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Paris-based International Chamber of Commerce (ICC) Launches New Mediation Rules

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On 4 December 2013, the Paris-based **International Chamber of Commerce** (ICC) published its new Mediation Rules, which will come into effect on 1 January 2014, one year after the ICC's new Arbitration Rules came into effect. The Mediation Rules replace the ICC's existing Amicable Dispute Resolution Rules, which had been in force since 1 July 2001.

Background

On 4 December 2013, the Paris-based International Chamber of Commerce (ICC) published its new Mediation Rules, which will come into effect on 1 January 2014, one year after the ICC's new Arbitration Rules came into effect. The Mediation Rules replace the ICC's existing Amicable Dispute Resolution (ADR) Rules, which had been in force since 1 July 2001.

The change in name (from ADR Rules to Mediation Rules) reflects the predominance of mediation in international ADR. Approximately 90 per cent of the ADR procedures held under the ADR Rules to date have, in fact, been mediations, with conciliations and neutral evaluations making up only 10 per cent of the total. It is still possible, however, for parties to agree to conduct other forms of ADR, *e.g.*, conciliation or neutral evaluation, under the Mediation Rules if they wish.

The Mediation Rules contain some well thought out provisions. These should help to enhance the ICC's appeal not only to users of international arbitration, but also to those who seek to resolve their disputes by alternative, less costly and faster methods. To view the new rules in full, please click here .

Summary of Rules

The Rules provide for the ICC International Centre for ADR to play an active role in guiding the parties towards a mutually acceptable form of mediation, *e.g.*, deciding on the place and language of mediation. The idea is to avoid the need for the mediator to take such decisions and thereby potentially alienate one of the parties. Where there is no pre-existing agreement to mediate, and one of the parties makes a mediation proposal, the Centre will play an important role in encouraging the other party to accept the idea of mediation.

The selection of mediator, unless agreed upon by the parties, will be made by the Centre. The Centre does not have an official roster of mediators, but it has developed an open network from which it selects mediators depending on the subject matter of the dispute, the place of mediation, the language of the mediation and the nationalities of the parties. Mediators have to sign a declaration of availability, impartiality and independence, as in an ICC arbitration.

Although the Rules deliberately refrain from specifying how the mediation should take place, a separate document—Mediation Guidance Notes—provides recommendations on how to conduct mediations. The Notes give useful guidance on a number of topics such as the use of joint and private sessions, preparation for mediation sessions, the need for someone with authority to attend the meetings, use of case summaries, and the relationship between mediation and arbitration proceedings.

Mediations, but not the fact that they are taking place, are private and confidential. So too are settlement agreements reached as a result of mediations, except to the extent that disclosure is required by applicable law or to implement or enforce such agreements. Parties to mediations may not rely, in any judicial or arbitral proceedings, on any documents, statements or other communications submitted in the mediation proceedings, or on any views, suggestions, admissions, proposals or indications that a party is ready to accept a proposal. This latter aspect is particularly important in jurisdictions that do not recognise the concept of “without prejudice” communications.

Model clauses are provided at the end of the booklet containing the Mediation Rules, and cover four different scenarios: the optional use of the ICC Mediation Rules, the obligation to consider the ICC Mediation Rules, the obligation to use the ICC Mediation Rules while allowing parallel arbitration and the obligation to use the ICC Mediation Rules before resorting to arbitration, *i.e.*, a multi-tier clause.

Changes to the Fee Structure

The fee structure has been modified. There is a non-refundable filing fee of US $2,000. In addition, the Centre will request one or more deposits to cover

- The Centre’s administrative expenses, which are based on the value of the dispute and range from US$5,000 for amounts in dispute of up to US$200,000, to US$30,000 for amounts in dispute of over US$100,000,000. If the mediation takes place in the context of an ICC arbitration, the filing fee paid for the arbitration (US$3,000) will be deductible from the Centre’s administrative expenses.

- The mediator’s fees, which are generally assessed on the basis of the time reasonably spent by the mediator and an hourly rate fixed by the Centre, generally between US$400 and US$600. It is also possible for parties to agree a fixed fee with the mediator.

- The mediator’s reasonable expenses.

For those who wish to avoid having to pay the Centre’s administrative expenses and/or who do not see the benefit of having the Centre administer their mediations, it is possible to request that the ICC acts merely as appointing authority, in which case it will select the mediator but play no other role in relation to the mediation.

The Relationship Between Mediation and Arbitration

There has been much discussion in recent years about the need to achieve higher rates of settlement of international arbitrations. Practitioners have different views about the benefits of arbitrators playing an active role in settlement discussions, but most agree that arbitrators can and should play a role in encouraging parties to consider different ways of settling their disputes, including mediation. The 2012 Arbitration Rules went some way to encouraging arbitrators to play such a role. The Mediation Guidance Notes go further by encouraging arbitrators to consider the use of “mediation windows”, *i.e.*, a stay or pause in the arbitration proceedings. The Mediation Rules themselves sound a note of caution, however, by providing that mediators “shall not act nor shall have acted in any judicial, arbitral or similar proceedings relating to the dispute”, except with the written agreement of the parties.

Practical Implications

The ICC is of course only one of a number of reliable mediation providers. It may, however, be a particularly good choice for cross-border disputes, in light of its reputation as being truly international and its ability to handle bridge cultural gaps effectively. After a relatively slow start, the number of ICC mediations has increased significantly in recent years. The new Mediation Rules should help this trend to continue and the ICC may soon become one of the leading international administrators, not only of arbitrations, but also of mediations.

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