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Commentary

The 2018 ICAC Rules: Upgrade Of Procedure At The Main Arbitration Institution In Ukraine

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In 2017, the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (ICAC) released the fourth edition of its Arbitration Rules (the 2018 ICAC Rules or the New Rules) with effect from 1 January 2018. The New Rules apply to arbitrations commenced on or after that date. They supersede the 2007 ICAC Rules.

Since its launch in 1992, ICAC has established itself as one of the leading arbitral institutions in the CIS (the Commonwealth of Independent States) and CEE (Central and Eastern Europe) regions. It administers in average 300-600 new international cases per

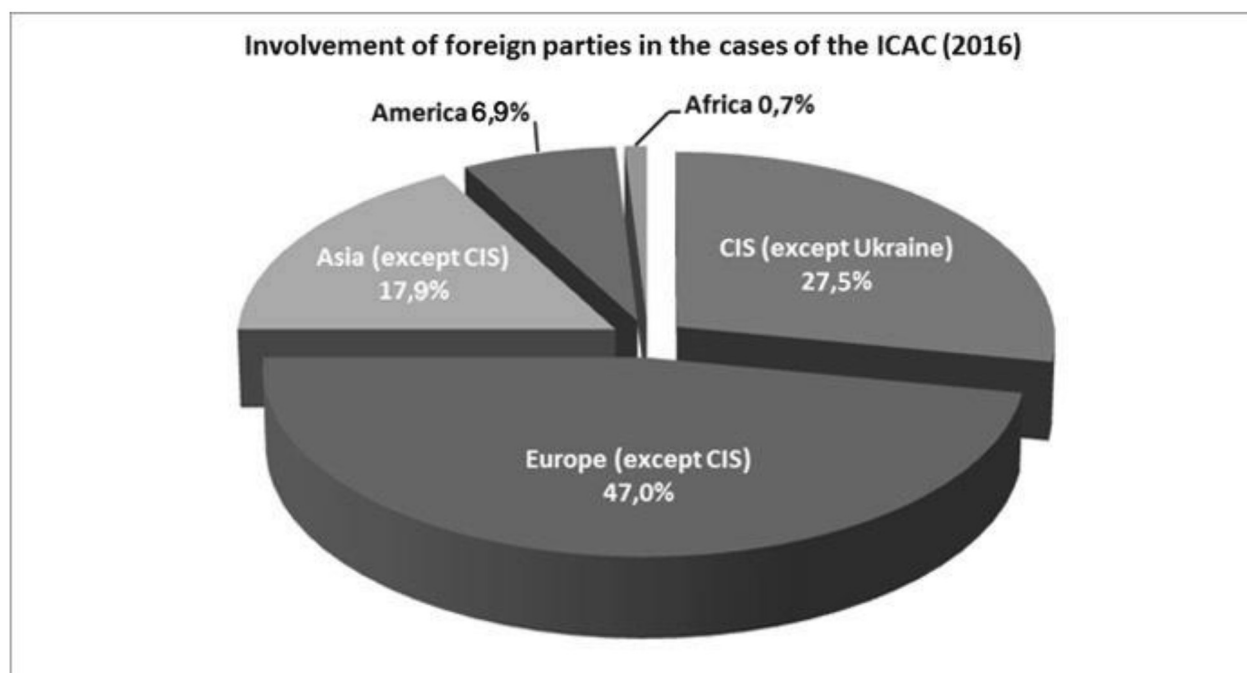
year. In 2016, ICAC registered 553 cases, and handled more than 500 active cases involving parties from over 57 countries, including 46 from far abroad countries, 10 CIS countries and Ukraine. See Chart 1.

However, such impressive caseload and de-facto monopoly position in Ukraine had delayed, to certain extent, the reform of ICAC rules and practices designated to follow the world's trends.

ICAC was established by the Chamber of Commerce and Industry of Ukraine shortly after Ukraine had declared its independence, when the soviet past still affected many areas of life in Ukraine. Having been functioning for over 25 years, ICAC remains the only arbitral institution in Ukraine administering international disputes (with a couple of exceptions for industry-specific disputes, such as shipping and maritime or restructuring, which can be administered by other institutions). The said situation and increasing caseload had not incentivized ICAC in implementation of reforms. The first edition of ICAC Rules of 1992 had been revised only twice: in 1994 when the Law of Ukraine on International Commercial Arbitration was adopted, and in 2007. Only 10 years later – in 2017 – a new edition of ICAC Rules was finalized and adopted.

The 2018 ICAC Rules aim to adopt best arbitration practices and further promote the cost-effective and efficient resolution of disputes. By introducing noticeable refinements together with a number of market-leading

Chart 1.



innovations, ICAC ensures that it increases efficiency of proceedings and better serves the needs of the businesses and financial institutions. ICAC has significantly upgraded the previous edition of the ICAC Rules responding to the criticism of the arbitration community.

The New Rules have not changed the 'rigid' case-administration style, which is typical for the institutions in the region. Yet, they have finally departed from the old-fashioned 'hard copy' only form of communications, evidence and even arbitration agreements. The 2018 ICAC Rules incorporate the following digital and technical improvements:

- ICAC now expressly accepts arbitration disputes commenced on the basis of arbitration agreements concluded in electronic form (Article 4);
- documents relating to arbitral proceedings can be circulated in electronic form (Article 11);
- electronic evidence may be submitted in electronic form (Article 52); and
- an oral hearing can now be recorded 'if either party considers it necessary' (Article 50).

Key innovations include new provisions on expedited arbitration procedures (Article 45) and scrutiny of an

arbitral award by the Secretary General of the ICAC (Article 60), and new rules on determination of the amount of claim (and an arbitration fee respectively) based on the relief sought (Article 15), on evidentiary matters and on awards publishing policy.

Notable changes in the 2018 ICAC Rules are summarized below.

I. Expedited procedure

The 2018 ICAC Rules contain 'opt-in' provisions for Expedited Arbitral Proceedings (Article 45). Parties may opt to proceed on the expedited basis where (i) the parties have so agreed in the arbitration agreement, or (ii) subsequently agreed on such proceedings, and (iii) the parties' agreement has been expressed no later than filing a response to the Statement of Claim. Notably, ICAC has not set up a threshold for the amount in dispute exceeding which parties may no longer opt for an expedited arbitral proceeding. It appears, that the essence of this new provision is to offer parties an alternative condensed timetable well-suited for less complicated cases with no need for the second round of written submissions and an oral hearing.

Article 45 of the 2018 ICAC Rules allows parties access to a more efficient and simplified arbitration procedure.

Amongst other things, the Statement of Defense has to be submitted within 10 days (as opposed to 30 days for standard arbitral proceedings), parties' submissions are limited to one round only, unless the Secretary General of the ICAC or the Tribunal decides otherwise with due regard for the case circumstances. A dispute will be considered by a sole arbitrator, unless otherwise agreed by the parties, and on the basis of documentary evidence only absent either party's request for an oral hearing. The Tribunal is under obligation to render an arbitral award within 20 days from the date of case completion (as opposed to 30 days for standard arbitral proceedings). Conversely, the Tribunal may also order that arbitral proceedings no longer be conducted in accordance with the expedited procedure. If so, the arbitration will continue under the standard 2018 ICAC Rules procedures.

II. Scrutiny

Unlike other institutions, except the International Chamber of Commerce (and few others following its model), the ICAC sets forth a mechanism to monitor the quality of a draft final award by means of scrutiny. Before a Tribunal signs an arbitral award, it has to submit the draft to the Secretary General of the ICAC. The latter, without intervening in a decision making process, may draw attention of the Tribunal to "any identified non-compliance of the draft Arbitral Award with the requirements of" the New Rules, including with respect to the form of the award, errors, omissions or typos. The Tribunal is supposed to consider the recommendations within 10 days from the date of their receipt. The 2018 ICAC Rules, however, do not provide for any sanctions in case the Tribunal fails to eliminate inconsistencies identified by the Secretary General of the ICAC or does not meet the established deadline.

III. Date of Awards

The New Rules expressly provide that the date of an award is 'the date of the last signature of an arbitrator' from the Arbitral Tribunal. Earlier this issue remained open and awards were deemed to be rendered as of the date of the last oral hearing in the case.

IV. Evidentiary Issues

Previous edition of the ICAC Rules was silent on party-appointed experts, and contained very sketchy provisions about witnesses and evidentiary matters. The 2018 ICAC Rules filled this gap. They now provide

extended rules on evidence, witnesses, party-appointed experts and Tribunal-appointed experts (Articles 52-55) and instruct the arbitrators 'to value the evidence in accordance with their inner conviction.'

Article 52 sets forth a detailed list of requirements for 'written evidence' and 'electronic evidence.' The New Rules also clarify the Tribunal's authority to order document production, site inspection, expert- and witness-examination. Article 53 expressly allows that a party to the arbitral proceedings, his or her officer or representative may appear as a witness. At the discretion of the Tribunal, testimony of witnesses can be presented in written form or in a form of oral testimony.

Either party may request that a witness whose written testimony the other party relies on shall appear for questioning at an oral hearing before the Tribunal. If a witness whose attendance was determined mandatory by the Tribunal fails to attend the oral hearing without good cause, the Tribunal may not take into account his written testimony.

V. Publication of Awards

ICAC has regularly published anonymized excerpts from its arbitral awards. The New Rules have made a further step towards transparency aimed at raising awareness of ICAC's arbitration practice. The arbitral proceedings remain confidential unless otherwise agreed by the parties (Article 68). However, the approach as to publication of awards has been changed. Now, unless none of the parties has objected, the ICAC President may decide to publish arbitral awards and orders once information allowing to identify the parties has been redacted (Article 71).

VI. Arbitrators and Reporters

From the very beginning of its operation, ICAC has always had a roster of arbitrators, which despite the word 'recommended' in title to the roster, is still of a mandatory nature. Put it differently, it is not possible to appoint an arbitrator not included in that roster. The New Rules are not revolutionary in this issue and maintain the status quo.

At the same time, the New Rules introduce new regulation regarding assistants to the tribunal, or 'case reporter.' Anyone who has 'the requisite knowledge and practical skills in the field of the arbitral proceedings'

can now be included in the List of Reporters, and, thus, be appointed by the President of the ICAC to serve as a reporter (Article 10).

VII. Conclusion

Although the adoption of the 2018 ICAC Rules is a significant step forward in developing arbitration

procedural framework in the CIS and CEE regions and serving the needs of international businesses, a number of major issues has been left behind. It remains to be seen whether ICAC will stay on top of international arbitration developments and introduce amendments dealing with multi-contract disputes, consolidation, and a popular emergency arbitrator procedure. ■

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