The ICC Publishes Revised Rules for 2021

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By: Théobald Naud | Séréna Salem | Camelia Aknouche

The International Chamber of Commerce (the “ICC”) has revised its Arbitration Rules with the new set of rules set to enter into force on 1 January 2021. The 2021 Rules, currently in draft form, will apply to all cases submitted to the International Court of Arbitration of the ICC from that date on (unless the arbitration agreement provides otherwise).

ICC Court President Alexis Mourre explains that the revision is intended to “mark a further step towards greater efficiency, flexibility and transparency” – a motto that also underlined the previous revision of the Rules in 2017.

We highlight below the most significant changes that look to be introduced in the 2021 Rules:

Joinder of additional parties in the course of the proceedings (Article 7(5))

Previously, no additional party could be joined after the confirmation or appointment of any arbitrator, unless all parties otherwise agreed (Article 7(1) of the 2017 ICC Rules). The 2021 Rules introduce more flexibility by allowing the tribunal, after it is constituted, to rule on a Request for Joinder on condition that the additional party (i) accepts the constitution of the arbitral tribunal and (ii) agrees to the Terms of Reference where applicable (Article 7(5) of the 2021 Rules).

In deciding whether to allow the joinder of the additional party where not all parties agree, the arbitral tribunal will notably consider whether it has “prima facie jurisdiction over the additional party, the timing of the Request for Joinder, possible conflicts of interest and the impact of the joinder on the arbitral procedure”.

According to the ICC, this revision will make the Rules “even more suitable” to complex, high-value, multi-party and multi-contract arbitrations.

Consolidation of cases in presence of different arbitration agreements (Article 10(b))

The ICC announces that Article 10(b) of the 2021 Rules will allow “the consolidation of cases in presence of different parties”, which should also increase the attractiveness of the ICC Rules for complex parallel disputes.

This change is not immediately clear from the proposed wording of Article 10(b) of the draft 2021 Rules, which refers only to the possibility to consolidate two or more cases under the Rules into a single arbitration where “all of the claims in the arbitrations are made under the same arbitration agreement or agreements”, whereas the 2017 Rules referred to “arbitration agreement” in the singular. It is expected that this language will be clarified before the 2021 Rules are finalized.

However, it appears the ICC is also introducing a change to Article 10(c), which will allow the consolidation of cases in between the same parties, even where the underlying arbitration agreements are not the same. Indeed, the 2017 Rules only envisaged the consolidation of cases in between the same parties “under more than one arbitration agreement”, which raised the question of whether these agreements necessarily had to be worded the same. The
2021 Rules appear to clarify the point.

Disclosure of third-party funding arrangements (Article 11(7))

There has been a marked tendency in recent years for more transparency in relation to third-party funding arrangements. One particular concern is the consequences of their implication on the assessment of the actual or perceived independence of arbitrators.

In 2014 already, the IBA Guidelines on Conflicts of Interest sought to address this concern by extending the parties’ duty of disclosure to any relationship between “the arbitrator and any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration”.

Article 11(7) of the 2021 Rules will also address this requirement by imposing on the parties a duty to “promptly” reveal the existence and the 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”.

ICC Court’s ability to disregard unconscionable arbitration agreements in relation to the constitution of arbitral tribunals (Article 12(9))

Article 12(9) of the 2021 Rules grants the ICC Court the new power, in “exceptional circumstances”, to disregard the agreement of the parties on the method of constitution of the arbitral tribunal “to avoid a significant risk of unequal treatment and unfairness that may affect the validity of the award”. In such exceptional circumstances, the ICC will itself appoint “each member of the arbitral tribunal”.

Exclusion of new counsel to preserve tribunal independence (Article 17(2))

The 2021 Rules further introduce the power of arbitral tribunals 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 a new party representatives from participating in whole or in part in the arbitral proceedings”.

This provision, which is the equivalent to Article 18(4) of the LCIA Arbitration Rules, is designed to protect the integrity of arbitration proceedings and to avoid the introduction of new counsel for the purpose of upsetting the conduct of the proceedings.

Additional Awards

The 2021 Rules introduce a provision on additional awards for claims on which the arbitral tribunal initially omitted to decide. Article 36(3) will grant parties a period of 30 days after the receipt of the award in which to apply for an additional award. The tribunal will then grant the other partie(s) the possibility to submit comments on the application within “a short time-limit, normally not exceeding 30 days”, and issue a decision on the application no “later than 30 days following the expiry of the time limit for the receipt of any comments from the other party or within such other period as the Court may decide”.

This addition mirrors similar provisions of other arbitration institutions with growing popularity such as the Article 40 of the HKIAC Administered Arbitration Rules and Article 33 of the SIAC Rules.

Exclusion of arbitrators of the same nationality of the parties and of emergency arbitration in investor-State disputes

One of the key developments in the 2021 Rules is the addition of provisions applying only to arbitration arising under a treaty, which in the vast majority of cases will concern arbitration between a State and a foreign investor under an investment treaty.

Article 13 of the 2021 Rules requires the appointment of arbitrators who do not have the same nationality of any party to the arbitration “unless the parties agree otherwise”. The ICC indicates that this provision is aimed at ensuring “complete neutrality of the tribunal in cases involving the public interest”.

Separately, Article 29(6)(c) excludes the application of the ICC’s Emergency Arbitrator Provisions to treaty-based arbitrations.

Expanded scope of application of the Expedited Procedure (Article 30 and Annex VI)
The 2021 Rules expand the scope of application of expedited arbitration provisions in light of the success encountered by the ICC with this accelerated procedure. The threshold allowing parties to opt-out from the procedure is raised from USD2 million to USD3 million, although the ICC Court will continue to assess on a case-by-case basis whether the application of these rules is suitable.

**Electronic Communications and Virtual Hearings**

The 2021 Rules confirm the trend towards the increasing use of telephonic and videoconference hearings, which have seen a surge in numbers in the context of the ongoing sanitary crisis. In keeping with the ICC’s Note on Possible Measures Aimed at Mitigating the Effects of the Covid-19 Pandemic including guidance on the organization of remote hearings, Article 26(1) of the 2021 Rules provides that tribunals may, “after consulting the parties, and on the basis of the relevant facts and circumstances of the case”, decide that the hearings would be conducted “remotely by videoconference, telephone or other appropriate means of communication”.

1 The text, which is currently subject to editorial corrections, should be published in final form on 1 December 2020. Access the current version.

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**AUTHORS**

**Théobald Naud**  
Partner  
Paris | T: +33 1 40 15 24 00  
theobald.naud@dlapiper.com

**Séréna Salem**  
Senior Associate  
Paris | T: +33 1 40 15 24 00  
Serena.Salem@dlapiper.com