Kluwer Arbitration Blog

New York Arbitration Week Revisited: The Challenges of Multi-Party and Multi-Contract Issues in International Arbitration and the Anticipated ICC Rules Changes

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On Thursday 19 November 2020, during the fourth day of New York Arbitration Week, the ICC International Court of Arbitration held a virtual round-table discussion of the challenges faced by parties and the ICC Court in cases involving multi-party and multi-contract disputes and the ways in which the 2021 revisions to the ICC Rules of Arbitration (the "2021 Rules") regarding joinder, consolidation, and the constitution of the arbitral tribunal address these issues. **Jennifer Kirby** (Independent Arbitrator, Kirby Arbitration) moderated the discussion among panelists **Laura Abrahamson** (Arbitrator, JAMS), **Paul Di Pietro** (Counsel, ICC International Court of Arbitration (SICANA, Inc.)), **Ziva Filipic** (Managing Counsel, ICC International Court of Arbitration), and **Claudia Salomon** (Partner, Latham & Watkins LLP; Vice President, ICC International Court of Arbitration).

Over 300 participants joined the event to engage in an active discussion about the revisions and the practical impact the changes will have on disputes when the 2021 Rules enter into force on 1 January 2021. In one of Ms. Salomon's first public appearances since the ICC announced their historic recommendation that she serve as the ICC Court's first female President on 1 July 2021, Ms. Salomon began the discussion by providing an overview of the changes the 2021 Rules made to Article 7 (Joinder of Additional Parties) and Article 10 (Consolidation of Arbitrations), before inviting comments from other panelists and audience questions.

Joinder

With respect to Article 7 on joinder, Ms. Salomon explained that since 2012, the Rules have allowed for joinder of additional parties after the confirmation or appointment of any arbitrator with the consent of *all* parties to the arbitration. Article 7(1) of the 2017 Rules thus provides, "[n]o additional party may be joined after the confirmation or appointment of any arbitrator, unless all parties, including the additional party, otherwise agree." The new Article 7(5) marks a shift, dispensing with the need for an agreement from all parties after the confirmation or appointment of any arbitrator and giving the decision-making power to the tribunal to join a consenting additional party, in effect eliminating the veto that each party could previously exercise to prevent the joinder of a willing third party. In deciding on the 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."

Providing illustrative case studies on how the 2021 changes will mitigate challenges that parties and tribunals previously experienced, Mr. Di Pietro walked the audience through several situations that demonstrated how the restrictions on joinder found under the 2012 and 2017 Rules have resulted in inefficiencies. For example, in the case of a dispute involving an owner/operator of an LNG terminal as Claimant, Claimant had materially identical contracts allocating its storage capacity with two companies. Claimant brought an arbitration against Respondent for unpaid storage fees and then sought to join its other storage customer, Company X, contending that the three parties had a tripartite relationship. Because Respondent objected to the joinder and the tribunal had already been constituted, Company X could not be joined. Instead, the two arbitrations proceeded in parallel, with identical tribunals adjudicating essentially identical claims.

Under the 2021 Rules, the panelists explained, the tribunal would have been empowered to "take into account all relevant circumstances" and could have avoided the duplication of the proceedings by joining Company X earlier. The 2021 revisions thus strike a balance between promoting efficiency in the proceedings and reducing the risk of any award set-aside, including by requiring that a party joined after the composition of the arbitral tribunal accept the tribunal, and as the case may be, the Terms of Reference.

Espousing the perspective of arbitrating parties, Ms. Abrahamson characterized the introduction of Rule 7(5) as the most important change in the 2021 Rules and underscored how helpful removing the unilateral veto on joinder will be to corporate entities that are likely to face complicated disputes with multiple parties.

Consolidation

With respect to consolidation, Ms. Salomon explained that arbitrations could be consolidated under the 1998 Rules, but only in limited circumstances, which were expanded by the 2012 Rules. The 2021 Rules now explicitly allow for consolidation where all of the claims made in the arbitration arise from the "same arbitration agreement *or* agreements," clarifying 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. Thus, the changes to Article 10(b) address the situation where it is undisputed that all claims in Arbitrations A and B arise under the same arbitration agreements contained in Contracts Alpha and Beta. While under the current Rules, there would be a question of whether the claims in A and B arose under a single arbitration agreement, and therefore, whether the two proceedings could be consolidated, under the 2021 Rules, there is additional clarity regarding the permissibility of consolidation.

Multi-Party Arbitration

The panelists addressed the importance of considering multi-party arbitration from the outset. The panelists highlighted the importance of considering the possibility of multi-party arbitrations when

negotiating complex transactions and ensuring that dispute resolution clauses be drafted intentionally. The panelists also discussed claimants' ability to frame a multi-party arbitration from the outset of the proceeding, and the potential benefits to a claimant of bringing all claims against all parties in a single arbitration in the first instance, while recognizing that it is not always possible for the claimant to ascertain in the beginning the full scope of claims or all relevant parties. Moreover, because the 2021 Rules eliminate the requirement that all parties to an arbitration agree to a joinder after the confirmation or appointment of any arbitrator, claimants must be cognizant that respondents may have the ability to shape an arbitration after the confirmation or appointment of any arbitrator by joining additional parties that the claimant would not have named of its own volition.

Constitution of the Tribunal

The panelists discussed the introduction of Article 12(9) which allows the Court to appoint each member of the arbitral tribunal, notwithstanding any agreement by the parties on the constitution of the tribunal, in exceptional circumstances "to avoid a significant risk of unequal treatment and unfairness that may affect the validity of the award." Ms. Filipic discussed a well-known case where the arbitration agreement provided for a five-arbitrator panel, with the four party-appointed arbitrators to be appointed by the four parties to a shareholder agreement. In that case, however, the interests of the parties were aligned in such a way so that following the text of the arbitration agreement would likely lead to unequal treatment of the parties. The Court ultimately relied on Article 42, which requires the Court and the tribunal to "make every effort to make sure that the award is enforceable at law," and appointed all five members of the tribunal. The panelists agreed that Article 12(9) effectively addresses such exceptional cases and ensures that the Court is able to balance party autonomy against ensuring the enforceability of the award.

Additional Innovations in the 2021 Rules

The panelists rounded out their discussion by highlighting several additional improvements in the 2021 Rules, including:

- Articles 3, 4, and 5 now provide that paper copies are only required when a party specifically requests transmission by delivery against receipt, registered post or courier.
- Article 11(7) now requires increased transparency regarding third party funding.
- Article 22(2) now requires rather than permits the arbitral tribunal to adopt appropriate procedural measures.
- Article 26(1) has been amended to reflect explicitly that the tribunal may decide – after consulting the parties and on the basis of the relevant facts and circumstances of the case – to conduct virtual hearings.
- The threshold for the application of the Expedited Procedure Rules has been increased to US$ 3 million for arbitrations brought under arbitration agreements concluded on or after 1 January 2021.

Conclusion

The 2021 Rules introduce several amendments that are likely to be welcomed by arbitration practitioners as they enhance the efficiency, flexibility, and transparency of ICC-administered arbitrations. The most noteworthy amendments in this respect include the changes regarding joinder and consolidation, which facilitate and clarify the management of complex arbitrations involving multiple parties on the basis of multi-layered contractual arrangements. The 2021 Rules on consolidation of claims should prove particularly helpful in multi-party arbitrations arising out of several interrelated contractual instruments.

The views expressed in this article reflect those of the authors and not necessarily those of Cleary Gottlieb Steen & Hamilton LLP or any of its clients.

Recordings for all New York Arbitration Week 2020 events are available here, and Kluwer Arbitration Blog's full coverage is available here.

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