



# THE LAUNCH OF THE 2021 ICC RULES OF ARBITRATION

DECEMBER 2020

On 1 January 2021, nine years after the last major overhaul of the ICC Rules of Arbitration<sup>1</sup> and less than four years after a very limited revision of these Rules in 2017,<sup>2</sup> a new version of the ICC Rules of Arbitration will come into force. While the 2021 ICC Rules contain a rather limited number of changes compared to the 2012 and 2017 predecessor versions, some of those changes are particularly significant. The 2021 ICC Rules will apply to all new ICC cases commenced as of 1 January 2021, regardless of the date of the arbitration agreement under which the arbitration is brought.

The 2021 ICC Rules were officially launched on 1 December 2020. Although the ICC Court of Arbitration is headquartered in Paris as part of the International Chamber of Commerce (ICC), it acts as a global institution nowadays with offices in Hong Kong, New York, São Paulo, Singapore and Abu Dhabi. By periodically revising its Rules of Arbitration, The ICC Court can best ensure that it will remain the leading institution for dispute resolution the world over. As of July 2021, the ICC Court will be presided by an American lawyer, since *Claudia Salomon*, a current vice-president

of the ICC Court, has been designated as the ICC Court's next president, the first woman ever to serve in that function.<sup>3</sup>

The outgoing president of the ICC Court, *Alexis Mourre* from France, has described the amendments to the 2021 ICC Rules as "*a further step towards greater efficiency, flexibility and transparency of the Rules, making ICC Arbitration even more attractive, both for large, complex arbitrations and for smaller cases.*"<sup>4</sup> Indeed, these worthy objectives account for many of the welcome small revisions that incorporate existing practices proven to be efficient (such as, amendments that prioritize electronic submissions and recognize the utility of remote hearings). The ICC's objectives are also exemplified by six notable changes contained in the new Rules, which we discuss below.

## **A Boost to the Tribunal's Authority to Join Additional Parties under Article 7(5)**

Article 7 was first added to the 2012 ICC Rules. It expressly provided a mechanism for an existing party to an arbitration to bring in or "join" a new party by filing a request for joinder against the additional party in the pending arbitration. However,

1. The 2012 ICC Rules of Arbitration had come into force on 1 January 2012.

2. The 2017 ICC Rules introduced a new provision on expedited proceedings for claims up to USD 2 million.

3. Ms. *Salomon* holds U.S. citizenship. Americans have several times served in the position of Secretary General of the ICC Court. However, apart from *Carl Salans* (who briefly acted as interim president between *Pierre Tercier* from Switzerland and *John Beechey* from the U.K.), Ms. *Salomon* will to our knowledge be the first American to serve as president of the ICC Court in the post-war era.

4. See <https://iccwbo.org/media-wall/news-speeches/icc-unveils-revised-rules-of-arbitration/>.



no additional party could be joined after any arbitrator had been confirmed or appointed by the ICC Court unless all the parties, including the additional party, agreed. In practice, such agreement rarely happened.

Pursuant to a new Article 7(5) of the 2021 ICC Rules, even after the confirmation or appointment of any arbitrator an additional party may be joined if two conditions are fulfilled: **(1)** the arbitral tribunal, if and once constituted accepts the joinder; and **(2)** the party to be joined accepts the constitution of the arbitral tribunal and, where applicable, the Terms of Reference. Thus, even where one of the original parties to the arbitration objects to the joinder of a party, the arbitral tribunal may authorize such joinder, after taking *"into account all relevant circumstances."*

When exercising this new power, the arbitral tribunal will have to consider, amongst other things, whether it has *prima facie* jurisdiction over the additional party, the timing of the request of joinder and its impact on the arbitral proceedings, as well as whether the addition of the additional party could create conflicts of interest for the tribunal. While the reinforced power of the arbitral tribunal allows flexibility, at the same time it comes at the price of a lack of certainty compared to the currently prevailing Rules.

### Facilitating Consolidation of Cases Involving Different Parties under Article 10(b)

Since 2012, under Article 10(b), the ICC Court could consolidate two or more pending arbitrations under the ICC Rules into a single arbitration at the request of

a party, provided that all of the claims in those arbitrations had been made *"under the same arbitration agreement"*. Article 10(b) as revised under the 2021 ICC Rules now allows for consolidation to occur where all of the claims in the pending arbitrations are made *"under the same arbitration agreement or agreements"* (emphasis added).

While the addition of the words *"or agreements"* may seem slight, it may have a powerful effect. The use of *"agreement"* in the singular in the prior iterations of Article 10(b) of the ICC Rules restricted consolidation under that provision to cases brought under the same contract. The only way that arbitrations based on more than one contract could be consolidated under the existing Rules was if they were between the same parties.

By contrast, the revised version of Article 10(b) under the 2021 ICC Rules will allow the Court to consolidate cases involving different parties and claims made under more than one contract, so long as the arbitration agreements at issue in each of the pending cases are the same. This is an important change compared to the existing Rules, meant to increase the suitability of ICC arbitration for complex multi-party and multi-contract arbitrations, but should not automatically allow owner-main contractor and main-contractor and subcontractor disputes to be consolidated, as the construction industry might fear.



## A New Obligation to Disclose Third-Party Funding under Article 11(7)

Article 11(7) sets out an entirely new provision requiring a 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 it has an economic interest in the outcome of the arbitration"*. The stated purpose of the provision is to ensure that arbitrators may fully comply with their duties under Articles 11(2) and 11(3) to disclose any facts or circumstances that might call into question the arbitrator's impartiality or independence in the eyes of the parties.

Some may view this as one of the less welcome developments in the 2021 ICC Rules. But, since the ICC's 1 January 2019 *"Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration"* already provided that *"an arbitrator or prospective arbitrator should consider relationships with non-parties having an interest in the outcome of the arbitration,"* this new provision adopts the ICC Court's policy goal of transparency, which had already become part of its recent practice.

## Tailoring the ICC Rules to Investment Arbitrations under Article 13(6) and Article 29(6)(c)

The 2021 ICC Rules introduce two new provisions aimed specifically at treaty-based investment arbitrations. In particular,

the ICC has tried to make its Rules more attractive for investor-State arbitrations in this context. Normally, each party is free to appoint an arbitrator of the nationality of its choice, including one with the same nationality as its own. Under Article 13(6) of the 2021 ICC Rules, where the arbitration is based on a treaty, such as a bilateral investment treaty, no arbitrator shall any longer have the same nationality as that of any party to the arbitration, unless all parties agree otherwise. The ICC describes this new restriction to the free choice of arbitrator appointments as a means to ensure *"the complete neutrality of the tribunal in cases involving the public interest"*.<sup>5</sup> The ICC is following here the policy of the ICSID Convention and ICSID Arbitration Rules, ICSID being the world's leading arbitration institution for investor-State disputes.

Likewise, a new Article 29(6)(c) explicitly excludes the ICC's emergency arbitrator procedure from investor-State disputes based upon a treaty. This effectively codifies the ICC Court's established practice precluding emergency arbitration in investor-State disputes. Together with Article 13(6), this should increase confidence in ICC arbitration as a suitable forum for investment treaty disputes.

5. See <https://iccwbo.org/media-wall/news-speeches/icc-unveils-revised-rules-of-arbitration/>.



### The Possibility of an “Additional Award” under Article 36(3)

The amendment of the title of Article 36 to include the words “Additional Award” speaks for itself. A modified Article 36(3) grants parties the possibility of applying for “*an additional award as to claims made in the arbitral proceedings which the arbitral tribunal has omitted to decide*” within 30 days of receipt of an award. This development is not entirely unexpected, as it was extensively discussed when the ICC Court tackled its major overhaul of the Rules in 2012. At the time, such provision appeared counterintuitive to the ICC Court’s system of scrutinizing and approving awards, since thanks to that process, the need for additional awards should not arise, insofar as the scrutiny process of the ICC Court would detect an arbitrator’s omission in not deciding upon a claim.

The ICC Court’s practice has, however, confirmed, that its system is not “waterproof”, and that the need for additional awards arises even in ICC arbitrations. While this may happen only occasionally, being able to remedy such situation even where the law applicable at the seat of arbitration does not provide for it, remains in the best interest of users of ICC arbitration.

### Expanding the Scope of the Expedited Procedure

The 2017 ICC Rules had introduced expedited procedure rules, requiring the tribunal to render the final award within six months of the case management conference. These rules applied for cases with an amount in dispute of not more than USD 2 million. In light of the very positive experience of the ICC Court with the application of these rules, the 2021 ICC Rules have increased the threshold from USD 2 to USD 3 million. The increased threshold will only apply to arbitration agreements concluded on or after 1 January 2021, and as in the past may, by agreement of the parties, be opted-out, but also opted-in for cases with much higher claims’ values. This remains the parties’ choice.



## Conclusion

The revisions include several improvements and are generally to be commended. At the same time, the limited number of these improvements confirms that the overhaul of the ICC Rules in 2012 has withstood the test of time. Like the 2017 revisions that preceded them, many of the revisions in the 2021 ICC Rules build on the 2012 ICC Rules for the purpose of adapting to new developments (such as the increased recognition of remote hearings and other advantages of the electronic age under Article 26(1), no doubt precipitated by the COVID-19 crisis).

Put simply, it has not proven necessary to correct the 2012 ICC Rules, but rather only to update them so as to be able to better respond to the needs of ICC arbitration users. Interestingly in several instances the revisions implement points that had already been discussed during the 2012 reform, but were held off for possible future changes, if the practice of ICC arbitrations would show a real need for them. In any event, the cumulative work that has gone into these revisions and the speed with which they have been adopted will surely allow the ICC to remain a leading arbitral institution of choice in a landscape of arbitral institutions with a global reach that is more competitive than ever.

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