International Insight: The Revised 2021 ICC Arbitration Rules: An Overview

On 6 October 2020, the International Chamber of Commerce ("ICC") Executive Board approved a revised version of the ICC Arbitration Rules in draft form (the "2021 Rules"). The current text is subject to editorial amendments, with the final text expected to be released in December 2020.[1] The 2021 Rules will enter into force on 1 January 2021 and will apply to ICC-administered arbitrations instituted on or after their entry into force, unless the arbitration agreement provides otherwise.[2]

The 2021 Rules replace the 2017 version (the "2017 Rules") and codify recent best practices in international arbitration, including with respect to the following issues:

- Written submissions and hearings
- Joinder of additional parties and consolidation of arbitration proceedings
- Disclosure of third-party funding
- Constitution of the arbitral tribunal
- Party representation
- Additional awards

The 2021 Rules also broaden the scope of application of the Expedited Procedure Rules and defer the adjudication of disputes arising out of the administration of ICC arbitrations to the exclusive jurisdiction of the Paris Judicial Tribunal.

We discuss each of the foregoing notable aspects of the 2021 Rules in greater detail below.

1. Electronic Submissions and Virtual Hearings

With information technology increasingly becoming more prevalent in international arbitration, and the current health crisis still cautioning against cross-border travel, the 2021 Rules cater for a streamlined and more cost-effective arbitral process relying on electronic submissions and virtual hearings.

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1 The 2021 Rules can be consulted on the ICC website (https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/rules-of-arbitration-2021/).

2 The provisions that broaden the scope of the Expedited Procedure Rules will apply by default to arbitrations instituted based upon arbitration agreements executed on or after 1 January 2021.

Building on the Report of the ICC Commission on Arbitration and ADR Task Force on the Use of Information Technology in International Arbitration[3] and the ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic,[4] the 2021 Rules provide that:

(i) Pleadings and other written communications, including fact exhibits and legal authorities, can be submitted electronically rather than in hard-copy format (Article 3).[5]

(ii) Hard-copy submissions, in multiple sets, of the Request, the Answer and any Application for Emergency Measures will only be required where the claimant, the respondent or the applicant, as the case may be, requests transmission "by delivery against receipt, registered post or courier" (Article 4(4)(b), Article 5(3), and Article 1(2), Appendix V).

(iii) After consulting the parties, the arbitral tribunal may decide that any hearing will be conducted "by physical attendance or remotely by videoconference, telephone or other appropriate means of communication" (Article 26(1)). Accordingly, the requirement that the arbitral tribunal "shall hear together the parties in person if any of them so requests" pursuant to Article 25(2) of the 2017 Rules has been removed. Giving arbitral tribunals discretion with respect to conducting in-person hearings is a welcome change in light of the ongoing health crisis, and should avoid delay to proceedings and limit costs.

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3 Report of the ICC Commission on Arbitration and ADR Task Force on the Use of Information Technology in International Arbitration (https://iccwbo.org/publication/information-technology-international-arbitration-report-icc-commission-arbitration-adr).

4 The ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic released on 9 April 2020 (https://iccwbo.org/publication/icc-guidance-note-on-possible-measures-aimed-at-mitigating-the-effects-of-the-covid-19-pandemic/?dm=bypass).

5 Article 3(1) of the 2021 Rules provides that "all pleadings and other written communications submitted by any party, as well as all documents annexed thereto, shall be sent to each party, each arbitrator, and the Secretariat" without particularising any specific form of service, whereas Article 3(1) of the 2017 Rules provides that "[a]ll pleadings and other written communications submitted by any party, as well as all documents annexed thereto, *shall be supplied in a number of copies sufficient to provide one copy for each party, plus one for each arbitrator, and one for the Secretariat*" (emphasis added).

2. Joinder of Additional Parties and Consolidation of Arbitral Proceedings

First, the 2021 Rules provide for enhanced powers of arbitral tribunals to join additional parties, i.e., parties not originally named as claimant or respondent.

Pursuant to Article 7(1) of the 2017 Rules, no additional party may be joined in the arbitration after the confirmation or appointment of any arbitrator, "unless all parties, including the additional party, otherwise agree." Conversely, Article 7(5) of the 2021 Rules permits this, providing that any Request for Joinder made after the confirmation or the appointment of any arbitrator "shall be decided by the arbitral tribunal once constituted and shall be subject to the additional party accepting the constitution of the arbitral tribunal and agreeing to the Terms of Reference, where applicable." In deciding whether to allow the joinder, the arbitral tribunal "shall take into account all relevant circumstances," including whether the tribunal has *prima facie* jurisdiction over the additional party, the timing of the application and its likely impact on the conduct of the arbitration. This is a significant change which allows for willing co-respondents to be joined without the claimant's consent.

Second, the 2021 Rules also reflect certain changes to Article 10 intended to broaden the scope of consolidation of parallel arbitrations. Specifically:

(i) Article 10(b) allows consolidation of arbitrations instituted under the same or different agreements, provided that they contain the same arbitration clauses.

(ii) Article 10(c) allows consolidation of arbitrations instituted under different agreements which contain different but compatible arbitration clauses, provided that (i) the parallel arbitrations are between the same parties and (ii) the disputes arise in connection with the same legal relationship.[6]

3. Disclosure of Third-Party Funding Arrangements

In order to address potential conflicts of interest arising out of the increasing use of third-party funding in international arbitration, Article 11(7) of the 2021 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

[6] A finding of compatibility of arbitration agreements encompasses: (i) the applicable arbitration rules, (ii) the arbitral seat, (iii) the number of arbitrators and the rules applicable to the constitution of the arbitral tribunal, (iv) the language(s) of the proceedings, and (v) any other determinative agreement in respect of the conduct of the arbitrations.

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) complements paragraph 28 of the 1 January 2019 Note to Parties and Arbitral Tribunals on the Conduct of Arbitration under the ICC Rules of Arbitration,[7] inviting arbitrators to consider and, where appropriate, disclose "relationships with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award." By including this provision in the 2021 Rules rather than relying on the guidance note, the ICC now places an obligation on parties to disclose the "existence and identity of any" third-party funder(s). Since the rationale of Article 11(7) is to address potential conflicts of interest vis-à-vis the arbitrators, the existence of contingency fee and similar arrangements between one of the parties and the law firm representing that party in the arbitration falls outside its scope of application.

Unlike other arbitration rules, the 2021 Rules do not specifically provide that the arbitral tribunal may take into account the existence of third-party funding arrangements when determining the costs of the arbitration.[8] Arguably, however, an ICC arbitral tribunal may, under Article 38(5) of the 2021 Rules, permit a successful funded party to recover from the unsuccessful party the amount owed to the third-party funder to the arbitration, including any uplift fees that had been agreed with the funder.[9]

4. Constitution of the Arbitral Tribunal

To protect the integrity of the arbitral process, Article 12(9) of the 2021 Rules empowers the ICC Court of Arbitration ("Court") – the ICC body deputised among other things to confirming and appointing arbitrators – to (i) disregard any agreement by the parties on the method of constitution of the arbitral tribunal and (ii) appoint each member of the arbitral tribunal. The Court, however, may invoke its authority under Article 12(9) only

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7 Note to Parties and Arbitral Tribunals on the Conduct of Arbitration under the ICC Rules of Arbitration, 1 January 2019 (https://iccwbo.org/publication/note-parties-arbitral-tribunals-conduct-arbitration).

8 *See, e.g.*, Article 34.4 of the 2018 Administered Arbitration Rules of the Hong Kong International Arbitration Centre, pursuant to which "The arbitral tribunal may take into account any third party funding arrangement in determining all or part of the costs of the arbitration referred to in Article 34.1."

9 Pursuant to Article 38(5) of the 2021 Rules, "[i]n making decisions as to costs, the arbitral tribunal may take into account *such circumstances as it considers relevant*, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner" (emphasis added). *See, e.g., Essar Oilfields Services Ltd v Norscot Management Pvt Ltd* [2016] EWHC 2361 (Comm), upholding an ICC award ordering the costs of the funding (including success fee) to be paid by the losing party.

in "exceptional circumstances" in order to "avoid a significant risk of unequal treatment and unfairness that may affect the validity of the award." These circumstances may include situations where the arbitration agreement calls for the (i) appointment of the arbitral tribunal by one of the parties only, or (ii) the appointment of a co-arbitrator in a three-member arbitral tribunal as the sole arbitrator in the event the other party fails to nominate a co-arbitrator. Under the 2017 Rules these situations have been addressed by the Court within the framework of the general provision of Article 42, pursuant to which "the Court and the arbitral tribunal shall make every effort to make sure that the award is enforceable at law." As such, Article 12(9) of the 2021 Rules expressly codifies the Court's previous practice.

The 2021 Rules also include provisions for the constitution of arbitral tribunals in investor-state arbitrations. Pursuant to Article 13(6) of the 2021 Rules, "[w]henever the arbitration agreement upon which the arbitration is based arises from a treaty, and unless the parties agree otherwise, no arbitrator shall have the same nationality of any party to the arbitration."[10]

5. Party Representation

Article 17 of the 2021 Rules sets forth two additional provisions intended to preserve the integrity of the arbitral process. First, Article 17(1) requires each party to "promptly inform the Secretariat, the arbitral tribunal and the other parties of any changes in its representation." Second, Article 17(2) empowers 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 new party representatives from participating in whole or in part in the arbitral proceedings."

These amendments reflect best practices in international arbitration intended to deal with opportunistic eleventh-hour changes of one or more members of the legal team which may raise issues of conflict vis-à-vis the arbitral tribunal.[11]

6. Additional Awards

Article 36 of the 2021 Rules expressly entitles parties to apply to the Secretariat within 30 days of the receipt of the award "for an additional award as to claims made in the

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[10] In the context of investor-state arbitration, Article 29.6(c) of the 2021 Rules codifies the Court's current practice to exclude the application of the Emergency Arbitrator Rules when "the arbitration agreement upon which the application is based arises from a treaty."

[11] *See* Guidelines 4-6 of IBA Guidelines on Party Representation in International Arbitration adopted by a resolution of the IBA Council on 25 May 2013 (*available at* https://www.ibanet.org/Document/Default.aspx?DocumentUid=6F0C57D7-E7A0-43AF-B76E-714D9FE74D7F).

arbitral proceedings which the arbitral tribunal has omitted to decide." Provisions permitting additional awards are routinely found in arbitration rules and statutes, and the Court has in the past allowed applications for additional awards when these were contemplated by the applicable *lex arbitri*. The 2021 Rules codify this practice.

7. Expedited Procedure Rules

The 2021 Rules also broaden the scope of the Expedited Procedure Rules introduced on 1 March 2017 by raising the monetary threshold for their default application from USD 2 million to USD 3 million. Like with the 2017 Rules, the new Expedited Procedure Rules will apply by default to ICC arbitration proceedings instituted pursuant to arbitration agreements entered into *after* the entry into force of the 2021 Rules, i.e., after 1 January 2021 (see Article 30(2) and Appendix VI, Article 1(2)).

8. Governing Law and Settlement of Disputes in the Administration of ICC Arbitrations

Finally, pursuant to Article 43 of the 2021 Rules, "any claims arising out of or in connection with the administration of the arbitration proceedings by the ICC Court under the Rules shall be governed by French law and settled by the Paris Judicial Tribunal (*Tribunal Judiciaire de Paris*) in France, which shall have exclusive jurisdiction." This provision is intended to address the possibility that one or more of the parties might institute proceedings against the ICC bodies in different *fora* under different laws. This addition mirrors recent changes to the Arbitration Rules of the London Court of International Arbitration ("LCIA"), pursuant to which any action, suit or proceedings against the LCIA, the LCIA Court, the LCIA Board, the Registrar, any arbitrator and any tribunal secretary fall within the exclusive jurisdiction of the English court.[12]

[12] Pursuant to Article 31.3 of the 2020 LCIA Rules, "[a]ny party agreeing to arbitration under or in accordance with the LCIA Rules irrevocably agrees that the courts of England and Wales shall have exclusive jurisdiction to hear and decide any action, suit or proceedings between that party and the LCIA (including its officers, members and employees), the LCIA Court (including its President, Vice Presidents, Honorary Vice Presidents, former Vice Presidents and members), the LCIA Board (including any board member), the Registrar (including any deputy Registrar) any arbitrator, any Emergency Arbitrator, any tribunal secretary and/or any expert to the Arbitral Tribunal which may arise out of or in connection with any such arbitration and, for these purposes, each party irrevocably submits to the jurisdiction of the courts of England and Wales."

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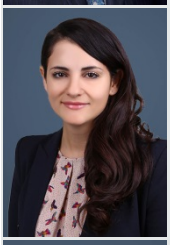

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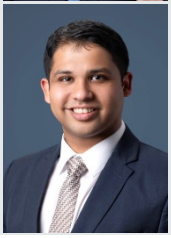

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