

# Kluwer Arbitration Blog

## The 2021 ICC Arbitration Rules: Changes to the Arbitral Tribunal's Powers

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The [2021 ICC Arbitration Rules](#) introduce new procedures, update key provisions, and formalize the existing practices of the ICC Secretariat and the Court in order to allow for greater flexibility, efficiency and transparency in the administration of ICC arbitration cases. We will focus in this post on the changes made under the new Rules to the Arbitral Tribunal's powers. In particular, we will address the following five key provisions: new Articles 12(9), 13(6), 17(1)-(2), 26, and Appendix IV paragraphs (h)(i).

In proposing modifications to the 2017 Rules, the ICC conducted a thorough revision process by consulting with the relevant stakeholders. The ICC first revealed the proposed modifications to the Commission on Arbitration and ADR at its fall meeting in Seoul on 21 September 2019 and solicited comments from the various National Committees and Commission members. New draft proposals were discussed at the Commission's meeting in July 2020. In total, the ICC received hundreds of written comments from various National Committees and individual Commission Members. Flowing from this consultation process, on 6 October 2020, the ICC Executive Board approved the revised ICC Rules of Arbitration as proposed by the International Court of Arbitration. On the same day, the ICC released the 2021 ICC Rules in draft form to the public. The new Rules came into force on 1 January 2021 and replaced the existing 2017 ICC Rules. The [ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration](#) has also been updated to reflect these changes.

With this in mind, we will shed light on some of the notable changes to the Arbitral Tribunal's powers in the 2021 Rules.

### Constitution of the Arbitral Tribunal

**New Article 12(9):** *“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.”*

This first and the most controversial change relates to the constitution of the arbitral tribunal itself. The amendment to Article 12(9) endeavours to give the ICC Court the power to appoint all members of the arbitral tribunal when there is an innate inequality or unfairness in the parties' arbitration agreement. This change addresses exceptional situations where following the parties' arbitration agreement would result in an unequal treatment of the parties and thus put at risk the enforceability of any award subsequently rendered. For example, the designation of a co-arbitrator as sole arbitrator in the event of the failure to nominate the other co-arbitrator.

The ICC has already been confronted with such arbitration clauses and has remedied them by referring to the "*spirit of the Rules*" found in Article 42 of the Rules. Moreover, it is to be expected that the ICC Court will only exercise the power in this new Article 12(9) in exceptional circumstances and that an arm's length party agreement on the method of constitution of the arbitral tribunal will not be disregarded.

Nonetheless, there is opposition to the new Article 12(9). In particular, there are concerns that the ICC has granted itself the authority to disregard an arbitration agreement in the event that it perceives an unfairness. Those opposing this change consider that the ICC should leave the parties' arbitration agreement in place and that such issues are better resolved in the course of the arbitral proceedings or at the enforcement stage. The debate over new Article 12(9) will surely continue and it will be interesting to observe whether other arbitral institutions will follow the ICC in the adoption of this provision.

### Nationality of arbitrators in treaty-based investment disputes

**New Article 13(6):** "*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.*"

The use of the ICC Rules in treaty-based investment disputes has grown substantially in recent years. Therefore, the ICC Rules must be appropriately adapted to reflect the sensitive nature of these investment disputes. More specifically, there is a particular need in investor-State disputes to secure the complete neutrality of the arbitral tribunal by ensuring that no arbitrator holds the same nationality as any of the parties to the dispute. Such a rule is important in treaty-based investment disputes where the arbitral tribunal is likely tasked with assessing the legitimacy of a state's laws, policies, and public interests. The introduction of Article 13(6) now aligns the ICC Rules with other investment arbitration rules such as [Rule 1\(3\) of the ICSID Arbitration Rules](#).

### Party representation

**New Articles 17(1)-(2):** "*(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.”*

The changes to Article 17 flow from an existing practice in international arbitration where arbitral tribunals commonly insert a similar provision in the Terms of Reference or Procedural Order No. 1. These provisions require the parties to notify promptly changes of counsel and also allowing the tribunal to act upon changes which may create a conflict of interest. The purpose of the provision is to address upfront any issues related to the change of counsel that may give rise to conflicts of interest or otherwise lead to challenges against the arbitrators. Similar provisions are contained in article 18.4 of the LCIA Rules.

As will be familiar to most readers, this issue was raised in *Hrvatska Elektroprivreda d.d. (HEP) v. Republic of Slovenia* where it was revealed ten days before the hearing that respondent had chosen a barrister from the same chambers as the president of the tribunal. The tribunal disqualified the barrister on the basis of the overriding principle of “*the immutability of properly-constituted tribunals*”.<sup>1)</sup> This power is now enshrined in Article 17 and need no longer be expressly included in the Terms of Reference or the Procedural Order No. 1.

However, new Article 17 gives rise to a potential issue. There is an inherent tension created by making the arbitral tribunal a judge in its own case on matters of representation. The arbitral tribunal’s interest (*i.e.*, to avoid a conflict of interest and thus having to resign) may be directly at odds with the inherent right of each party to choose its representatives.

## Remote hearings

**New Article 26:** *“A hearing shall be held if any of the parties so requests or, failing such a request, if the arbitral tribunal on its own motion decides to hear the parties. When a hearing is to be held, the arbitral tribunal, giving reasonable notice, shall summon the parties to appear before it on the day and at the place fixed by it. 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.”*

The Covid-19 pandemic affected all walks of life and international arbitration was not spared. As the pandemic spread, working through Zoom, Teams, Skype, and other videoconferencing platforms became our new normal. With in-person hearings precluded for large portions of 2020, parties requested, and tribunals considered, ‘virtual’ hearings. However, the 2017 ICC Rules did not state expressly that the hearing could be held virtually, instead Article 25(2) of the Rules provided that the tribunal “*shall hear the parties together in person if any of them so requests*”. Indeed, the ICC was quick to act. On 9 April 2020, the ICC issued its [Guidance Note on Possible Measures Aimed at Mitigating the Effects of the Covid-19 Pandemic](#), which clarified in paragraph 23 that hearings may be held virtually under the ICC Rules and now this practice has been

formalized in new Article 26.

New Article 26 contains some other interesting elements. Notably, while discretion is given to the arbitral tribunal, it must first consult with the parties before deciding on the format of the hearing. When taking such a decision, the tribunal must consider the relevant facts and circumstances along with the fairness of the proceedings and equal treatment of the parties. Moreover, a careful reading of Article 26 reveals that the arbitral tribunal's options are not limited to videoconferencing, but also include telephone and "*other appropriate means of communication*". These technological options endeavor to avoid prejudicing parties who do not have access to more expensive videoconferencing technologies or adequate internet speeds to support such platforms. Moreover, these options encourage the parties to use the most suitable mean of communication for their hearing. Finally, Article 26 does not presume that the hearing will be held in person. Indeed, it will be interesting to observe in a post-pandemic world whether international arbitration users will continue to use virtual hearings as a way to reduce the costs of arbitration despite not being constrained to use them.

## Settlement of disputes

**New Appendix IV paragraph (h)(i):** "*encouraging the parties to consider settlement of all or part of the dispute either by negotiation or through any form of amicable dispute resolution methods such as, for example, mediation under the ICC Mediation Rules*"

The changes to Appendix IV are subtle, but significant. The language of paragraph (h)(i) has been strengthened from "*informing the parties that they are free to settle*" to "*encouraging the parties to consider settlement*". The revised provision now vests the arbitral tribunal with more power to guide the parties towards an amicable settlement either by negotiation or through any form of amicable dispute resolution methods, such as, for example, mediation under the [ICC Mediation Rules](#). The question is how the tribunal can extend such an encouragement so that it has an impact on the parties' behavior, but without the arbitrators feeling that they have exceeded their mandate.

Overall, the 2021 ICC Rules are a welcome revision. The changes to the arbitral tribunal's powers are precise, reflect the evolution of the ICC Court and the Secretariat's practices and are consistent with the techniques and procedures that have become the norm in ICC arbitrations.

*The views expressed in this article reflect those of the authors and not necessarily those of Mayer Brown, Quinn Emanuel Urquhart & Sullivan, or any of their clients.*

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### References

- <sup>1</sup> Hrvatska Elektroprivreda d.d. v. The Republic of Slovenia, ICSID Case No. ARB/05/24, Tribunal's Decision on the participation of counsel, 6 May 2008, at para. 25.

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