ALLEN & OVERY

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The ICC's 2021 Arbitration Rules bring new focus on efficiencies and streamlined processes, including through the use of technology

The International Chamber of Commerce (the **ICC**) has published its revised 2021 Arbitration Rules (**2021 Rules**). The 2021 Rules, which will apply to all arbitrations registered after 1 January 2021, make a number of important changes and incremental improvements to the current Rules, which have been in force since March 2017 (**2017 Rules**).

The key changes made in the 2021 Rules, which are most likely to be of interest to, and directly affect, users of ICC arbitration, include:

- A shift toward the increased use of technology, in particular in relation to virtual or remote hearings, and a presumption in favour of electronic copies of pleadings and communications, rather than hardcopies;
- Additional rules around the nationality of arbitrators and party representatives to ensure complete neutrality and avoid conflicts of interest;
- A more flexible approach to the consolidation of multiple arbitrations and the joinder of additional parties;
- More transparency as regards the use of third party funding; and
- An increased threshold of USD3million for Expedited Procedure to apply automatically.

In addition, the ICC has moved to ensure that any disputes brought against the institution itself, in relation to its activities administering arbitrations, are governed by French law and are under the exclusive jurisdiction of the Paris courts. This follows several disputes brought against the ICC.

1. VIRTUAL HEARINGS AND LESS PAPER

The 2021 Rules now address the rapid shift toward virtual hearings in arbitration, which has taken place during 2020. Although a gradual move away from in-person hearings was already afoot, the pace of change has been dramatically hastened by the Covid-19 pandemic. While the ICC responded quickly to the pandemic and issued its Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic in April 2020, there remained aspects of the 2017 Rules, which arguably required hearings to be held "in person." It is, therefore, to be welcomed that Article 26.1 of the 2021 Rules now expressly provides that *"the arbitral tribunal may decide, after consulting the parties, and on the basis of the relevant facts and circumstances of the case, that any hearing will be conducted by physical attendance or remotely by videoconference, telephone or other appropriate means of communication"*.

It is now clear, therefore, that any hearing (including a final hearing on the merits) may held remotely, even if one party objects to this. As the new provision makes clear, the Tribunal should carefully consider any party's objection to a full or partially remote hearing, taking into account the equality of arms (in particular in hybrid hearings) and ensuring that all parties have the opportunity to properly present their case. It is expected, however, that the 2021 Rules should reduce, or even eliminate, the scope for challenges such as that recently decided by the Austrian Supreme Court, which ruled that a remote hearing under the 2017 Rules could go ahead.

The 2021 Rules also shift away from the presumption that pleadings and other written communications should be submitted in multiple hardcopy sets for each party, arbitrator and the ICC Secretariat. Article 3.1 of the 2021 Rules provides for pleadings and written communications to be "sent" to each party, arbitrator and the ICC Secretariat, with all communications from the Tribunal to the parties also "sent in copy" to the Secretariat. Drafted in broader and more permissive terms than their 2017 predecessors, the 2021 Rules make clear that it is no longer necessary to provide hardcopies, unless the submitting party expressly requests "transmission of the [Request/Answer/Application] by delivery against receipt, registered post or courier" (see Article 4.4(c), Article 5.3 and Article 1.2 of Appendix V (Emergency Arbitrator Rules) of the 2021 Rules). In fact, this change brings the Rules into line with ICC practice, which, due to the COVID-19 pandemic, has meant that Requests for Arbitration and applications for Emergency Arbitrations could only be filed by email since March 2020.

2. ARBITRATOR APPOINTMENTS – NATIONALITY AND PARTY EQUALITY

The 2021 Rules in Article 12.9 provide that *"in exceptional circumstances the Court may appoint each member of the arbitral tribunal to avoid a significant risk of unequal treatment and unfairness that may affect the validity of the award"*. This is a codification of the Court's existing practice. Such exceptional circumstances may apply, for example, in a situation of one claimant and multiple respondents, where the respondents are unable to agree on a jointly nominated arbitrator. In order to prevent an unequal situation where the Court would only appoint the arbitrator on respondents' behalf, the Court can appoint all arbitrators and thus overrule the claimant's nomination.

Article 13.5 of the 2021 Rules limits the rule that a sole arbitrator or the president of the Tribunal be of a nationality other than those of the parties, to the situation where it is the ICC Court that makes the appointment. If the president is appointed by the co-arbitrators, the nationality limitation does not apply. In suitable

circumstances, for example where the arbitrating parties are of the same nationality, and provided that none of the parties objects within the time limit set by the Secretariat, the sole arbitrator or president may have the same nationality.

It should be noted, however, that Article 13.6 expressly provides that, for treaty-based arbitrations *"no arbitrator shall have the same nationality of any party to the arbitration."* This appears to be a recognition of the specific nature of treaty-based arbitrations, where opposing nationalities of the parties are at the heart of the dispute. Treaty-based arbitrations are also now expressly excluded from the scope of the 2021 Rules' emergency arbitrator provisions (Article 29.6(c)).

3. PARTY REPRESENTATION - MORE POWER TO THE TRIBUNAL

Article 17 of the 2021 Rules, which addresses party representation, has also been amended to require a party changing its representation in a pending arbitration to promptly inform the Secretariat, tribunal and other parties of such. Perhaps more significantly, Article 17.2 now allows an arbitral tribunal under the 2021 Rules 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."*

A tribunal under the 2021 Rules will thus be expressly empowered to exclude new party representatives, thereby limiting a party's freedom to choose its legal representatives pending an arbitration if and to the extent needed to avoid a conflict of interest of an arbitrator and consequently, delay of the arbitration procedure. The change seeks to protect the integrity of ongoing proceedings and ensure a pending arbitration is not derailed by a change in counsel. It may nevertheless be expected that an exercise of the new power under Article 17.2 of the 2021 Rules will re-ignite the debate begun back in 2014 in relation to the Rules of the London Court of International Arbitration (the **LCIA**) that include a similar provision.

4. THIRD-PARTY FUNDING – INCREASED TRANSPARENCY

The 2021 Rules will for the first time address third-party funding, providing that to *"assist prospective arbitrators and arbitrators in complying with their* [disclosure obligations and duties of independence and impartiality], *each party must 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 under which it has an economic interest in the outcome of the arbitration."*

In January 2019, the ICC released a Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (the **ICC Note**) – which we expect to also be updated before the 2021 Rules enter into force – confirming that, when deciding on potential conflicts of interest, the ICC Court does consider as relevant relationships between arbitrators and *"any entity having a direct economic interest in the dispute"*. Similarly, General Standard 7 of the IBA Guidelines on Conflicts of Interest in International Arbitration extends a party's disclosure obligation to *"entities having a direct economic interest in the award to be rendered in the arbitration"*.

The duty of disclosure introduced by the 2021 Rules does not go as far as that under the Rules of the Hong Kong International Arbitration Centre (the **HKIAC**), however,

which requires the disclosure of the funding agreement itself. The level of disclosure required was much debated during the drafting process of the 2021 Rules, which ultimately opted for the narrower approach, on the basis that that was all that was required to facilitate the conflicts process.

The fact that the disclosure obligation is limited to parties that are funding the arbitration and have an economic interest in the outcome of the arbitration also leaves open the question of whether straightforward insurance coverage of a claim should be disclosed. It is to be hoped that the ICC will provide further guidance in this area, perhaps when it updates the ICC Note.

5. EXPEDITED PROCEDURES – LIKELY INCREASE IN THEIR USE

The monetary threshold for the automatic application of the Expedited Procedure Rules in Appendix VI to the Rules will be increased from USD2 million under the 2017 Rules to USD3 million under the 2021 Rules. Applying to arbitration agreements entered into on or after 1 January 2021, this change is expected to capture a number of additional disputes, which previously fell outside the scope for automatic application, and brings the ICC's threshold more in line with the levels for expedited procedures set by the HKIAC Rules (USD 3 million) and the Singapore International Arbitration Centre Rules (USD 4.4 million), at the time of writing. The procedure, first introduced in the 2017 Rules with the lower limit, has been broadly successful in facilitating the faster and cheaper resolution of lower value "smaller" disputes. It remains open to parties wanting to avoid the automatic application of the Expedited Procedures to expressly opt out of them in their arbitration agreement.

6. CONSOLIDATION AND JOINDER – FACILITATION OF COMPLEX ARBITRATIONS

While the 2017 Rules provided for consolidation of multiple arbitrations, there was some ambiguity about the circumstances in which this was permissible. The 2021 Rules have clarified that, under Article 10(b), a party may request the consolidation of two or more arbitrations where these are commenced under multiple contracts, which contain the same arbitration clause *("all of the claims in the arbitrations are made under the same arbitration agreement or agreements"*). The provision essentially puts in writing the already existing ICC practice and allows consolidation of two arbitrations which are initiated under back-to-back contracts but are not between the same parties. If the arbitration agreements in such back-to-back contracts are the "same", this allows consolidation even though the parties to the arbitrations are not the same.

Moreover, consolidation is permitted under the 2021 Rules even where the claims in the arbitrations are not made under the "same" arbitration agreement or agreements, provided that *"the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the [ICC] Court finds the arbitration agreements to be compatible"* (Article 10(c)).

As regards joinder, a significant change under the 2021 Rules is to allow an additional party to be joined to an arbitration after the confirmation or appointment of the tribunal and without the consent of all the arbitrating parties. The tribunal may decide to join that additional party, provided that it agrees the constitution of the tribunal and to the Terms of Reference, where applicable (see Article 7.5). Under the 2017 Rules, no additional party could be joined after the confirmation or

appointment of the tribunal, unless all parties consented. In deciding whether to join an additional party under the 2021 Rules, the tribunal *"shall take into account all relevant circumstances, which may include whether the arbitral tribunal has prima facie jurisdiction over the additional party, the timing of the Request for Joinder, possible conflicts of interests and the impact of the joinder on the arbitral procedure."*

These expanded powers to consolidate arbitrations and join parties are welcome additions to the ICC Rules, particularly in the context of complex transactions involving more than two parties and/or a larger suite of agreements.

7. DISPUTES WITH THE ICC MUST NOW BE RESOLVED IN PARIS

The ICC has also expressly provided for the exclusive jurisdiction of the Paris courts over any *"claims arising out of or in connection with the administration of the arbitration proceedings by the Court under the Rules"* which shall be governed by French law. Previously, there was no such provision and the ICC could be, and indeed has been, sued in any state courts with jurisdiction. Allen & Overy has successfully represented the ICC in such proceedings.

8. CONCLUSION

The 2021 Rules do not contain major revisions. Rather, the changes – a number of which codify what had already become ICC practice – focus on facilitating the efficient handling of complex disputes, in particular through the introduction of specific provisions addressing virtual or remote hearings and the new joinder and consolidation provisions, while aiming to minimise potential roadblocks, such as conflicts of interest. In making these changes, some powers are shifted away from the parties to the Court and the arbitral tribunal. While the changes are, on the whole, to be welcomed, certain questions are left unanswered and a few of the changes, such as those around party representation, might stir debate going forward. Like the **new LCIA Rules**, the 2021 Rules are a case of iterative improvement and evolution to drive efficiency, rather than a revolution in ICC practice.

Those changes providing for the increased use of technology, in particular during the uncertain times we are all currently living in, are particularly to be welcomed. Further practical guidance is expected in the ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration, of which a revised version is expected before 1 January 2021.

Key contacts

If you require advice on any of the matters raised in this document, please call any of our partners or your usual contact at Allen & Overy.

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