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ICC's New Mediation Rules: Mediation Steps out of the Shadow*

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Following the revision of its arbitration rules in 2012, the International Chamber of Commerce (ICC)¹ embarked on the revision of its other dispute resolution rules, including the 2001 ICC Amicable Dispute Resolution (ADR) Rules providing for settlement proceedings. The ICC unveiled its revised rules for settlement proceedings at the world-wide launch conference that took place in Paris on December 4, 2013.² The new ICC Mediation Rules,³ effective January 1, 2014, are a bold step for one of the oldest and most reputable international arbitral institutions⁴ toward endorsing mediation and thus are a reflection of its increasingly holistic approach to dispute resolution.⁵

* The views expressed and the statements made in this article are those of the author and may not be construed as creating any duty, liability, or obligation on the part of the ICC and its constituent bodies, including the International Court of Arbitration, the International Centre for ADR, and their respective Secretariats.

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1. The ICC is a non-profit, global business organization and home of the ICC International Court of Arbitration. The ICC's headquarters are in Paris, France, but it carries out its activities, including the administration of dispute resolution proceedings, around the world. *See generally* INT'L CHAMBER OF COM., <http://www.iccwbo.org> (last visited Jan. 13, 2014).

2. *ICC Hosts Conference To Mark World-Wide Launch of New Mediation Rules*, INT'L CHAMBER OF COM. (Sept. 17, 2013), <http://www.iccwbo.org/News/Articles/2013/ICC-hosts-conference-to-mark-world-wide-launch-of-new-Mediation-Rules/>.

3. *See generally* Int'l Chamber of Commerce, ICC Mediation Rules (2014), *available at* <http://www.iccwbo.org/products-and-services/arbitration-and-adr/mediation/rules/> (last visited Jan. 13, 2014).

4. The ICC International Court of Arbitration was founded in 1923. *See generally* *The Merchants of Peace*, INT'L CHAMBER OF COM., <http://www.iccwbo.org/about-icc/history/> (last visited Jan. 13, 2014). A 2010 survey conducted by Queen Mary University found that the ICC is the most preferred and widely used arbitration institution amongst general counsel and other corporate counsel from corporations across a range of industries and geographical regions and a significant number of corporations based in emerging markets. *See* SCH. OF INT'L ARB., 2010 INTERNATIONAL ARBITRATION SURVEY: CHOICES IN INTERNATIONAL ARBITRATION (2010).

5. *See generally* Calliope M. Sudborough, *The Dawn of the Holistic Dispute Resolution Era and the 2012 ICC Arbitration Rules*, 7 YOUNG ARB. REV. 21 (2012).

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I. Revision Process

Since 2001, the ICC has offered parties to a commercial contract the possibility of settling their disputes under the ADR Rules. The ADR Rules are stand-alone rules that give parties the possibility to choose from a range of settlement techniques, including mediation.⁶ The ICC International Centre for ADR (Centre), a separate body from the Secretariat of the International Court of Arbitration, administers proceedings under the ADR Rules. The stand-alone ADR Rules were an innovation because previously there was no set of ICC rules separate from the arbitration rules for parties seeking to settle their disputes amicably. Moreover, those who did wish to settle their disputes could only resort to conciliation as a settlement technique.⁷

In 2012, the ICC issued its newly revised arbitration rules, replacing the 1998 ICC Rules of Arbitration, and simultaneously decided to proceed with the revision of its other dispute resolution rules. The ICC body responsible for issuing and revising rules is the ICC Commission on Arbitration and ADR.⁸ The Commission is the ICC's think-tank on dispute resolution services and is composed of 700 members from ninety-two countries who are lawyers, in-house counsel, members of management, engineers, professors, arbitrators, experts, and mediators.⁹ The Commission assigned the job of revising the ADR Rules to a smaller taskforce and drafting group that consulted internally within the Commission as well as with external dispute resolution users and professionals during the revision process.¹⁰

Contrary to the revision of the 1998 ICC Rules of Arbitration, the revision of the ADR Rules was not considered urgent or in response to any new developments that had arisen. Rather, the revision of the ADR Rules was intended as a "check-up" after more than ten years of use to ensure that all was working well and to ensure continued "good health" in the future. Furthermore, the taskforce took a very conservative approach led by three guiding principles, (i) to only make changes that were genuinely necessary and useful ("if it's not broke, don't fix it"), (ii) changes must reflect practical developments in the field and the Centre's experience in administering cases, and (iii) maintain consistency with the language and provisions of the ICC Rules of Arbitration and its model clauses.¹¹

6. See Int'l Chamber of Commerce, Amicable Dispute Resolution Rules (2001).

7. Peter M. Wolrich, *ICC ADR Rules: The Latest Addition to ICC's Dispute Resolution Services*, ADR INT'L APPLICATIONS, ICC INT'L CT. OF ARB. BULL. 7, 9 (2001).

8. "ADR" was added to the Commission's name in July 2013. See *ICC Announces Newly Named Commission on Arbitration and ADR*, INT'L CHAMBER OF COM. (July 29, 2013), <http://www.iccwbo.org/News/Articles/2013/ICC-announces-newly-named-Commission-on-Arbitration-and-ADR/>.

9. The ICC Commission on Arbitration and ADR is the ICC's rule-making and research body for dispute resolution. See generally *Arbitration and ADR*, INT'L CHAMBER OF COM., <http://www.iccwbo.org/About-ICC/Policy-Commissions/Arbitration/> (last visited Dec. 30, 2013) (providing more information on the ICC Commission on Arbitration and ADR, which is the ICC's rule-making and research body for dispute resolution).

10. See *Introduction to the New ICC Mediation Rules*, 24 ICC INT'L CT. OF ARB. BULL., no. 2, Dec. 2013.

11. *Id.*

II. Most Notable Changes

Following the process described above, the Commission approved the ICC Mediation Rules (Mediation Rules) in May 2013. Although many of the features of the ADR Rules have remained essentially the same, there are some changes worth highlighting.¹²

The most obvious and notable change is the name of the new rules themselves. Whereas before the name of the ADR Rules was intentionally neutral to reflect the diversity of settlement techniques available for parties,¹³ the Mediation Rules clearly endorse mediation as a settlement technique.¹⁴ This change reflects the Centre's experience administering cases, as parties engaged in mediations in over 90 percent of cases administered under the ADR Rules.¹⁵ At the same time, the Mediation Rules maintain the flexibility of the ADR Rules by permitting parties to opt for a different settlement technique from mediation, should they wish to do so.

Another significant change is the creation of the Mediation Guidance Notes (Guidance Notes), which serve as an accessory tool to the ICC Mediation Rules.¹⁶ The Guidance Notes replace the Guide to ICC ADR (Guide), which is the companion booklet to the ADR Rules. Unlike the Guide, the Guidance Notes are not simply background information on the various provisions of the ADR Rules. As its title suggests, the Guidance Notes offer detailed assistance on the administrative and procedural questions parties may consider prior to and during mediation and, notably, in relation to any arbitration proceedings. Thus, the seventeen page booklet covers such topics as, *inter alia*, what is mediation, why mediation, mediation sessions, preparing for mediation, authority, and the relationship between mediation and arbitration proceedings.

The Mediation Rules have also removed the Centre's anonymity and enhanced its role in the conduct of mediation proceedings. Under the ADR Rules, there is no reference to the ICC body that will administer the proceedings. In fact, it was not clear under the ADR Rules whether or not the same secretariat administering ICC arbitration proceedings would also administer settlement proceedings under the ICC ADR Rules.¹⁷ Now, Article 1(1) of the Mediation Rules clearly states that the Centre administers proceedings

12. According to Hannah Tümpel, Senior Counsel and Manager of the Centre, "[t]here's no earth-shaking new change to the rules. The old ADR rules worked but we wanted to ensure that we take into consideration our lessons learned, having administered international commercial mediation cases since 2001." *New ICC Mediation Rules Unveiled at Global Launch Event*, INT'L CHAMBER OF COM. (Dec. 4, 2013), <http://www.iccwbo.org/News/Articles/2013/New-ICC-Mediation-Rules-unveiled-at-global-launch-event/>.

13. The possible settlement techniques parties can elect under the ADR Rules and the Mediation Rules include mediation, conciliation, neutral evaluation, mini-trial, any other settlement technique, or a combination thereof. The ADR Rules refer to the "Neutral," or the third person that facilitates the aforementioned settlement proceedings.

14. Where mediation was the default settlement mechanism should the parties fail to choose otherwise under the ADR Rules, the Mediation Rules presume that mediation shall be the settlement technique, unless the parties choose otherwise. Compare ADR Rules, *supra* note 6, art. 5(2), with ICC Mediation Rules, *supra* note 3, art. 1(3).

15. *Introduction to the New ICC Mediation Rules*, *supra* note 10.

16. The Foreword to the Guidance Notes describes them as a "practical companion to the ICC Mediation Rules." Int'l Chamber of Com., *Mediation Guidance Notes*, available at <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Mediation/Rules/Mediation-Guidance-Notes/> (last visited Jan. 13, 2014).

17. As mentioned in Section I above, the Centre administers ADR proceedings and is a separate body from the Secretariat of the ICC International Court of Arbitration. See generally *ICC International Centre for ADR*, INT'L CHAMBER OF COM., <http://www.iccwbo.org/About-ICC/Organization/Dispute-Resolution-Services/>

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filed under the Mediation Rules and that it is a separate administrative body within the ICC.¹⁸ Furthermore, the Mediation Rules expressly enable the Centre to use its dispute resolution expertise and international reputation to assist the parties in considering a proposal to refer their dispute to mediation under the Mediation Rules, should the parties have no prior agreement to do so.¹⁹ The Mediation Rules also give the Centre the power to unblock any procedural disagreement at the outset of the mediation between the parties with regard to the place of physical meetings for the mediation and the language(s) to be used in the mediation.²⁰ Although, in practice, the Centre will seek to assist the parties to reach agreement on such procedural issues, the ability of the Centre to decide, should agreement not be reached, ensures that such procedural hurdles do not prevent the parties from reaching the mediation table.²¹ Interestingly, the Centre may additionally propose to the parties that there be more than one mediator (co-mediators) in appropriate circumstances.²² To date, however, the Centre has not administered a case involving co-mediators, although it has administered mediations involving one or more neutral experts who assisted the mediator.

Of course, money matters, and this has been reflected in the Mediation Rules. Under the ADR Rules, the administrative fees were unrelated to the amount in dispute and capped at a maximum of U.S. \$10,000.²³ The Mediation Rules have now linked the maximum administrative expenses to the amount in dispute, thus allowing the ICC to recover its real costs of administering complex cases, while at the same time giving greater incentive to parties to mediate where the amount in dispute is lower.²⁴ This change brings the method of cost management of the administrative expenses of ICC mediation proceedings

ICC-International-Centre-for-ADR/ (last visited Jan. 13, 2014) (providing a complete description of the Centre).

18. Article 1(5) also mentions that the Centre is the only institution authorized to administer mediations or other settlement proceedings under the ICC Mediation Rules. ICC Mediation Rules, *supra* note 3, art. 1(5). Article 1(4) provides that the Centre may decide not to administer the proceedings. *Id.* art. 1(4).

19. *Id.* art. 3(1).

20. *Id.* art. 4(2).

21. Pursuant to Article 4(1) of the Mediation Rules, the Mediator can also decide the place of any physical meetings and the language(s) of the mediation, should the parties fail to agree. But it could potentially be damaging for the mediator's relationship with the parties should she make such a decision so early in the proceedings, before she has had the opportunity to gain the parties' confidence. Moreover, the Centre's experience shows that parties who have had at least the meeting with the Mediator have a higher rate of success. See Hannah Tümpel & Calliope Sudborough, *ICC's ADR Rules 2001–2010: Current Practices, Case Examples and Lessons Learned*, in 2 ADR IN BUSINESS: PRACTICE AND ISSUES ACROSS COUNTRIES AND CULTURES 255, 269 (Arnold Ingen-Housz ed., 2011).

22. According to Article 36 of the Guidance Notes, "[c]o-mediation may be used where there are several parties involved in the dispute, or where the parties wish to have the benefit of mediators from different cultural backgrounds or with different expertise and experience." *Mediation Guidance Notes*, *supra* note 16, art. 36.

23. ADR Rules, *supra* note 6, app. B.

24. Article 2 of the Appendix to the Mediation Rules provides that the Centre shall fix the administrative costs of the proceeding at its discretion but that the costs shall not normally exceed the maximum amounts assigned to each scale for amounts in dispute ranging from U.S. \$200,000 to U.S. \$100,000,000. ICC Mediation Rules, *supra* note 3, app. art. 2. For proceedings in which the amount in dispute is up to and including U.S. \$200,000, the maximum administrative costs are actually half the amount than under the ADR Rules (U.S. \$5,000 rather than U.S. \$10,000). Compare ICC Mediation Rules, *supra* note 3, app. art. 2 with ADR Rules, *supra* note 6, app. B. Article 2(2) of the Appendix to the Mediation Rules provides that where the amount in dispute is not stated, the Centre shall fix the administrative expenses in its discretion taking into

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closer to that of ICC arbitration proceedings, although at significantly lower cost.²⁵ The practice of fixing the mediator's hourly rate has remained unchanged, however, as it continues to be independent of the amount in dispute and is decided on a case-by-case basis by the Centre in consultation with the parties. A dramatically new exception to the ICC's mediator fee policy permits the parties and the mediator to agree that the Centre shall assign a single fixed fee for the whole proceedings.²⁶

The Mediation Rules are also accompanied by four alternative model clauses, two of which combine mediation with arbitration. One clause provides for mediation prior to any arbitration,²⁷ whereas the other provides for parallel mediation and arbitration.²⁸ The latter clause, expressly permitting parallel proceedings, does not exist in the ADR Rules and is therefore a new addition under the Mediation Rules. This addition reflects the Centre's experience administering cases in which parties increasingly want to resort to mediation during the course of arbitration proceedings,²⁹ and in fact the 2012 Arbitration Rules specifically suggest this possibility.³⁰

Another addition to the standard clauses reflects one of the newest features of the 2012 Arbitration Rules, the Emergency Arbitrator Rules.³¹ Where parties wish to have a multi-tiered clause providing for mediation followed by arbitration after the expiration of forty-five days or some other time limit, there are two clauses that allow the parties to explicitly

account all indications as to the amount in dispute and normally exceeding the maximum amount of U.S. \$20,000.

25. The ICC Arbitration Cost Calculator tool allows users to calculate the potential costs of arbitration proceedings by entering the amount in dispute and the number of arbitrators. For example, for an amount in dispute of U.S. \$10,000,000, the administrative expenses for arbitration with a sole arbitrator are estimated at U.S. \$57,515, whereas the administrative expenses for mediation are capped at U.S. \$15,000. This comparison excludes the fees of the arbitrator or mediator, although the mediator's fees are generally far less expensive than the arbitrator's fees by virtue of the quick nature of mediation proceedings. *Cost Calculator*, INT'L CHAMBER OF COM., <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/cost-and-payment/cost-calculator/> (last visited Jan. 13, 2014).

26. See ICC Mediation Rules, *supra* note 3, app. art. 3.

27. See *Suggested Clauses for ICC Mediation*, INT'L CHAMBER OF COM., cl. D, <http://www.iccwbo.org/products-and-services/arbitration-and-adr/mediation/suggested-clauses/> (last visited Jan. 13, 2014) (providing that "[i]n the event of any dispute arising out of or in connection with the present contract, the parties shall first refer the dispute to proceedings under the ICC Mediation Rules. If the dispute has not been settled pursuant to the said Rules within [45] days following the filing of a Request for Mediation or within such other period as the parties may agree in writing, such dispute shall thereafter be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration").

28. See *id.*, cl. C (providing that "(x) In the event of any dispute arising out of or in connection with the present contract, the parties shall first refer the dispute to proceedings under the ICC Mediation Rules. The commencement of proceedings under the ICC Mediation Rules shall not prevent any party from commencing arbitration in accordance with sub-clause y below. (y) All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration").

29. See Tümpel & Sudborough, *supra* note 21.

30. Article h(i), Appendix IV of the ICC Rules of Arbitration provides that one of the case management techniques that the arbitral tribunal can employ is to inform the parties that they may settle all or part of their dispute through any form of amicable dispute resolution methods, such as mediation under the ICC Mediation Rules. Int'l Chamber of Com., ICC Rules of Arbitration, app. IV art. h(i), *available at* <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/> (last visited Jan. 13, 2014).

31. See *id.* app. V.

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state whether they wish for the Emergency Arbitrator provisions to apply during the mediation time limit or thereafter.³²

Finally, parties who have contracts providing for settlement proceedings under the ADR Rules may wonder whether the ADR Rules or the Mediation Rules will apply to disputes submitted after January 1, 2014. Accordingly, the Mediation Rules provide that any written agreements made prior to January 1, 2014, to submit any dispute to proceedings under the ADR Rules shall be deemed to refer to the Mediation Rules unless any party objects, in which case the ADR Rules shall apply.³³ Of course, any dispute resolution clause referring to the ADR Rules in a contract signed after January 1, 2014, shall be deemed in all cases to refer to the Mediation Rules.

III. Mediation Is out of the Closet

By naming the new ICC rules for settlement proceedings “the Mediation Rules,” providing the Centre with explicit power to assist the parties in setting up mediation proceedings, and devising dispute resolution clauses that allow parties to combine mediation and arbitration in parallel, mediation has stepped out of the shadow cast by the institution’s reputation as an arbitral institution. In January 2013, the Paris Bar Association announced 2013 was the Year of Mediation.³⁴ For the ICC, that was indeed the case.

32. See *Suggested Clauses for ICC Mediation*, *supra* note 27 (addressing specific issues concerning the emergency arbitrator provisions).

33. See ICC Mediation Rules, *supra* note 3, art. 10(1).

34. *Leading Women in ADR*, ARBITRAL WOMEN NEWSL., (Arbitral Women, Hong Kong), Summer 2013, at 2, available at <http://www.arbitralwomen.org/files/founder/03082028272499.pdf>.