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What you need to know about the revised ICC Rules

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Following the recent trend of periodic incremental updates to the arbitral rules of major institutions, the International Chamber of Commerce (ICC) has published the draft text of its revised 2021 Arbitration Rules. The principal amendments and key new provisions summarised below are grouped under four main themes: conflicts of interest, party equality, efficiency, and flexibility. For our detailed comparison of the 2021 Rules and the 2017 version of the Rules click here.

While not a wholesale re-imagining of the Rules (which were last substantially updated in 2012, and expanded in respect of expedited arbitrations in 2017), the 2021 Rules make a number of important amendments responding to recent trends and current best practices, and are designed to enhance the transparency, efficiency and flexibility of both ICC arbitrations and the processes undertaken in support of them by the ICC's International Court of Arbitration (the ICC Court).

The 2021 Rules are anticipated to come into effect on 1 January 2021, meaning that any case submitted to the ICC after this date will *de facto* be subject to this new version of the rules. However, they remain subject to potential editorial changes ahead of their official launch on 1 December 2020.

Conflicts of interest

Obligation to disclose any third-party funding – Art. 11(7).

As the use of third-party funding in international arbitration continues to expand, the ICC has introduced a new Article 11(7) (*General Provisions*), requiring parties 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 ICC has been a champion of greater transparency of third-party funding arrangements over the past few years and has stated in both a 2016 and 2019 Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules that arbitrators should consider "*relationships with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award*", when evaluating whether to make a disclosure of a conflict of interest. However, any such disclosure by an arbitrator necessarily requires that parties themselves proactively first disclose the existence of any third-party funding arrangement to the tribunal. The introduction of an obligation on the parties to notify third-party funding

arrangements is thus aimed at assisting arbitrators in identifying potential conflicts of interest at an early stage.

In so doing, the ICC takes matters further than the SCC (which last year issued a policy encouraging – but not requiring – parties to identify funders with a significant interest in the dispute) and the LCIA (which confirmed last year that its new rules – now in effect – would not introduce new provisions on third-party funding).

While it remains to be seen how Article 11(7) will be applied in practice, we note that the 2021 Rules require parties to disclose any non-party which has "*an economic interest in the outcome of the arbitration*", which may indicate a more expansive approach than under previous guidance (the 2016 and 2019 Note to Parties each referring to "*a direct economic interest in the dispute*").

Exclusion of new party legal representatives – Art. 17(1) and 17(2).

Articles 17(1) and 17(2) (*Party Representation*), now require parties promptly to notify changes in representation and grant tribunals the power to exclude new representatives from participating in the proceedings (or take other measures) if "*necessary to avoid a conflict of interest*" arising with any member of the tribunal.

Party equality

Party equality – Art. 12(9).

In exceptional circumstances, the ICC Court will now have the power to appoint each member of an arbitral tribunal where there is a "*significant risk of unequal treatment and unfairness*" to one of the parties. The ICC itself has already indicated that this provision was added to disregard "*unconscionable arbitration agreements*" that may threaten the validity of the award. This could refer, for example, to asymmetrical arbitration agreements where parties are not at arm's length - however it remains to be seen in what circumstances the ICC Court will use this power.

In the revision of its Rules in 1998, the ICC had already introduced a provision through which, in the case of multi-party arbitration, the Court could appoint the whole arbitral tribunal if parties were unable to agree on a method to appoint it. This 1998 provision, adopted following the *Dutco* case, is found at Article 12(8).

This new Article 12(9) goes further as it entitles the Court to appoint the whole arbitral tribunal in any arbitration – not only in multi-party arbitration – where party equality is at risk. Moreover, this new power can in theory be exercised in a discretionary manner (without the need to give reasons for a decision to exercise this power) but in all likelihood the Court will explain the rationale of its decision to the parties.

Efficiency: Expedited arbitration, case management, joinder and consolidation

Expedited arbitration – Art. 30.

Rules in respect of expedited arbitrations were introduced in 2017 to apply by default (on an opt-out basis) where the amount in dispute did not exceed US$ 2 million (see Article 30 (*Expedited Procedure*) and Appendix VI (*Expedited Procedure Rules*) in part to address concerns among users of arbitration that arbitrations were not sufficiently cost or time efficient.

In 2019, 36% of new cases registered with the ICC involved amounts falling within the US$2 million threshold for expedited arbitration. Since 2017, some 146 arbitrations (as at the end of

2019) have actually been conducted under the Expedited Procedure Rules resulting in almost 100 awards.

The 2021 Rules respond to the apparent increased uptake among users with lower value disputes by raising the financial limit from US$2 million to US$3 million for arbitration agreements concluded on or after 1 January 2021, thereby bringing more arbitrations within the scope of the Expedited Procedure Rules (Articles. 1(2)(ii) of Appendix VI of the Rules). As before, it remains open to parties to opt out of the Expedited Procedure Rules.

Joinder and consolidation – Art. 7(5) and 10.

Building on recent changes, the 2021 Rules expand and clarify the provisions dealing with complex arbitrations, involving multiple parties, contracts and/or sets of proceedings.

Regarding joinder, a new provision – Article 7(5) (*Joinder of Additional Parties*) – increases the scope for requests for joinder made after the appointment or the confirmation of an arbitrator. Under the 2017 Rules, an additional party wishing to join an arbitration after the appointment or the confirmation of an arbitrator would have needed the consent of all parties. The 2021 Rules creates an exception to this rule at Article 7(5): when there is no unanimous consent, this request of joinder shall be decided by the arbitral tribunal once constituted. The arbitral tribunal shall take into account all the relevant circumstances, notably: (i) whether it has prima facie jurisdiction over this new party; (ii) the timing of the request; (iii) possible conflicts of interests; and (iv) the impact of the joinder on the procedure.

With regard to consolidation, it is sometimes agreed in practice that multiple arbitrations initiated under several identical arbitration agreements can be consolidated. However, the 2017 Rules required the arbitration claims to be made under "*the same arbitration agreement*" (i.e. in one single contract). To avoid any doubt, Article 10(b) was amended to clarify that multiples arbitrations can be consolidated even where the arbitrations claims were made "*under the same arbitration agreement or agreements*". This is consistent with recent trends towards facilitating "one-step adjudication". This amendment is slightly different from that made in the LCIA Rules 2020 where consolidation is now possible even when the arbitration agreements are not identical ("*the same arbitration agreement or any compatible arbitration agreement(s)*", Article 22A, LCIA Rules 2020).

Case management – Art. 22(2).

Whatever the size and complexity of the dispute, Article 22(2) (*Conduct of the Arbitration*) has been amended to require arbitral tribunals to adopt appropriate procedural measures to ensure effective case management (replacing the previous permissive language that they "*may adopt*" such measures). Further to Appendix IV, these may include, for example, bifurcating the proceedings or identifying issues that can be resolved by agreement between the parties or their experts. In a similar vein, Article 24(2) (*Case Management Conference and Procedural Timetable*) now obliges tribunals to establish the procedural timetable during or "*as soon as possible*" after (no longer merely "*following*") the first case management conference. Moreover the procedural timetable produced is now expressly envisaged to provide for the "*efficient*" conduct of the arbitration.

Virtual hearings and modern communications – Art. 26(1).

2020 having seen the international arbitration community rapidly embrace virtual hearings in the face of restrictions imposed in response to the global pandemic, Article 26(1) (*Hearings*) of the 2021 Rules expressly codifies the tribunal's discretion to decide to conduct a hearing remotely, after discussion with the parties, seeking to address doubts expressed by some that a

virtual hearing might infringe a party's right to be heard under Article 25(2) of the current rules (to be deleted from the 2021 Rules).

Like the LCIA's recent revisions, the ICC's amendments acknowledge the impact of technology on the ways in which hearings nowadays might be conducted and afford tribunals discretion to permit their use where appropriate.

Reflecting an increasing trend that was further accentuated by the pandemic, Article 3(1) (*Written Notifications or Communications; Time Limits*) has been updated to move further away from the historic presumption that physical copies of communications and submissions would be generated in all (or even most) arbitrations. The amended provision requires merely that communications and documents be "*sent*" to each party and tribunal member, copied to the ICC, removing any residual suggestion that they be sent in hard copy. Consequential amendments are made to Articles 4(4) and 5(3).

Flexibility

Investment arbitration provisions – Art. 13(6) and 29(6).

According to the last available statistics, at least a fifth of cases commenced under the ICC Rules in 2019 involved a state or state entity, representing a significant increase on the position earlier in the decade as a direct result of efforts made by the ICC over the last ten years to address the perceived underuse of its Rules in disputes involving states. In line with longstanding policy, however, the ICC prefers that such disputes be governed, with a degree of flexibility, by the ICC Rules themselves, rather than a separate subset of them.

In order to encourage the number of treaty-based arbitrations registered with the ICC, the 2021 Rules make two important distinctions between commercial and investment arbitrations.

First, a new Article 13(6) (*Appointment and Confirmation of the Arbitrators*), prevents the appointment or confirmation of an arbitrator who shares the same nationality as any party to the arbitration, unless all the parties consent to the appointment. This new provision mirrors the nationality rules already found in other investment arbitration institutional rules, such as ICSID Arbitration Rule 1(3) and UNCITRAL Arbitration Rule 6(7).

Second, Article 29(6)(c) makes it clear that the Emergency Arbitrator provisions are not applicable to investment treaty arbitrations. This reflects the ICC's long-standing practice, and brings the ICC Rules in line with the ICSID and UNCITRAL Arbitration Rules.

Additional Awards – Art. 36(3).

Where a tribunal has omitted to decide particular claims made in the arbitral proceedings, under Article 36(3) (*Correction and Interpretation of the Award; Additional Award; Remission of Awards*) parties may now submit an application for an additional award to the ICC Court Secretariat within 30 days of receipt of an award.

This provision adds to the parties' existing rights under the Rules to apply to correct clerical errors in awards or for the interpretation of awards.

Contacts

Kieron O'Callaghan
Partner, London
T +44 20 7296 5970
kieron.ocallaghan@hoganlovells.com

Laurent Gouiffés
Partner, Paris
T +33 1 53 67 47 47
laurent.gouiffes@hoganlovells.com

Melissa Ordonez
Counsel, Paris
T +33 1 53 67 47 47
melissa.ordonez@hoganlovells.com

Robert Shoesmith
Senior Associate, London
T +44 20 7296 2000
robert.shoesmith@hoganlovells.com

Gulshan Gill
Associate, London
T +44 20 7296 2481
gulshan.gill@hoganlovells.com

Ledea Sawadogo-Lewis
Business Lawyer, Paris
T +33 1 53 67 16 29
ledea.sawadogo-lewis@hoganlovells.com

www.hoganlovells.com