

# Arbitrating under the 2012 ICC Rules

An Introductory User's Guide

BY JACOB GRIERSON AND ANNET VAN HOOFT



Wolters Kluwer

Law & Business

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# Preface

The idea of writing a ‘beginners’ guide’ to ICC arbitration came to us in early 2011, at a time when the discussions concerning the revision of the ICC Rules were almost complete. It seemed to us that such a book would be consistent with the ICC’s (laudable) goal of making its Rules of Arbitration more easily understood by non-insiders.

We already knew that working with each other and with our excellent reference editor, Corinne Nguyen, would be a pleasure, as it has always been over many years. We also knew that we would benefit from combining our different cultural and professional backgrounds, in much the same way as do the participants in so many international arbitrations.

What we had not anticipated was the complexity of writing a simple book. We should have born in mind the wise words of the seventeenth century French philosopher Blaise Pascal, *'Je n'ai fait celle-ci plus longue que parce que je n'ai pas eu le loisir de la faire plus courte'* ('I have only written you a long letter because I did not have time to make it shorter').

In the complex process of making our book as simple as possible, we have relied on the help of many, including (in alphabetical order) Estelle Brisson, Maggy Chabance, Ronnie Grierson, Tamara Joseph, Johannes Landbrecht, Claire Morel de Westgaver, H       Sironneau and Sabrina Yakici. They have very generously given their time to assist us in various ways, including reading and commenting on our drafts, and typing up changes.

We have also been greatly supported by Kluwer Law International and our respective firms, McDermott Will & Emery and Bird & Bird, whose enthusiasm for our project has been wonderful.\* We would like to thank in particular Eleanor Taylor and Vincent Verschoor of Kluwer Law International, Mireya Berteau, Jacques

\* The views expressed here are solely those of the authors and do not necessarily reflect those of McDermott Will & Emery or Bird & Bird, or any of their affiliates.

## *Preface*

Buhart and Peg Warner of McDermott Will & Emery and Marion Barbier, Frédérique Dupuis-Toubol, Vonnick LeGuillou and Ludovic de Walden of Bird & Bird.

Above all, we would like to thank our families (Anna, Aurore, Benjamin, Thijs and last but not least Thomas) for their patience and understanding during the countless evenings, weekends and vacations when we have deserted them and instead plunged ourselves into the 2012 ICC Rules. This book is dedicated to them, and may help them to better understand what we do when we are not at home!

Jacob Grierson  
Annet van Hooft  
Paris, March 2012

## Note Concerning the Applicability of the 2012 Version of the ICC Rules

This is a book about the new 2012 version of the International Chamber of Commerce (ICC)'s Rules of Arbitration (hereinafter: the 2012 ICC Rules). The 2012 ICC Rules apply to all ICC arbitrations commenced after 1 January 2012, unless the parties have agreed that an earlier version should apply.<sup>1</sup> In other words, the 2012 ICC Rules will apply in all cases *except*:

- where a Request for Arbitration was already filed with the ICC before 1 January 2012;<sup>2</sup> or
- where the parties have agreed that an earlier version of the ICC Rules applies.<sup>3</sup>

If you are handling an ICC arbitration that falls into either of these categories, you should put this book down and refer instead to a book on arbitration under the relevant version of the ICC Rules. The names of some of the leading books on the 1998 version of the ICC Rules (hereinafter: the 1998 ICC Rules) are provided in the Bibliography below.

- 
1. 2012 ICC Rules, Art. 6(1): 'Where the parties have agreed to submit to arbitration under the Rules, they shall be deemed to have submitted *ipso facto* to the Rules in effect on the date of commencement of the arbitration, unless they have agreed to submit to the Rules in effect on the date of their arbitration agreement.'
  2. 2012 ICC Rules, Art. 4(2): 'The date on which the Request is received by the Secretariat shall, for all purposes, be deemed to be the date of the commencement of the arbitration.'
  3. If the parties have agreed that an earlier version of the ICC Rules applies, the secretariat will draw the parties' attention to the fact that they can still agree on the application of the 2012 ICC Rules, when it notifies the Request for Arbitration to the respondent.

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## Chapter 1

# Introduction

International commercial arbitration (including ICC arbitration) has a number of distinct advantages for companies, States or individuals seeking to resolve international disputes.<sup>1</sup> One of these is that it is accessible to lawyers from all jurisdictions: to fight a case before a German court, it is indispensable to instruct a German lawyer; but *any* lawyer (indeed, in most jurisdictions any *non-lawyer* too) is competent to appear before an ICC arbitral tribunal.<sup>2</sup> In addition, the 2012 ICC Rules are contained in an 80-page booklet,<sup>3</sup> which is very easy and quick to read; and international arbitral tribunals will generally adopt procedures that are designed to make all the participants feel as much at home as possible.

That is the theory. The reality is somewhat different: the world of international arbitration has been appropriated by a number of specialists (such as the authors of this book). There are good and bad reasons for this.

One *good* reason is that, because of the inherently international nature of the exercise, the lawyers who participate need to have experience of dealing with clients, adversaries and arbitrators from many different jurisdictions. A lawyer who has spent his or her career fighting cases before national courts may encounter some nasty surprises when he or she comes to handle an international arbitration, where things will not always be done as they are before the national courts.

One *bad* reason is that some lawyers wish to maintain a mystique about international arbitration in order to scare away those who are not members of the ‘club’.

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1. These will be examined in Ch. 3(I) below.

2. Note, however, that in certain countries the lawyer may be required to obtain a (temporary) license or work permit.

3. This booklet also contains the ICC ADR Rules. The ICC ADR Rules are not the subject of this book although we will refer to them in Ch. 4(III)(B) (optional amendments to an ICC arbitration clause) and Ch. 6(II) (mediation).

The aim of this book is to do away with this mystique, so that lawyers (whether in-house or outside counsel) have a clearer understanding of ICC arbitration for the purposes of (a) deciding whether to opt for ICC arbitration, (b) drafting ICC arbitration clauses and (c) embarking on an actual ICC arbitration.

We will not pretend that after reading this book the reader will be able to do everything related to ICC arbitration. To the contrary, there are a number of areas where advice and assistance will be needed from experts. However, the reader will, we hope, know which these areas are. In addition, he or she will be able to ask for such advice and assistance with the benefit of a good understanding of the process.

How should this book be used? This will depend on the objective for which it is being read:

- those who want a full introduction to the topic of ICC arbitration are recommended to read all the chapters in the book, although possibly without Chapter 2 (Key Innovations Under the 2012 ICC Rules) and leaving Chapter 4 (How to Draft an ICC Arbitration Clause) until last;
- those who already have a good understanding of how ICC arbitration worked under the old, 1998 ICC Rules but are looking for an update on the new, 2012 ICC Rules will find the key changes to the 1998 ICC Rules summarized in Chapter 2 (Key Innovations Under the 2012 ICC Rules);
- those who need to take a decision on whether to opt for ICC arbitration may wish to read only Chapter 3 (Why Choose ICC Arbitration?), which will cross-refer to a number of the other chapters in this book for further explanation of the advantages and disadvantages of ICC arbitration;
- those who have opted for ICC arbitration and need to draft an ICC arbitration clause may wish to read only Chapter 4 (How to Draft an ICC Arbitration Clause), which will also cross-refer to other chapters in this book where relevant;
- those who are actually faced with the prospect of an ICC arbitration may wish to read the whole of this book, except for Chapters 2, 3 and 4, in order to better understand what awaits them. However, they will also find answers to specific questions by reference to the table of contents and index.

For the benefit, in particular, of those readers falling into the last of these categories, we have structured the book chronologically, as far as possible.<sup>4</sup> Thus, following a discussion of preliminary matters in Part I, we describe the process leading from negotiation to arbitration (Part II). We then discuss the initial decisions that may be taken by the International Court of Arbitration of the ICC (hereinafter: the Court) (Part III), followed by a description of the different steps in the proceeding before the arbitral tribunal (Part IV). We end with a discussion of the award (Part V) including the enforcement thereof.

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4. Obviously, this does not always work perfectly. For example, challenges to and replacements of arbitrators are dealt with in Ch. 22 below, which follows the description of the entire procedure before the arbitral tribunal, even though arbitrators can be challenged and replaced at any stage after they have been confirmed or appointed.

One result of this approach is that certain themes are not dealt with together but instead in a number of different places. Most notably, issues relating to multi-party and multi-contract arbitrations are in our book dealt with in a number of different places:

- the innovations brought about by the 2012 ICC Rules in respect of multi-party and multi-contract arbitrations are described (briefly) in Chapter 2(I)(B) below;
- recommendations for the drafting of arbitration clauses for multi-party and/or multi-contract disputes are made in Chapter 4(IV) below;
- considerations about who can and should be named as parties in the Request for Arbitration, and in particular whether non-signatories can be included, are discussed in Chapter 8(I)(B) below;
- cross-claims between multiple parties are described in Chapter 9(III)(E) below;
- the possibility of a party other than those named in the Request for Arbitration being joined into the arbitration is discussed in Chapter 10 below;
- considerations about whether claims under the different arbitration agreements can be heard in the same arbitration are discussed in Chapters 8(I)(E)(1) and 11(II)(B) below;
- the rules on consolidation of arbitrations are explained in Chapter 13 below;
- considerations relating to the constitution of three-member arbitral tribunals in multi-party cases are described in Chapter 14(III)(C) below; and
- the rules on the fixing of advances on costs in multi-party cases are addressed in Chapter 15(II) below.

As we have already explained, the object of this book is not to turn the reader into an expert on ICC arbitration, but rather to remove the mystique that is sometimes associated with it and to help the non-specialist understand which areas require specialist assistance and which do not. The former will be clearly indicated in the text.

If the reader does wish to probe further into areas that we consider to be ‘specialist’ areas, we indicate the books, articles, websites and other resources that exist.<sup>5</sup> Some of these are not only excellent but are also very comprehensive, and we have no intention of attempting to redo the work that has already been done by their authors. Many of the books mentioned in our Bibliography will no doubt soon be updated in light of the 2012 revision of the ICC Rules.

For all readers, whether or not they are approaching the subject for the first time, we hope that our Glossary will also be a helpful tool.

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5. See notes to the relevant parts of the text; and see the Bibliography below.