

Corporate Newsletter



The 2021 ICC Arbitration Rules – what’s new?

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* This newsletter was drafted based upon the information available as of October 23, 2020

A. INTRODUCTION

On 8 October 2020, the International Court of Arbitration (“**Court**”) of the International Chamber of Commerce (“**ICC**”) unveiled a draft of its revised Rules of Arbitration (“**2021 ICC Rules**”) following their formal approval by the ICC Executive Board on 6 October 2020.¹ The ICC Executive Board is a governing body comprising 28 members and primarily in charge of developing and implementing the ICC’s strategy, policy and overseeing financial affairs.²

The 2021 ICC Rules mark the almost centennial history of the ICC’s International Court of Arbitration, a world leading arbitral institution founded in 1923 in Paris, administering both international commercial and increasingly investor-state disputes. It is also very popular among users in Asia, despite the attractive competing offerings from Asian arbitral institutions. Over the years, the ICC Rules have undergone numerous updates, last in 2017. The upcoming ninth revision is aimed at enhancing efficiency, flexibility and transparency and facilitating complex arbitrations of all scales.

The 2021 ICC Rules are scheduled to be officially launched at the end of December 2020 after final editorial corrections,

¹ See also ICC press releases dated 6 and 8 October 2020, available at: <https://iccwbo.org/media-wall/news-speeches/icc-unveils-revised-rules-of-arbitration/> and <https://iccwbo.org/media-wall/news-speeches/iccs-170th-executive-board-took-place-today-bringing-together-the-business-and-chamber-executives-who-make-up-iccs-most-diverse-board-in-the-global-institutions-100-year-history/>.

² Article 6 of the ICC Constitution dated June 2017, available at: <https://iccwbo.org/constitution/#Article%206>.

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and will enter into force on 1 January 2021.³ For cases registered before this date, the 2017 ICC Rules will continue to apply.

B. KEY FEATURES OF THE 2021 ICC RULES

The most noteworthy changes include provisions concerning the consolidation of cases and joinder of additional parties, conflicts of interest and party equality, expedited and emergency arbitration procedures, and remote hearings.⁴

I. Consolidation and joinder

The latest amendments ease the requirements for a joinder of additional parties and consolidation of proceedings in the interest of the efficient resolution of disputes.

New Article 7(5) of the 2021 ICC Rules will grant arbitral tribunals discretion to join an additional party upon request by either one of the original disputing parties.⁵ While the 2017 ICC Rules currently require the consent of all parties and the additional party, in the future, a joinder will only be subject to the additional party's consent.⁶ In deciding on a request for joinder, arbitral tribunals shall consider any relevant circumstances, including their jurisdiction over the additional party, the timing of a request for joinder, possible conflicts of interest and the impact of the joinder on the proceedings.

Furthermore, the revised Article 10(b) expressly allows cases to be consolidated irrespective of whether claims are brought under one and the same contract and arbitration agreement, or under multiple contracts containing the same arbitration agreement.⁷ This ends the open question of whether the current Article 10(b) also covers the latter cases.⁸

II. Conflicts of interest and party equality

In line with the recent efforts to prevent potential conflicts of interest between arbitrators and non-parties to the case, Article 11(7) of the 2021 ICC Rules introduces a duty of the parties to disclose the existence and identity of any funding arrangement with a third party who has an economic interest in the outcome of the dispute.⁹ The provision effectively reflects the ICC's current approach in its Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration ("**Note**

³ Draft 2021 ICC Rules, available at: <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/rules-of-arbitration-2021/>

⁴ Additionally, new Article 36(3) allows parties to apply for an additional award within a period of 30 days after the receipt of the award for claims that the arbitral tribunal did not decide on.

⁵ Draft Article 7(5) of the 2021 ICC Rules: "Any Request for Joinder made after the confirmation or 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 on such a Request for Joinder, the arbitral 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. [...]"

⁶ Article 7(1) of the 2017 ICC Rules: "[...] No additional party may be joined after the confirmation or appointment of any arbitrator, unless all parties, including the additional party, otherwise agree. [...]"

⁷ Draft Article 10(b) of the 2021 ICC Rules: "The Court may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration, where: [...] b) all of the claims in the arbitrations are made under the same arbitration agreement or agreements [...]"

⁸ Article 10(b) of the 2017 ICC Rules: "The Court may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration, where: [...] b) all of the claims in the arbitrations are made under the same arbitration agreement [...]"

⁹ Draft Article 11(7) of the 2021 ICC Rules: "In order to assist prospective arbitrators and arbitrators in complying with their duties under Articles 11(2) and 11(3), 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 and under which it has an economic interest in the outcome of the arbitration."

on the Conduct of Arbitration”) as well as international practice.¹⁰ It does, however, not go as far as to require disclosure of the actual funding agreement.

Similarly, under new Article 17(1), parties are required to promptly disclose any changes to their legal representation, and Article 17(2) empowers arbitral tribunals to exclude a new counsel to avoid conflicts of interest.¹¹ This is aimed at preventing a conflict of interest arising out of a relationship between a tribunal member and the new legal representative, which may disrupt and delay the proceedings.

A third provision, Article 13(6), concerns investment treaty arbitrations and prohibits arbitrators from having the same nationality as any of the parties.¹² The provision recognizes the need to ensure the independence and impartiality of tribunal members particularly where the public interest is at stake.

Where an arbitral tribunal has not yet been constituted, new Article 12(9) explicitly allows the Court to disregard a party agreement in exceptional circumstances and to appoint each tribunal member so as to avoid unequal treatment and unfairness affecting the validity of the award.¹³ This could, for instance, be the case where a party would be entitled to unilaterally appoint a sole/presiding arbitrator or the tribunal majority. This could impact the validity of the award, if such unequal treatment is contrary to the laws at the seat of the arbitration. Pursuant to Article 5(1) of Appendix II, the Court must also provide reasons for its decision upon request by either party.¹⁴

III. Expedited procedure and emergency measures

The 2021 ICC Rules expand the scope of both the expedited procedure and emergency arbitrator provisions.

The ICC considers that its introduction of the expedited procedure provisions in the 2017 ICC Rules has been popular with disputing parties. The ICC has therefore increased the threshold amount for the mandatory expedited procedure from an amount in dispute of USD 2 million to USD 3 million under Article 30(2) and Article 1(2) of Appendix VI.¹⁵ The parties’ right to opt out of the expedited procedure and the Court’s discretion to deny the application of the expedited

¹⁰ See paragraph 28 of the ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration dated 1 January 2019, available at: <https://iccwbo.org/publication/note-parties-arbitral-tribunals-conduct-arbitration>. See also General Standard 7 of the IBA Guidelines on Conflicts of Interest in International Arbitration dated 23 October 2014, available at: https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

¹¹ Draft Article 17(1),(2) of the 2021 ICC Rules: “1) Each party must promptly inform the Secretariat, the arbitral tribunal and the other parties of any changes in its representation. / 2) The arbitral tribunal may, once constituted and after it has afforded an opportunity to the parties to comment in writing within a suitable period of time, 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.”

¹² Draft Article 13(6) of the 2021 ICC Rules: “Whenever 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.”

¹³ Draft Article 12(9) of the 2021 ICC Rules: “Notwithstanding any agreement by the parties on the method of constitution of the arbitral tribunal, 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.”

¹⁴ Draft Article 5(1) of Appendix II of the 2021 ICC Rules: “Upon request of any party, the Court will communicate the reasons for Article[] 12(9), [...]”

¹⁵ Draft Article 1(2) of Appendix VI of the 2021 ICC Rules: “The amount referred to in Article 30(2), subparagraph a) of the Rules is: i) US\$ 2,000,000 if the arbitration agreement under the Rules was concluded on or after 1 March 2017 and before 1 January 2021 or ii) US\$ 3,000,000 if the arbitration agreement under the Rules was concluded on or after 1 January 2021.” See also draft Article 30(2) f the 2021 ICC Rules: “The Expedited Procedure Rules set forth in Appendix VI shall apply if: a) the amount in dispute does not exceed the limit set out in Article 1(2) of Appendix VI at the time of the communication referred to in Article 1(3) of that Appendix; or b) the parties so agree.”

procedure at any time will, however, be preserved.¹⁶

As for the emergency arbitrator provisions under Article 29 and Appendix V, new Article 29(6) no longer requires that no other pre-arbitral procedure has been agreed by the parties.¹⁷ The old provision raised the question of whether emergency arbitration was possible in case of multi-tiered dispute resolution provisions.¹⁸ The new provision also explicitly recognizes existing (ICC) practice and carves out investment treaty arbitrations considered to be incompatible with the strict time limits of emergency measures.¹⁹

IV. Virtual hearings and electronic filings

In light of the ongoing COVID-19 pandemic, Article 26(1) of the 2021 ICC Rules has been revised to expressly allow for hearings to be held remotely either by videoconference, telephone or any other means of communication, where an arbitral tribunal upon consultation with the parties, considers it appropriate.²⁰ The ICC's approach is consistent with the current trend followed by many other arbitral institutions.²¹

Additionally, the revised Article 3(1) has removed any reference to paper filings of pleadings and written communications and merely provides that they be "sent" to each party, each arbitrator and the Secretariat.²² In a similar vein, the updated Articles 4(4) and 5(3) and Article 1(2) of Appendix V have reversed the general rule for paper filings in favor of electronic filings of the request for arbitration ("**Request**"), the answer to the Request, and the application for emergency measures, respectively. Only where a submitting party expressly requests "delivery against receipt, registered post or courier" must it file its submission in hardcopy and in a sufficient number.²³

¹⁶ Draft Article 1(4) of Appendix VI of the 2021 ICC Rules: "The Court may, at any time during the arbitral proceedings, on its own motion or upon the request of a party, and after consultation with the arbitral tribunal and the parties, decide that the Expedited Procedure Provisions shall no longer apply to the case. In such case, unless the Court considers that it is appropriate to replace and/or reconstitute the arbitral tribunal, the arbitral tribunal shall remain in place." See also draft Article 30(3)(c) of the 2021 ICC Rules: the Court, upon the request of a party before the constitution of the arbitral tribunal or on its own motion, determines that it is inappropriate in the circumstances to apply the Expedited Procedure Provisions".

¹⁷ Article 29(6) of the 2017 ICC Rules: "The Emergency Arbitrator Provisions shall not apply if: [...] c) the parties have agreed to another pre-arbitral procedure that provides for the granting of conservatory, interim or similar measures."

¹⁸ See Lars Markert & Raeesa Rawal, 'Emergency Arbitration in Investment and Construction Disputes: An Uneasy Fit?' . *Journal of International Arbitration* 37, no. 1 (2020), 131–142.

¹⁹ Draft Article 29(6) of the 2021 ICC Rules: "The Emergency Arbitrator Provisions shall not apply if: [...] c) the arbitration agreement upon which the application is based arises from a treaty." The application of emergency arbitrator provisions in the SCC Arbitration Rules to investment arbitrations has led to criticism, see Lars Markert, 'Efficiency and Investment Arbitration – New Developments and the Need for a Multi-Dimensional Approach', *Transnational Dispute Management* 15, no. 4 (2018), 1, 27 *et seq.*

²⁰ Draft Article 26(1) of the 2021 ICC Rules: "[...] 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."

²¹ See also ICC's Guidance Note on Possible Measures Aimed at Mitigating the Effects of the Covid-19 Pandemic dated 9 April 2020, available at: <https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf>.

²² Draft Article 3(1) of the 2021 ICC Rules: "Save as otherwise provided in Articles 4(4)(b) and 5(3), 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."

²³ See, e.g., draft Article 4(4)(b) of the 2021 ICC Rules: "Together with the Request, the claimant shall: [...] b) submit a sufficient number of copies of the Request for each other party, each arbitrator and the Secretariat where the claimant requests transmission of the Request by delivery against receipt, registered post or courier."

C. OUTLOOK

The latest revisions of the 2021 ICC Rules are not sweeping, but fine-tune the already tried and tested regime of the 2017 ICC Rules in some important aspects. It therefore can be expected that the ICC will reach its goal of enhancing efficiency, flexibility and transparency, and facilitating complex arbitrations. In terms of the ICC's clarification about the possibility of conducting hearings via videoconference, the changes are very timely. The 2021 ICC Rules will soon be complemented by the updated Note on the Conduct of Arbitration. A number of events to promote the new rules are scheduled to take place over the course of the next months leading to their official release and launch.²⁴

We will be closely following the developments, and report as soon as new noteworthy details are unveiled.

²⁴ On 22 October 2020, ICC Japan, in cooperation with the Japan International Dispute Resolution Center (“**JIDRC**”), the Japan Association of Arbitrators (“**JAA**”), the Japan In-House Lawyers Association (“**JILA**”), The Japan Chamber of Commerce and Industry as well as The Tokyo Chamber of Commerce and Industry held the “The First Webinar ICC Court leadership in the Covid 19 era – How International Arbitration has been transformed by Covid 19” as a part of the “ICC 2020 Arbitration Webinar Series in Japan”. For further details, see: http://www.iccjapan.org/seminar/webinar_en-20201022.php and <https://idrc.jp/en/>.



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