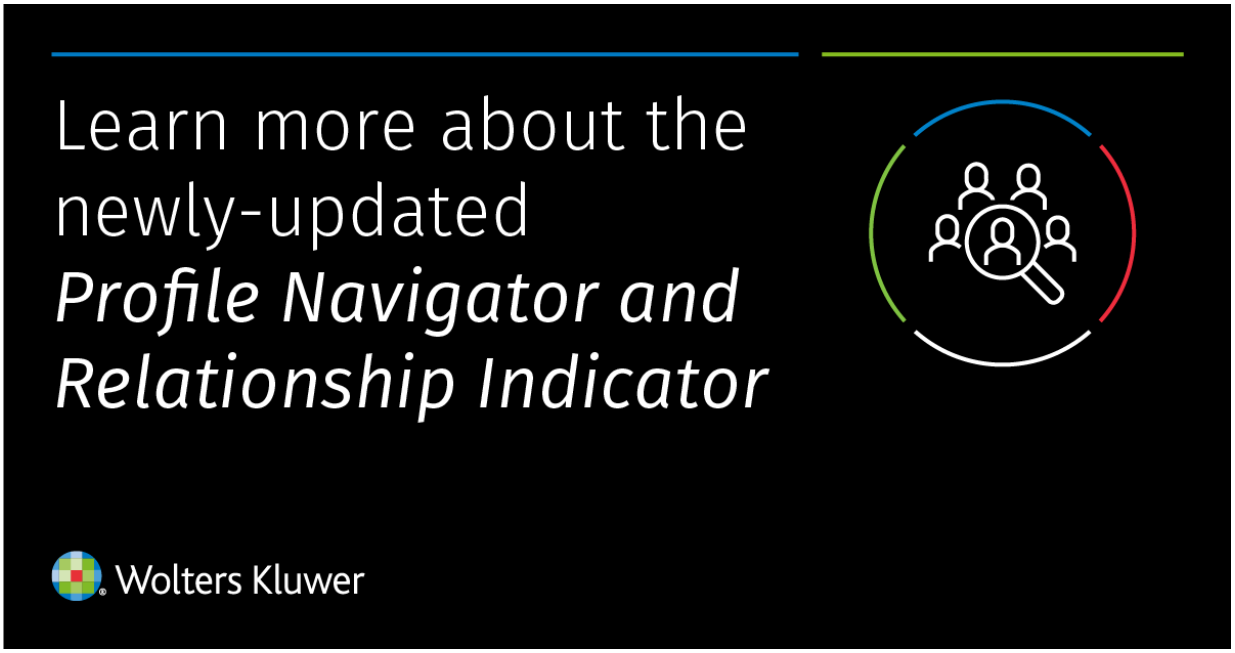

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