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International Arbitration Focus Team

December 2020

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ICC Arbitration Rules 2021

New Arbitration Rules of the International Court of Arbitration ("**Court**") of the International Chamber of Commerce ("**ICC**") will enter into force on 1 January 2021 and will apply to proceedings commenced after that date ("**2021 Rules**").

Though still subject to editorial corrections, the published text of the 2021 Rules unveils some notable updates from its predecessor (the "**2017 Rules**"). Our International Arbitration Focus Team weighs in on them.

Joinder of additional parties may be decided by arbitral tribunals, absent all parties' consent

The 2021 Rules introduce the possibility for a party to obtain a joinder of an additional party even without the consensus of all other parties involved in the arbitration. The 2021 Rules do away with the consensus requirement imposed by Article 7 of the 2017 Rules, by adding a fifth paragraph to this provision, whereby **requests for joinder filed by one party after appointment or confirmation of any arbitrator are to be decided by the tribunal** (once constituted), subject only to the third party accepting the *status quo* of the arbitration, *i.e.,* the constitution of the tribunal and the agreed Terms of Reference.

> This amendment is welcome, especially in multi-party cases, as a party's (potentially arbitrary) reasons for opposing joinder will now fall under the scrutiny of the tribunal.

The latter shall consider "*all relevant circumstances*", including its *prima facie* jurisdiction over the third party and the disruption that its joinder could cause to the proceedings. Such decision does not prevent the tribunal from later ascertaining whether the new party is indeed a party to the *arbitration agreement*, which might be a controversial issue. This approach is in line with the path chosen by competing arbitration institutions such as

the LCIA,[1] the Swiss Chamber,[2] and the VIAC.[3] However, the 2021 Rules still prevent additional parties from submitting their own motion to be joined in the arbitration, maintaining the requirement for a request for joinder to be filed by an existing party of the arbitration proceedings.

"Dematerialization"

As a response to the Covid-19 pandemic, and following the *ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic*, the ICC will move towards the primacy of electronic pleadings, communications, and documents, and specific provision for remote hearings.

In particular, Article 3(1) of the 2021 Rules has deleted the requirement to file all pleadings and communications in hard copy for the different parties involved in the arbitral proceedings. The same amendment has been reflected with regards to the Request for Arbitration (Article 4(4)(b)) and to the Answer to the Request (Article 5(3)), which shall be sent in hard copy only if the filing party "*requests transmission thereof by delivery against receipt, registered post or courier*".

Article 26(1) confers upon the tribunal the jurisdiction to hold hearings – if the circumstances do not permit their celebration in person – virtually or remotely, or by any "*other appropriate means of communication*", thus leaving the provision open to the possibility of conducting hearings through any new technology that may be implemented or discovered over time. This express acknowledgement, coupled with the amendment in Article 25(2), which no longer provides that "*the arbitral tribunal shall hear the parties together in person*", will do much to deter any party from attempting to delay the proceedings by refusing a virtual hearing.

Third-party funding

The 2021 Rules impose a disclosure requirement on the existence of third-party funding: at the outset of an arbitration, the parties must promptly disclose to the Court's Secretariat, "*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*" (Article 11(7)).

While the influence of outside funding sources has been seen as a potential threat to the integrity of arbitration proceedings and the impartiality and independence of arbitral tribunals, major arbitral institutions have not until very recently taken clear positions on third-party funders. This approach is however changing, as the 2021 Rules confirm. The ICC has followed the HKIAC[4] by introducing into its Rules a requirement to

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[1] Article 22(1)(x) of the LCIA Rules of 2020.
[2] Article 4(2) of the Swiss Chambers' Rules of 2012.
[3] Article 14(1) of the VIAC Rules of 2018.
[4] Article 44 of the HKIAC Rules of 2018.

disclose the existence and identity of a third-party funder.

Constitution of the arbitral tribunal by the Court

The 2021 Rules (Article 12(9)) provide that in "*in exceptional circumstances*", where necessary to avoid a "*significant risk of unequal treatment and unfairness that may affect the validity of the award*", the Court may – apparently even *ex officio* – disregard the method agreed by the parties for the constitution of the arbitral tribunal and appoint each arbitrator itself.

This can be regarded as a 'failsafe' provision, applicable where the observance of an unconscionable arbitration agreement could threaten the legitimacy of the prospective award. In practice this provision could raise some issues. A non-consensual departure from an agreed arbitration agreement, however unfair, might also pose a threat to the validity and enforceability of the ensuing award: under the New York Convention,[5] Contracting States "*shall recognize*" written arbitration agreements (Article II) and are allowed to deny recognition of awards where "[t]*he composition of the arbitral authority* […] *was not in accordance with the agreement of the parties*" (Article V(1)(d)). However, national courts may interpret the parties' adoption of the 2021 Rules as consent to subject their arbitration agreement to the Court's review as per Article 12(9), unless the parties have *expressly* agreed to derogate from this rule.

Party representation

The 2021 Rules formalize the authority of the tribunal to exclude new parties' representatives, with the aim of avoiding conflicts of interest. While Article 17(1) now provides that "[e]*ach party must promptly inform the Secretariat, the arbitral tribunal and the other parties of any changes in its representation*", new Article 17(2) goes even further by empowering the arbitrators 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*".

Article 17(2) is not a groundbreaking provision, as the authority to exclude a party's counsel conflicted with an arbitrator was already widely viewed to be one of the tribunal's inherent powers.[6]

Additional awards

Tribunals will be allowed to issue an additional award for claims made in the arbitration and omitted in the original award. Under the 2021 Rules (Article 36(3)), any party that wishes that the tribunal complement the award with issues not covered within the first award, shall make an

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[5] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

[6] The express provision of this power can also be found in the LCIA Rules. See Article 18(4) of the 2020 LCIA Rules.

application to the Secretariat within 30 days of the receipt of the award. The other party shall be granted a short time limit (normally within 30 days) to submit any comment and the tribunal shall have further 30 days to submit its decision on the application in draft form to the Court.

Before this modification, any party that sought any remedy against an *infra petita* award would have to look at the law of the place of arbitration to verify if it allowed the parties to request an additional award and the arbitrators to correct omissions in their decision. If the answers to the above were in the negative, the party would have been compelled to start entirely new arbitration proceedings.

Transparency of the Court's decisions

Article 5 of Appendix II of the 2021 Rules enables parties to demand that the Court state its reasons for a specific set of decisions deferred to it under the Rules,[7] provided the request is made *before* the decision.

Although the Court retains discretion not to disclose its reasoning in undefined "*exceptional circumstances*", this new approach is in sharp contrast with the traditional secrecy of the Court's decisions.

Disputes concerning the administration of the arbitral proceedings

New Article 43, implemented by the 2021 Rules provides that "[a]*ny claims arising out of or in connection with the administration of the arbitration proceedings by the Court*" shall be deferred to the Paris Court and governed by French law.

Thus, **parties adopting the ICC rules also agree to litigate any ensuing dispute with the ICC pursuant to these terms**.

Treaty-based arbitration

Finally, the 2021 Rules have introduced two provisions, Articles 13(6) and 29(6)(c), which apply solely to investment arbitration disputes based on treaties.

Article 13(6) provides that no arbitrator shall have the same nationality as that of any party to the arbitration. This is a further measure to seek to ensure impartiality and neutrality of the decision-making body. Article 29(6)(c) codifies the Court's existing practice that emergency arbitration is not available in investor-State disputes. Indeed, the requirement that the emergency arbitration provisions apply solely to signatories of the arbitration agreement (Article 29(5)) automatically excludes disputes based on treaties from their scope of application for the peculiar way in which

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[7] In particular, decisions issued under Articles 6(4) (*prima facie* jurisdiction), 10 (consolidation of proceedings), 12(8) (appointment of the tribunal in multi-party cases), 12(9) (analyzed above), 14 (challenges to arbitrators), and 15(2) (replacement of arbitrators on the Court's own motion).

the arbitration agreement is formed (*i.e.*, by the investor's acceptance of a State's open offer to arbitrate). At the same time, the new version of Article 29(6)(c) eliminates the presumption of an opt-out of the emergency arbitration provisions in all cases where the parties have agreed on a different pre-arbitral procedure enabling them to request interim relief.

The aim of these provisions is to increase the appeal of the ICC for sovereign actors; according to the *2019 Statistics*, the ICC has administered only 42 cases based on BITs since 1996, when the first BIT case was registered.

Conclusion

There is cause for regarding the ICC Rules, perhaps the most popular institutional rules globally, as a bellwether of the state of arbitral practice. The 2021 Rules are no exception, in that they reflect the most recent trends in the industry (*e.g.*, transparency, the digital transition, flexibility and streamlining of the proceedings), without attempting to jump ahead of the curve.

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The Focus Team is a constellation of skills in different practice areas with a focus on International Arbitration.

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