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THE NEW ICC ARBITRATION RULES 2012

EMERGENCY MEASURES

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International Commercial Arbitration

- **The New ICC Arbitration Rules 2012 - Emergency Measures**

New arbitration rules have come in effect for ICC arbitrations commenced on or after January 1, 2012. These rules now contain provisions for an “*emergency arbitrator*” (article 29, Appendix V of the rules).

From now on, these provisions offer an alternative to the recourse to the National Courts for conservatory/interim measures.

The following very important point should be considered as far as these new rules are concerned. The “*emergency arbitrator provisions*” will automatically apply to any ICC arbitration proceeding after January 1, 2012. If a party does not wish to be covered by these provisions, it has to opt out and to be valid, this opting out must be specified at the outset, in the arbitration clause.

For the moment, we suggest that any party signing an arbitration clause under the ICC Rules should be prudent. We feel that in Quebec and in Canada, the parties should possibly wait to see how the experience of the emergency arbitrator provisions turns out before committing to this new procedure by default.

In such a case, the clause should read as follows:

All disputes arising out or in connection with the present contract shall be finally settled under the rules of application of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said rules. The emergency arbitrator provisions shall not apply.

[Underlining ours]



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It should be noted that, although the new emergency arbitrator rules specify that the emergency arbitrator provisions “are not intended to prevent any party for seeking urgent, interim or conservatory measures from a competent judicial authority at any time prior to making an application for such measures”, we are not completely clear on the effect these provisions would have on an eventual recourse for injunction in Canadian courts. Because of this uncertainty, we feel the parties should be very prudent and consider the situation before tacitly accepting emergency arbitration procedures in a new arbitration clause.

We will monitor the precedents that will clarify these new provisions in the meantime and update these comments as required.

Finally we should not forget that the commercial arbitration clause should be clearly drafted and that besides analysing the possibility of opting out for the “emergency arbitrator”, the parties should not forget to include provisions pertaining to:

1. The number of arbitrators (1 or 3);
2. The law governing the contract;
3. The place of arbitration;
4. The language of the arbitration; and
5. The venue or place of arbitration (which will determine the procedure rules that will apply).

For more information, please refer to www.iccwbo.org.