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ICC Report on Arbitration Involving States and State Entities

Introduction

In September 2012, the ICC (whose rules are very commonly identified as applying to arbitration disputes) published a report on Arbitration Involving States and State Entities under the ICC Rules of Arbitration (the "2012 Report"). The purpose of the 2012 Report is to explain how arbitration works in relation to disputes involving states and state entities, and focuses on three main areas - (a) recommendations for drafting an arbitration clause which will apply to arbitrations involving state or state entities; (b) guidance on how the revised 2012 ICC Rules are intended to apply to arbitrations involving state or state entities; and (c) current practice on arbitrations involving states or state entities.

The International Court of Arbitration was established in 1923 as the ICC's arbitration body, and since then has administered more than 19,000 arbitrations. There are no restrictions as to which parties can use ICC arbitration. At present, approximately 10% of ICC arbitrations involve a state or a state entity. There is a concentration of cases from Sub-Saharan Africa, Central and West Asia, and Central and Eastern Europe, which account, between them, for about 80 per cent. of ICC arbitrations involving states or state entities. The majority of these arbitrations relate to commercial disputes, although the ICC also deals with a number of investment treaty arbitrations.

The 2012 Report arose out of the work carried out by the Task Force established by the ICC in March 2009 "to study and identify the essential and distinctive features of arbitrations involving states or state entities and determine whether there are special procedural considerations that should apply to such proceedings..." A number of recommendations proposed by the Task Force were adopted in the revised 2012 ICC Rules to make the rules more "state arbitration" friendly, and eliminate the need for a separate set of rules.

Drafting an arbitration clause

Where parties wish to utilize ICC arbitration in the event of any dispute, a clause or provisions should be included in the relevant contract or investment treaty. The 2012 Report provides guidance and recommendations on how the basic ICC arbitration clause should be modified to be more appropriate for an arbitration involving a state or state entities. In particular, the report highlights changes that may be made in respect of:

- Determining the number of arbitrators (85-86% of ICC cases involving states and state entities are referred to three-member tribunals, compared to only 57.5% of ICC cases in general);
- Appointment of arbitrators
- Disapplication of the emergency arbitrator provisions; and
- Ensuring confidentiality (Unless otherwise provided under the applicable law, ICC arbitration is not confidential per se).

Changes in the revised 2012 ICC Rules

The 2012 Report discusses the impact of certain changes included in the revised 2012 ICC Rules on arbitrations involving state or state entities, including:

- Article 1 – this now refers to "disputes" rather than "business disputes"
- Article 6(2) – amended provisions relating to prima facie analysis (and existence) of arbitration agreements;
- Article 13(4) – appointment of sole arbitrators by the ICC Court (rather than the ICC National Committees); and
- Article 29(5) – investment treaty arbitration is now specifically excluded from the emergency arbitrator provisions.

Current Practice

The ICC have also identified various practices of the ICC Court when dealing with arbitrations involving states and state entities. In particular, in such arbitrations, it is the Court's practice to:

- Submit disputes involving states and state entities to a three-member arbitral tribunal.
- Fix the place of the arbitration in a neutral location situated in a country that has ratified the New York Convention; and
- To scrutinize draft awards rendered in ICC arbitrations involving states or state entities at its plenary sessions.

Previously, in circumstances where a state or state entity had not nominated an arbitrator, it was Court practice to appoint an arbitrator from that state or from a state with which that state has cultural affinities - following the recommendation of the Task Force which produced the 2012 Report, the Court's discretion is no longer limited in this way, and the Court will take into account all facts and circumstances. The ICC states that the evidence suggests that the Court proceeds more restrictively where one of the parties sought the extension of the arbitration agreement to a non-signatory state or state entity.

The full report can be found online in the ICC's Dispute Resolution Library (http://www.iccdrl.com/).

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