

Dispute Resolution Hotline

January 01, 2021

2021 ICC ARBITRATION RULES COME INTO FORCE TODAY!

BACKGROUND

The International Chamber of Commerce ("ICC") launched the Revised Rules of Arbitration ("2021 ICC Rules"), on 1 December 2020.¹ The 2021 ICC Rules enter into force on January 1, 2021. The ICC Arbitration Rules 2017 ("2017 ICC Rules") will continue to apply to cases registered prior to January 1, 2021.² The amendments in the 2021 ICC Rules are a step towards greater efficiency, flexibility and transparency in ICC arbitrations.³

Notably, the following revisions have been undertaken by way of the 2021 ICC Rules:

1. Joinder of Parties and Consolidation of Proceedings;
2. Disclosure of Third-Party Funding;
3. Conflict of Interest and Integrity;
4. Provisions for Investment Treaty Arbitrations;
5. Remote Hearings;
6. Additional Awards;
7. Increase in Threshold for Expedited Arbitrations;
8. Governing Law and Settlement of Disputes

We are glad to have comments and inputs from leading arbitrators, practitioners and ICC members around the world on the implications of the 2021 ICC Rules.

NOTABLE REVISIONS

I. Joinder of Parties and Consolidation of Proceedings

Under the 2017 ICC Rules, additional parties could be joined to the arbitration proceedings after appointment or confirmation of Arbitral Tribunal **only upon the agreement of all the parties and the additional parties.**⁴

The 2021 ICC Rules have inserted Article 7(5) to allow for the joinder of additional parties to be decided by the Arbitral Tribunal subject to the additional party accepting the constitution of the arbitral tribunal and agreeing to the Terms of Reference, where applicable. In making its decision, the arbitral tribunal is required to consider all relevant circumstances.⁵ Thus, additional parties may now be permitted to be joined by the arbitral tribunal without requiring the agreement of all the parties.

Article 10(b), which pertains to consolidation of proceedings has also been amended by the 2021 ICC Rules. The amendment provides much needed clarity with respect to consolidation being allowed: (i) where all parties agree to consolidation; (ii) where all claims are made under the same arbitration agreement or *agreements between different parties*; and (iii) *claims involving different parties and may not be under same arbitration agreement, provided that the dispute arises in connection with the same legal relationship and the arbitration agreements are compatible.*⁶ Thus, the 2021 ICC Rules now clarify that claims that are made under similar arbitration agreement(s) can now be consolidated into a single arbitration proceeding. This inclusion is similar to the newly introduced LCIA Rules 2020.⁷

Guy Pendall, Partner and Head of Commercial, Regulatory and Disputes Practice at CMS, London states "The amendments to the joinder and consolidation provisions reflect the shift in international practice to provide more practical solutions to parties involved in complex projects or transactions. Empowering a tribunal to join a third party to proceedings, provides a simple procedural solution to what may be needed for certainty in the proceedings. It is not always the case that joinder of a party is a controversial step, and this amendment facilitates such a joinder where all parties agree. The updated consolidation mechanism for proceedings between the same parties even where they are not made under the same arbitration agreement(s), represents a small drafting change, but provides another practical solution for disputes arising under different agreements between the same parties, typically where the disputes arise in relation to the same project or transaction. This trend can also be seen in the recent amendments made to the LCIA Rules in what is now Article 22A. There will be many drivers for the legitimate separation of disputes into separate arbitral proceedings between the same or connected parties, but inflexible arbitral rules should not be one of them. Facilitating efficient joinder or consolidation, with appropriate safeguards, is an important element of modern arbitral practice."

II. Disclosure of Third-Party Funding

Under the 2021 ICC Rules, parties are now required to disclose the presence of third-party funding arrangements,

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i.e., “of the existence and identity of any non-party which has entered into an arrangement for the funding of claims or defences and under which it has an economic interest in the outcome of the arbitration”.⁸ This change has been brought in to assist prospective arbitrators in complying with their duties of independence and impartiality during the arbitration and obligation on parties to disclosure funding arrangements. Introduction of this specific provision is in sync with their earlier note⁹ to check conflict of interest between arbitrators and any party having a direct economic interest.

Quentin Pak, Director at Burford Capital, Singapore welcomed the new rules and states that “*they support the ICC’s desire to ensure impartiality and independence of arbitral tribunals and understand their view that greater transparency around the presence of arbitration finance has a role to play. Indeed, the new Article 11(7) of the 2021 Arbitration Rules reflects existing ICC practice and the fact that many parties already disclose the fact of external financing voluntarily.*”

However, the disclosure of arbitration finance may be misused by respondents to create expensive and time-wasting frolics and detours. For instance, although security for costs applications have been rare in ICC arbitrations, the new Article 11(7) may lead to an increase in frivolous applications. With that in mind, ICC tribunals may become more willing under Article 38(5) to take into account such applications in making decisions on costs against respondents. Furthermore, since respondents will now be cognizant of the use of arbitration finance very early on in an arbitration, tribunals may be more likely to permit successful claimants to recover the costs of funding under Article 38(1).”

III. Conflict of Interest and Integrity

Nicola Peart, Associate, Three Crowns LLP, Washington and Member of IBA Arb 40 Sub-Committee, commented that “*the ICC Court is the world’s leading arbitration institution, and it works at the forefront of developments in international arbitration procedure. For example, Three Crowns recently represented the ICC in the UK Supreme Court in the case of Halliburton Company v Chubb Bermuda Insurance Ltd & Ors [2020] UKSC 48, to provide an international and independent perspective on the question of when arbitrators need to disclose appointments in multiple references involving one common party. The recent updates to the ICC’s rules demonstrate the ICC’s focus on ensuring its rules reflect the latest procedural developments in international arbitration.*”

The 2021 ICC Rules have strengthened the integrity of the arbitration process by including a new provision, Article 17(2), which provides arbitral tribunals the power to take necessary measures to avoid conflict of interest of an arbitrator arising from a change in party representation. The arbitral tribunal can undertake measures after providing the parties an opportunity to comment (in writing) within a suitable time period. These measures can include exclusion of the new party representative from participating in whole, or a part of, the arbitration proceedings.¹⁰ Thus, the arbitral tribunal has now been vested with powers to exclude new counsels representing the parties from the arbitration proceedings, or a part thereof, in the event of a conflict of interest.

Article 12(9) has also been inserted, which provides the International Court of Arbitration of the International Chamber of Commerce (“**Court**”) with powers to appoint each member of the arbitral tribunal, notwithstanding the agreement between the parties on the arbitral tribunal’s constitution, to avoid a significant risk of unequal treatment and unfairness that may affect the validity of the award.¹¹ The interpretation of the term “*exceptional circumstances*” for Court to intervene is open to intervention and will be adjudicated on a case-to-case basis. Thereby, the Court now has powers to step in and appoint the arbitral tribunal in case the appointment of arbitrators as per the arbitration agreement between the parties would result in unequal treatment and unfairness that may affect the validity of the resultant award. Both the provisions have been introduced with the idea to bring in more transparency and avoid arbitrator challenges.

IV. Provisions for Investment Treaty Arbitrations

The 2021 ICC Rules provide two new provisions pertaining to Investment Treaty Arbitrations. Article 13(6) has been inserted to ensure that in a treaty arbitration, unless the parties agree otherwise, no arbitrator shall have the same nationality of any party to the arbitration.¹² Further, Article 29(6)(c) now provides that the ‘Emergency Arbitrator Provisions’ under the 2021 ICC Rules will not be applicable to applications from arbitration agreements arising from a treaty,¹³ thus clarifying the 2017 ICC Rules.

V. Remote Hearings

The 2021 ICC Rules have modified Article 26 (Hearings) to allow for hearings to be conducted remotely by videoconference, telephone or other appropriate means of communication.¹⁴ The 2017 ICC Rules did provide the Tribunal with the discretion to conduct virtual hearings as clarified in their earlier Guidance Note¹⁵, the new provision codifies the discretion. This change will cater to the efficiency of arbitration given the risks of travel due to the Covid-19 pandemic.

The new provision encourages virtual and remote hearings in arbitration based on request of parties, at the same time giving some discretion to the Arbitral Tribunal to decide based on relevant facts and circumstances. While the newly constituted ICCA Task Force is currently deliberating the question, “*Does a Right to a Physical Hearing Exist in International Arbitration?*”, this new provision is aimed at moving forward with the changing times.

Michael Cartier, Partner at Walder Wyss notes that “*Even without the new wording of the 2021 ICC Rules, hearings have of course already been conducted by way of videoconference. However, previously remote hearings were often only considered as a second-best option if a witness could otherwise not participate. COVID-19 has led to a shift in perception due to the large-scale adoption of videoconferencing in business life going hand in hand with technical improvements (bandwidth, quality of sound and video) making hearings by videoconference currently the default rather than the exception. Post COVID-19, video conferences will remain an important tool in the arbitrator’s toolbox, and this is rightly reflected in the 2021 ICC Rules.*”

Keeping pace with these changes, the 2021 ICC Rules have also introduced amendments to written communications

exchanged between parties,¹⁶ aligning to a more technology-oriented and environment-friendly form of arbitration proceedings.

Michael further notes that “*Arbitration has inexorably been shifting from paper to electronic over the past years. From paper only filings, to simultaneous filing on paper and email, to determinative filing by email followed up by a courtesy hardcopy, to only electronic filing. This development has been fueled due to additional features available by electronic files (full text search, hyperlinked eBriefs) and technical devices (tablets, dual screens) on the one hand, but also the ever-increasing amount of data and hence exhibits that can be submitted on the other hand. The 2021 ICC Rules do away of the anachronism of requiring hardcopies when parties invariably go for an electronic only arbitration.*”

VI. Additional Awards

The 2021 ICC Rules have also inserted a provision for additional awards. Parties can now make an application, within 30 days of receipt of the award, for any additional award on the claims made in the arbitration which the arbitral tribunal has omitted to decide.¹⁷ This amendment should result in increasing the enforceability of ICC arbitral awards and compliance with due process.

VII. Increase in Threshold for Expedited Arbitrations

The monetary threshold for applying the ‘**Expedited Procedure**’ provisions of the 2021 ICC Rules (Article 30 and Appendix VI), has been increased from USD 2 Million to USD 3 Million.¹⁸ Thus, the scope of application has been enhanced to permit disputes under USD 3 Million to be adjudicated under the Expedited Procedure.

VIII. Governing Law and Settlement of Disputes

The 2021 ICC Rules have provided clarity on the applicable governing law for claims arising out, of or in connection with, the administration of the arbitration proceedings by the Court under the 2021 ICC Rules. Article 43 has been inserted clarifying that such claims shall be governed by French law and settled by the Paris Judicial Tribunal (Tribunal Judiciaire de Paris) in France, having exclusive jurisdiction.¹⁹

CONCLUSION

The changes in the 2021 ICC Rules have certainly aimed to improve transparency and the integrity of the arbitral process, particularly by requiring the disclosure of third-party funding and strengthening the provisions on conflicts of interest. Further, the amendments on joinder and consolidation should be helpful in improving the flexibility and efficiency of the arbitral process. The 2021 ICC Rules have also adapted to the current global scenario by codifying the availability of remote hearings during the arbitral process, keeping pace with the ‘new normal’. The recent amendments solidify the ICC’s presence as the leading arbitral institution.

— Bhavana Sunder, Payel Chatterjee & Vyapak Desai

You can direct your queries or comments to the authors

¹ ICC Rules of Arbitration, 2021, available at: https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/rules-of-arbitration-2021/#article_7.

² ICC Arbitration Rules, 2017, available at: https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_7.

³ ICC Court President Alexis Mourre, available at: <https://iccwbo.org/media-wall/news-speeches/icc-unveils-revised-rules-of-arbitration/>.

⁴ Article 7, 2017 ICC Rules.

⁵ Article 7(5), 2021 ICC Rules; Relevant circumstances would include whether the tribunal has prima facie jurisdiction over the additional party, the timing of the request for joinder, possible conflicts of interest and the possible impact of the joinder on the arbitral procedure

⁶ Article 10(b), 2021 ICC Rules.

⁷ For a detailed reading on the LCIA Rules please refer to our earlier hotline available at https://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/revised-arbitration-rules-of-lcia-new-age-arbitration.html?no_cache=1&cHash=e7242c7c289edba77488fce82e9872ca

⁸ Article 11(7), 2021 ICC Rules.

⁹ ICC’s Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration

¹⁰ Article 17(2), 2021 ICC Rules.

¹¹ Article 12(9), 2021 ICC Rules.

¹² Article 13(6), 2021 ICC Rules.

¹³ Article 29(6)(c), 2021 ICC Rules.

¹⁴ Article 26(1), 2021 ICC Rules.

¹⁵ <https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf>

¹⁶ Articles 3(1), 4(4)(b) and 5(3) of the 2021 ICC Rules

¹⁷ Article 36(3), 2021 ICC Rules.

¹⁸ Article 30 and Appendix VI, 2021 ICC Rules.

¹⁹ Article 43, 2021 ICC Rules.

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