

ARTICLE

A new year, a new set of arbitral rules: a summary of the key changes introduced in the 2021 ICC arbitration rules

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Introduction

2021 has brought hope and new changes. Such new changes also extend into the international arbitration world. At the start of the new year, the International Chamber of Commerce (“ICC”) implemented the 2021 Arbitration Rules (“2021 ICC Rules”), which applies to cases filed from 1 January 2021 onwards. The 2021 ICC Rules is a culmination of the ICC’s attempt to meet the current and future needs of the arbitration community. Some of the key amendments as reflected in the 2021 ICC Rules relate to the following areas:

- a. Joinder of parties and consolidation of arbitration proceedings;
- b. Expedited arbitration procedure;
- c. Remote hearings;
- d. Paperless filings;
- e. Obligation to disclose funding arrangements; and
- f. Limits on modifications to the counsel team after the tribunal has been constituted.



The revisions to the ICC Arbitration Rules are aimed at increasing the flexibility, efficiency and transparency of ICC arbitrations. The revisions also help to plug certain gaps in the 2017 ICC Rules.

Increase in efficiency

Joinder of parties and consolidation of arbitration proceedings

Pursuant to the 2017 ICC Rules, no additional party could be joined after the constitution of the arbitral tribunal has been completed, unless all parties (including the party being joined) agree to the joinder. The rules have since been amended to include a new Article 7(5), which allows any party to the arbitration to submit a Request for Joinder even after the arbitral tribunal has been constituted. It is not necessary for all other parties to agree to the Request for Joinder. The only caveat is that the party that is being joined to the arbitration must accept the constitution of the arbitral tribunal and agree to the Terms of Reference (where applicable).

In deciding whether to allow the Request for Joinder, the arbitral tribunal must consider “all relevant circumstances”. This would include (i) whether the arbitral tribunal has *prima facie* jurisdiction over the additional party, (ii) the timing of the request, (iii) possible conflicts of interests, and (iv) the impact of the joinder on the arbitration procedure. This new Article 7(5) increases the efficiency of ICC arbitrations as it will help to reduce the occurrence of parallel arbitration proceedings and the risk of conflicting decisions.

In relation to the consolidation of arbitration proceedings, Article 10(b) of the 2021 ICC Rules has been revised to clarify that consolidation of two or more arbitrations into a single arbitration may be permitted where all of the claims are made under the same arbitration agreement or agreements (emphasis added). This resolves the ambiguity as to whether claims arising out of different but related underlying transactional agreements containing identical arbitration agreements, can be consolidated.

In situations where the wording of the arbitration agreements are not identical, the revised Article 10(c) of the 2021 ICC Rules makes it clear that two or more arbitrations can be consolidated when the claims in the arbitrations are not made under the same arbitration



agreement or agreements, but (i) the arbitrations are between the same parties, (ii) the disputes in the arbitrations arise in connection with the same legal relationship, and (iii) the various arbitration agreements are found to be compatible. To ensure that parties do not abuse Article 10(c) of the 2021 ICC Rules, it is important that the terms of the various arbitration agreements (e.g. the seat of the arbitration and procedure for constituting the arbitral tribunal) are scrutinized closely, so as to make sure that the arbitration agreements are indeed compatible. The amendments to both Articles 10(b) and 10(c) of the 2021 ICC Rules increase the efficiency of arbitration proceedings as disputes arising out of related transactions can be dealt with in a single arbitration proceeding, instead of parties having to incur the time and cost of commencing multiple arbitration proceedings.

Increase in the threshold value of disputes to be sent to expedited arbitration

Under the 2017 ICC Rules, the expedited procedure would automatically apply to arbitrations where the amount in dispute is USD2 million and below, unless the parties have expressly opted out of the expedited procedure. Pursuant to the revised Article 1(2) of Appendix VI of the 2021 ICC Rules, the threshold for the expedited procedure has now been increased from USD2 million to USD3 million. Unlike the other amendments to the 2021 ICC Rules which apply to cases received by the ICC from 1 January 2021, the revised Article 1(2) of Appendix VI only applies to arbitration agreements which were concluded on or after 1 January 2021. Increasing the threshold for expedited proceedings further enhances the expeditious nature of ICC arbitration proceedings as it allows more disputes to be resolved in a faster and more cost-efficient manner.

Additional awards

Pursuant to the 2017 ICC Rules, the arbitral tribunal could only render a correction or interpretation of its final award, and was unable to issue an additional award for claims which were inadvertently omitted in the final award. The new Article 36(3) of the 2021 ICC Rules now allows for any party to put in a request within 30 days from the date of receipt of the award, for the arbitral tribunal



issue an additional award, so as to rule on claims that were raised in the arbitral proceedings but were omitted in the award. This will help avoid the possibility of the final award from being set aside for *infra petita* reasons, which further promotes efficiency as it helps to avoid delays allowing parties to pursue their rights and incurring unnecessary additional costs related to a setting aside proceeding.

Higher degree of flexibility

Virtual hearings

Before the amendments to the ICC Rules, Article 25(2) of the 2017 ICC Rules provided that the tribunal shall hear the parties together in person if any of them so request. As a result of this wording, during the Covid-19 pandemic, there was some uncertainty as to whether hearings could take place virtually. Fortunately, the ICC has plugged the gap by introducing a new Article 26 in the 2021 ICC Rules, which specifically allows for hearings to be conducted by physical attendance, or remotely by videoconference, telephone or other appropriate means of communication. This introduces greater flexibility in the manner in which hearings are conducted and allows for parties' to ensure their voices are heard and cases are plead even if they are prevented from traveling physically to a hearing.

Notwithstanding this revision, it is important to note that while the arbitral tribunal has the discretion to conduct remote hearings, the tribunal remains under an obligation to consider all relevant facts and circumstances and to consult with the parties before deciding on the format of the hearing. This is so as to ensure that procedural fairness is not unduly compromised.

Paperless filings

More often than not, the amount of documents involved in arbitration proceedings can be very voluminous. The 2017 ICC Rules provided that pleadings and written communications shall be supplied to each party, each arbitrator and the Secretariat. In practice, most of the pleadings would be submitted in hard copies. However, Article 3(1) of the 2021 ICC Rules has been amended to require that pleadings and written communications merely be sent to each party, the arbitrator and the Secretariat without specifying the mode in which the documents have to be sent. The revised wording



for Article 3(1) in the 2021 ICC Rules leaves it open for parties to submit documents electronically, allowing firms to take a bigger step towards paperless filings, which allows for more flexible filings.

Greater fairness and transparency

Parties to disclose third party funding agreements under which the funder has an economic interest in the outcome of the arbitration

Third party funding for arbitration has become a common occurrence over the last years. Prior to the 2021 ICC Rules, the ICC did not address the issue of third party funding. This has now changed. Article 11(7) of the 2021 ICC Rules requires each party to promptly inform the Secretariat, the arbitral tribunal and the other parties, 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 the funder has an economic interest in the outcome of the arbitration. The rationale behind this provision is to assist prospective arbitrators in fulfilling their obligations and avoiding a conflict of interest with a party funding the arbitration, thereby ensuring greater transparency.

Parties to promptly disclose changes in party representation after the tribunal is constituted

The new Article 17(1) of the 2021 ICC Rules codifies the usual practice of the Secretariat that each party must promptly inform the Secretariat, the arbitral tribunal and the other parties of any changes in its representation. This increases the transparency of proceedings, as it ensures that parties are properly notified of any changes in party representation. Further, Article 17(2) empowers the arbitral tribunal to take any measure necessary to avoid a conflict of interest of an arbitrator arising from a change in party representation, including the exclusion of new party representatives from participating in whole or in part in the arbitral proceedings. The aim of this provision is to ensure the fairness of arbitral proceedings, and hopefully, this



will deter parties from deploying tactical maneuvers at the eleventh hour, thereby delaying or frustrating the arbitral proceedings.

Other noteworthy amendments

Restrictions imposed on treaty-based disputes

First, Article 29(6) of the 2021 ICC Rules makes it clear that the emergency arbitrator provisions does not apply to disputes arising from a treaty. This amendment is a codification of the ICC's existing practice, as many states and/or state-owned entities are usually unable to meet the short timelines imposed as a result of such emergency measures.

Second, the new Article 13(6) of the 2021 ICC Rules provides that whenever the arbitration agreement upon which the arbitration is based on arises from a treaty, and unless the parties agree otherwise, no arbitrator shall have the same nationality of any party to the arbitration. Previously, under the 2017 ICC Rules, only the president of the arbitral tribunal and sole arbitrators had to be of a different nationality. The new amendment ensures the neutrality of the arbitrator in treaty-based disputes, which is a vital component of investment arbitrations given the issues that are likely to be put before the arbitral tribunal and implications of the arbitral tribunal's decisions on public interest.

Power of the ICC Court to appoint the tribunal in exceptional circumstances

Perhaps the most controversial amendment to the 2021 ICC Rules is the inclusion of the new Article 12(9). This new provision builds upon the existing Article 12(8) of the ICC Rules, which allows the ICC Court to appoint each member of the arbitral tribunal only in disputes (i) involving multiple parties or where an additional party has been joined and (ii) in the absence of a joint nomination or agreement amongst the parties. In line with the landmark decision of French Cour de Cassation in *Siemens v. BKMI and Dutco*, the new Article 12(9) grants the ICC Court a broad scope of power to



disregard the agreement by the parties on the method of constitution of the arbitral tribunal in exceptional circumstances (e.g. if the arbitration agreement itself was unconscionable), and to appoint each member of the arbitral tribunal, so as avoid a significant risk of unequal treatment and unfairness. With this new provision, the ICC seeks to introduce an additional safeguard for parties' equality in the constitution of the arbitral tribunal, and to avoid the risk of unequal treatment or unfairness which may in turn impact the validity of the arbitral award.

It is not clear from the 2021 ICC Rules what would constitute "exceptional circumstances". However, one would expect that the power conferred on the ICC Court pursuant to Article 12(9) should be used sparingly. This is because the exercise of this power would be tantamount to overriding the party's ability to nominate their preferred choice of arbitrator, which is one of the key features of arbitration.

Conclusion

Overall, the amendments to the 2021 ICC Rules are to be welcomed, and reflect how the ICC always endeavors to respond promptly to the needs of the international arbitration community. The new amendments will no doubt further strengthen the ICC's position as one of the most popular choices for parties in complex cross-border transactions. Nonetheless, it remains to be seen how the ICC will implement and enforce some of the new provisions, especially the amendments aimed at bringing about greater transparency.

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