

Nothing Changes if Nothing Changes: An Introduction to the 2021 ICC Rules of Arbitration

Kluwer Arbitration Blog

October 27, 2020

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Please refer to this post as: Abhinav Bhushan and Sameer Thakur, 'Nothing Changes if Nothing Changes: An Introduction to the 2021 ICC Rules of Arbitration', Kluwer Arbitration Blog, October 27 2020, <http://arbitrationblog.kluwerarbitration.com/2020/10/27/nothing-changes-if-nothing-changes-an-introduction-to-the-2021-icc-rules-of-arbitration/>

On 6 October 2020, the International Court of Arbitration of the International Chamber of Commerce (ICC) approved and released its 2021 Rules of Arbitration (2021 Rules), in draft. These Rules are subject to editorial changes and the final version is to be officially launched in December 2020. The 2021 Rules of Arbitration will then come into force on January 1, 2021, replacing the 2017 Rules of Arbitration. The new Rules make noticeable changes to the framework of ICC arbitration, while not altering its character.

Most significantly, the 2021 Rules update the provisions concerning multi-party arbitrations, party representation, disclosure of external funding, and clarify the powers of the ICC Court to appoint all arbitrators itself to prevent unequal treatment of parties.

Virtual Hearings and Electronic Communication

Keeping in mind the demands of work caused by COVID-19, the 2021 Rules have updated Article 26(1) (Hearings) to reflect explicitly in the rules that the Tribunal

has the jurisdiction to conduct virtual hearings. While Tribunals under the ICC Rules already had the discretion to conduct virtual hearings (for instance, see para 23 of the ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic), the 2021 Rules clarify any doubts that may have remained.

Under the 2021 Rules, virtual hearings may be held if either party so requests or if the tribunal on its own motion decides to conduct the hearing virtually. After consulting with the parties and considering the facts and circumstances of the dispute, the tribunal may decide that hearings be conducted by physical attendance or remotely, by video conferencing, telephone, or other appropriate means of communication. The new provision clarifies the tribunal's discretion to decide the most appropriate manner of hearing the parties and is also a step to future-proof the 2021 Rules, by allowing for "other appropriate means of communication" to continue to evolve and include future technology.

The ICC Secretariat has been encouraging parties to dispense with written communication through paper copies for many years now. To further solidify this practice, Articles 3, 4 and 5 have been amended to ensure that paper copies of pleadings are only required when a party specifically requests transmission by delivery against receipt, registered post or courier (Articles 3(1), 4(4)(b) and 5(3)).

Changes in Multi-Party Arbitration

The 2021 Rules have made changes to Article 7 (Joinder of Additional Parties) and Article 10 (Consolidation of Arbitrations). Of the two, Article 7 sees a more significant change due to the inclusion of a new paragraph 7(5) which allows for requests for joinder to be made even after the confirmation or appointment of an arbitrator. Such requests are to be decided by the tribunal after its constitution and are subject to the additional party accepting the constitution of the tribunal and agreeing to the Terms of Reference, where applicable. While making its decision on a request for joinder, the tribunal is required to take into account all relevant circumstances, including the *prima facie* jurisdiction of the tribunal over the additional party, the timing of the request for joinder, potential conflicts of interest and the impact of the joinder on the procedure of the arbitration. The new paragraph further clarifies that a decision to allow for the joinder of an additional

party is without prejudice to the tribunal's decision as to its jurisdiction over that party.

The new Article 7(5) marks a shift from the 2017 Rules, where no additional party could be joined to an arbitration after the confirmation or appointment of an arbitrator, unless there was agreement among all parties, including the additional party, to that effect. The 2021 Rules dispense with the need for an agreement from all parties and gives the decision-making power to the arbitral tribunal to join a consenting additional party.

Article 10 has also been updated in the 2021 Rules to now explicitly allow for consolidation where all of the claims made in the arbitration arise from the "same arbitration agreement or agreements" (Article 10(b)). This change clarifies any doubts regarding the application of Article 10(b) to more than one arbitration agreements, when previously it could only be used when one arbitration agreement was being relied upon. The updated Article 10(c) further clarifies that it applies to claims not made under the same arbitration agreement or agreements.

Disclosure of Funding Parties

The 2021 Rules add an important provision in paragraph 7 of Article 11 (General Provisions). According to this addition, for any prospective arbitrator to effectively render their duties independently and impartially, parties must promptly inform the ICC Secretariat and other parties of the existence of a 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. This inclusion is in line with the ICC's existing outlook on such relationships. The Note to Parties and Tribunals on the Conduct of Arbitration under ICC Rules (1 January 2019) had previously clarified that a relationship between an arbitrator and "any entity having a direct economic interest in the dispute" would be required to be disclosed by an arbitrator. It must also be noted that, for parties, a similar disclosure obligation already existed under General Standard 7 of the IBA Rules on Conflict of Interest in International Arbitration.

Changes in Appointment of Arbitrators and Arbitrator Nationality

In addition to the provision of Article 12(8), a new paragraph 9 has been added in [Article 12](#) (Constitution of Arbitral Tribunal) which gives the ICC Court the power, in exceptional circumstances, to appoint each member of the tribunal even if a different method of appointment is envisaged in the arbitration agreement, to avoid a significant risk of unequal treatment and unfairness that may affect the validity of an award. This rule is only intended to apply in rare circumstances where an appointment method may seriously impact the validity of an award issued by the Tribunal as envisaged in the arbitration agreement.

Sole arbitrators and presidents of tribunals continue to be a different nationality than the parties unless the parties agree otherwise within the time limit fixed by the ICC Secretariat. The new paragraph 6 in Article 13 (Appointment and Confirmation of Arbitrators) states that no arbitrator may be of the same nationality as any of the parties, where the arbitration agreement arises from a treaty, unless the parties agree otherwise.

Party Representation

The title of [Article 17](#) has been changed from 'Proof of Authority' to 'Party Representation'. The new Article 17 requires parties to immediately notify the ICC Secretariat, the tribunal, and other parties of a change in their representation. The tribunal also now has the power to exclude new representatives from participating in the whole or part of the proceedings if it is found necessary to avoid a conflict of interest of an arbitrator with the new party representative.

Additional Award for claims that were not addressed by the Tribunal

The 2021 Rules allow a tribunal to issue an additional award to address claims that were not addressed in an award per the new [Article 36\(3\)](#). The definition of an award under Article 2(v) now includes an additional award under the new Rules.

A party seeking an Additional Award from the Tribunal under this rule must submit an application requesting the same within 30 days of receipt of the Award.

Increasing Transparency with regards to the working of the ICC Court

Appendices I and II of the 2021 Rules now make available information regarding the operations of the Court to all stakeholders. The 2021 Rules note a two consecutive term limit for all members, the creation of Special Committees for specific purposes and annual meetings of the plenary of the Court to make decisions with respect to the Special Committees. Appendix II contains updated rules for the constitution of the Court, and most significantly states in the revised Article 5 that the Court will communicate its reasons for its decisions, upon a party's request, on Articles 6(4) (whether and to what extent the arbitration shall proceed), 10 (consolidation of arbitrations), 12(8) (appointment of tribunal in multi-party arbitrations), 12(9) (appointment of tribunal in exceptional circumstances), 14 (challenges to an arbitrator) and 15(2) (replacement of arbitrator on the Court's own motion) in a dispute. However, in exceptional circumstances, the Court retains the discretion to not disclose its reasons.

Other Changes

Under the 2021 Rules, the addition of Article 43 (Governing Law and Settlement of Disputes) makes it explicit that any claims arising concerning the administration of the arbitration proceedings by the ICC Court shall be settled by the Paris Judicial Tribunal in France and be governed by French law.

Additionally, the revised Article 29(6)(c) excludes the application of Emergency Arbitrator Provisions to treaty-based arbitration.

The 2021 Rules also revise the pecuniary threshold for Expedited Procedure Rules to apply and increase it from \$2 million to \$3 million if the arbitration agreement was concluded on or after January 1, 2021 (Article 1(2) in Appendix VI).

Final Remarks

The 2021 Rules cater to the ICC Court's continued efforts to enhance efficiency, increase transparency and accountability to the parties. As arbitration continues to grow from developed to developing parts of the world, it is important that all arbitral institutions continue to strive and meet user expectations.

The global launch of the 2021 Rules is scheduled for 1 December 2020.