ALERT MEMORANDUM

2021 ICC Rules Of Arbitration Unveiled

November 12, 2020

On October 8, 2020, the International Chamber of Commerce ("ICC") unveiled its revised Rules of Arbitration ("2021 ICC Rules"), which are expected to enter into force on January 1, 2021. They are intended to replace the current version of the Rules, which have been in force since 2017 ("2017 ICC Rules"). The text of the Revised Rules remains subject to additional editorial amendments prior to the official launch.

These latest changes are designed to be "*a further step towards greater efficiency, flexibility and transparency*" of ICC-administered arbitration, in the words of ICC Court President Alexis Mourre.[1]

The newly released ICC Rules include noteworthy modifications that will directly impact ICC users and practitioners in a number of important areas, such as complex arbitrations (with revisions affecting both joinder and consolidation of claims), third-party funding, party representation, and constitution of arbitral tribunals. Apart from a third-party funding disclosure requirement, the most striking revision may be the ability of the ICC Court to disregard, in "*exceptional circumstances*," any party agreement on the method of constitution of the arbitral tribunal in order "*to avoid a significant risk of unequal treatment and unfairness that may affect the validity of the award*."

Also of note, and in a departure from prior practice, the 2021 ICC Rules include tailor-made provisions for investment treaty-based arbitration, namely a third-State nationality requirement for arbitrators and the exclusion of provisions on emergency arbitrators.

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[1] ICC, *ICC unveils revised Rules of Arbitration* (Oct. 8, 2020), available at: https://www.iccwbo.be/icc-unveils-revised-rules-of-arbitration/.

Constitution of the Arbitral Tribunal

Article 12(9) of the 2021 ICC Rules on the constitution of the Arbitral Tribunal provides that *"[n]otwithstanding 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."*

The new provision aims to further ensure fairness and equality in the constitution of arbitral tribunals and to limit the risk of setting aside of arbitral awards by domestic courts on the basis of lack of fairness and equal treatment. The provision may be seen as an additional measure by the ICC to avoid the predicament of unequally constituted tribunals. The issue first came into sharp focus in 1992 with the well-known *Dutco* decision by the French Court of Cassation[2] and has been a focus of attention in almost every major rules revision by the ICC and other leading arbitral institutions since that time.

New Article 12(9) builds on and goes beyond current Article 12(8), which until now had empowered the ICC Court to appoint each member of the arbitral tribunal specifically in multi-party arbitrations "*where all parties are unable to agree on a method for constitution of the arbitral tribunal*."[3] Unlike the 2012 provision, new Article 12(9) applies to multiparty and bilateral arbitrations alike and is thus designed to avoid appointment processes which might pose a risk to the enforceability of the award.

It remains to be seen what the ramifications of new Article 12(9) will be, which in view of its potential application calls for close scrutiny by users and practitioners alike. Only time will tell how the ICC Court interprets the *"exceptional circumstances"* standard in the new provision. Yet, it may be anticipated that an arm's length party agreement on the method of constitution of the arbitral tribunal will not be disregarded except in extremely limited cases. Any more liberal implementation of the provision would likely lead to a rise in petitions by the award debtor to set aside the award or to oppose its recognition and enforcement on the ground that "[t]*he composition of the arbitral authorities* […] *was not in accordance with the agreement of the parties*").[4] This ground is of course firmly anchored not only in international conventions and instruments respecting international commercial arbitration, but also in the national arbitration legislation of most jurisdictions respecting grounds for set aside and refusal of enforcement.

Party Representation

The 2017 ICC Rules are largely silent on party representation. Article 17 of the 2017 ICC Rules simply provides that, at any time during the arbitration, *"the arbitral tribunal or the Secretariat may require proof of the authority of any party representative.*" The 2021 ICC Rules add two provisions on party representations. These additions appear designed to increase transparency throughout the arbitration proceedings and to avoid conflicts of interest that may undermine the impartiality and independence of arbitral tribunals.

The first new provision is Article 17(1), pursuant to which each party has a duty to "*promptly inform the Secretariat, the arbitral tribunal and the other parties*

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[2] *See, Siemens AG and BKMI Industrienlagen GmbH v. Dutco Consortium Construction Company Ltd.,* French Court of Cassation, Ch. Civ. 1 (Jan. 7, 1992). Specifically, in *Dutco*, the French Court of Cassation, the highest French court for civil actions, set aside an ICC award that had been rendered in a multi-party arbitration (where the two co-respondents had claimed that they were each entitled to nominate one arbitrator as they had conflicting interests). During the arbitration, the ICC Court invited the co-respondents to agree upon a joint nomination. They did so, but under protest, and at the end of the arbitration they challenged the award, which the French Court set aside on the grounds that such nomination procedure had not complied with the principle of equality of the parties in appointing arbitrators, which the French Court found to be a "*matter of public policy*."

[3] *See* Article 12(8) of the 2017 ICC Rules: *"[i]n the absence of a joint nomination pursuant to Articles 12(6) or 12(7) [i.e., in cases where the dispute is to be referred to three arbitrators and the arbitration is a multi-party procedure] and where all parties are unable to agree to a method for the constitution of the arbitral tribunal, the Court may appoint each member of the arbitral tribunal and shall designate one of them to act as president.*"

[4] *See, e.g.*, Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), Article V.1(c) pursuant to which *"[r]ecognition and enforcement of the award may be refused, at the request of the party against whom it is invoked*," if "*[t]he composition of the arbitral authorities […] was not in accordance with the agreement of the parties*"; 2006 UNCITRAL Model Law on International Commercial Arbitration, Article 34(2)(a)(iv) which provides that an arbitral award may be set aside if "*the composition of the arbitral tribunal […] was not in accordance with the agreement of the parties*."

of any changes in its representation." This provision is consistent with the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration, which require each party to inform the arbitral tribunal and the other parties of the "*identity of its counsel appearing in the arbitration*" and subsequently of "*any change in its counsel team*."[5]

The second new provision is Article 17(2). It bestows on arbitral tribunals the discretionary power to "*take any measure necessary to avoid a conflict of interest*" arising from a change in the legal representation of the parties, "*including the exclusion of new party representatives from participating in whole or in part in the arbitral proceedings.*" New Article 17(2) takes the same approach as adopted in 2014 by the Rules of Arbitration of the London Court of International Arbitration ("LCIA"), which have themselves undergone further revision earlier this year.

Users and practitioners will likely welcome the new disclosure requirements as a useful tool to ensure transparency and avoid unnecessary belated arbitrator challenges in ICC proceedings. At the same time, depending upon the law deemed applicable to the issue and because of the controversy surrounding the extent of the power of the arbitral tribunal to limit the ability of parties to appoint legal representatives of their choice, it will behoove both parties and arbitral tribunals to carefully consider the scope of this power in the specific arbitration and in view of the specific law deemed applicable to the question.

Third-Party Funding Disclosure

The 2021 ICC Rules introduce a significant new provision regarding third-party funding disclosure at the outset of an arbitration. Pursuant to new Article 11(7), "*[i]n 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.*" Accordingly, parties to an ICC arbitration will be obligated to disclose the existence and identity of any third-party funder, with the aim of assisting the members of the arbitral tribunal in complying with their own respective duties of independence and impartiality.

Similar to the 2018 Hong Kong International Arbitration Rules,[6] new Article 11(7) clearly reaffirms the ICC's goal of avoiding conflicts of interests stemming from third-party funding arrangements. The 2019 ICC Note to Parties and Arbitral Tribunals indeed confirmed that it would consider "*relationships with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award*" in addressing possible objections to confirmation or challenge of arbitrators.[7]

By more specifically addressing when use of third-party funding must be disclosed, the ICC is actively attempting to limit conflicts of interests by responding to the rapid increase in third-party funding arrangements in international arbitration. For example, some of these arrangements have involved cases in which a party was receiving financing from a third-party funder that had a pre-existing relationship with one of the arbitrators appointed in the same matter.

Complex Arbitrations: Joinder And Consolidation

Complex cross-border disputes often involve the interaction between multiple parties on the basis of multi-layered contractual relationships. The 2021 ICC Rules introduce amendments intended to facilitate the joinder of third parties and to clarify the process for the consolidation of arbitrations conducted between different parties and/or based on different contractual instruments.

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5 *See,* Guideline No. 7(b).

6 Hong Kong International Arbitration Rules, Article 44 which mandates that *"[i]f a funding agreement is made, the funded party shall communicate a written notice to all other parties, the arbitral tribunal, any emergency arbitrator and HKIAC*" regarding the existence of the funding agreement and the identity of the third-party funder.

7 ICC International Court of Arbitration, Note to Parties and Arbitral Tribunals On the Conduct of the Arbitration Under the ICC Rules of Arbitration (Jan. 1, 2019), available at: https://iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf

- ***Joinder***

Under the current 2017 ICC Rules, *"[n]o additional party may be joined after the confirmation or appointment of any arbitrator, unless all parties, including the additional party, otherwise agree*."[8] New Article 7(5) of the 2021 ICC Rules will allow requests for joinder of a consenting additional party to be made even after the confirmation or the appointment of any arbitrator. Once constituted, the arbitral tribunal will decide on the request. In doing so, the arbitral tribunal may take into account all circumstances, including whether the tribunal has *prima facie* jurisdiction over the additional party, the timing of the request for joinder, possible conflicts of interest and the possible impact of the joinder on the arbitral procedure. In any event, for the arbitration to go forward the additional party must accept the constitution of the arbitral tribunal and must agree to the arbitration's Terms of Reference, in order to avoid any risk to the enforceability of the award.

This new provision on joinder is designed to enhance the efficiency and flexibility of the arbitration proceedings. But only time will tell whether Article 7(5) is used with any frequency in future proceedings under the new ICC Rules and whether it proves to have a significant impact in practice, in particular regarding time efficiency.

- ***Consolidation***

Currently, Article 10 of the 2017 ICC Rules does not expressly address whether consolidation of claims is permitted only where the claims in the arbitration arise out of the "*same arbitration agreement*" or also where the dispute arises from multiple contracts which contain identical arbitration agreements. Article 10 of the 2021 ICC Rules clarifies this question and confirms that consolidation of claims is allowed where:

(i) All of the parties agree to consolidation[9];

(ii) The arbitrations involve different parties and the claims arise out of more than one arbitration agreement, provided that the arbitration agreements are identical[10]; or

(iii) The arbitration involves different parties and the claims arise out of more than one arbitration agreement, provided that the dispute arises in connection with the same legal relationship and the arbitration agreements are compatible.[11]

New Article 10 of the 2021 ICC Rules takes the same approach recently adopted in the 2020 LCIA Arbitration Rules, which, under Article 22.7, likewise allow for greater flexibility in the consolidation of claims commenced under compatible arbitration agreements and arising out of interrelated contractual instruments.

The 2021 ICC Rules on consolidation of claims should prove particularly helpful in multi-party arbitrations arising out of several interrelated contractual instruments. Nevertheless, in the event parties to an ICC arbitration contemplate consolidation under new Article 10 of the Rules, it will be important to scrutinize each agreement's arbitration provision, in order to ensure that all of the arbitration agreements are either identical or at least compatible.

Issuance of Additional Awards

The 2021 ICC Rules introduce a new Article 36(3) on additional awards. This provision allows the arbitral tribunal to issue an additional award on claims which the tribunal has failed to decide. The party requesting the additional award must make an application to that effect to the arbitral tribunal within 30 days of receipt of the award by that party. The other party is given a short period of time – not exceeding 30 days – to comment on the application. The arbitral tribunal must then submit its decision in draft form to the ICC Court not later than 30 days following the expiry of the time limit for receipt of the other party's comments or within any other time period which the ICC Court may decide.

This new provision adds another mechanism which has the potential to reinforce the parties' due process rights and to enhance the efficiency of the arbitral proceeding. To limit the risk of challenge to awards on the ground of *infra petita*, that is in an amount or otherwise of a nature less than what was sought, the

8 2017 ICC Rules, Article 7(1) [emphasis added].

9 2021 ICC Rules, Article 10(a).

10 2021 ICC Rules, Article 10(b).

11 2021 ICC Rules, Article 10(c).

parties will now be able to apply for an additional award on these matters to be issued by the same tribunal. New Article 36(3) also complements other existing provisions in the ICC Rules which permit the correction and the interpretation of existing arbitral awards.

Virtual Hearings And E-Submissions

As in the 2020 LCIA Rules,[12] the 2021 ICC Rules introduce important and timely provisions aimed at normalizing and facilitating the holding of virtual hearings and making of electronic submissions. These new provisions are especially relevant in the context of the current COVID-19 pandemic, during which the electronic management of cases has become not only commonplace, but oftentimes inevitable:

(i) Pursuant to new Article 26(1), "*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.*" This provision clarifies the current and increasing practice of holding virtual hearing following a consultation of the parties, and leaves a margin of discretion to the arbitral tribunal, which may order a virtual hearing if deemed appropriate in the given case.

This provision will be a welcome addition insofar as it empowers tribunals to reject dilatory tactics of a party aimed at unjustifiably delaying the proceedings where the circumstances do not, or do not readily permit holding hearings in person. Nevertheless, while the debate on whether a party has the right to insist upon an in-person hearing is ongoing, arbitral tribunals should exercise this new discretion under the ICC Rules with caution. Tribunals should strive to limit virtual hearings only to cases where in-person hearings are highly impractical or even impossible, particularly where there is party agreement to hold in-person hearings.

(ii) In a welcome development, the 2021 ICC Rules have abandoned the previously applicable default rules that pleadings and communications had to be filed in hard copies. In particular, new Article 3(1) has removed the requirement that "[a]*ll pleadings and other written communications* […] *be supplied in a number of copies sufficient to provide one*" to the other party, the arbitrators and the Secretariat.[13] It thereby leaves it to the arbitral tribunal and the parties to agree upon the form in which pleadings and communications must be "*sent*."[14]

Similarly, Articles 4 (Request for Arbitration) and 5 (Answer) of the 2021 ICC Rules require claimant and respondent to submit their initial pleadings "in a sufficient number of copies […] for each other party, each arbitrator and the Secretariat" only if the claimant or the respondent, as the case may be, requests the transmission of such pleadings "*by delivery against receipt, registered post or courier*."

Investment Treaty Arbitrations

Another significant development in the 2021 ICC Rules is the introduction of two rules specifically designed to apply to investment treaty disputes.

First, new Article 13(6) provides that when the arbitration agreement upon which the arbitration is based arises from a treaty, absent the parties' agreement, no arbitrator may have the same nationality as any party to the arbitration. This provision is similar to Article 39 of the ICSID Convention, which limits the appointment of arbitrators who have the same nationality as one of the parties.[15]

New Article 13(6) seeks to bolster both the appearance and the reality of neutrality of the arbitral

12 *See*, *e.g.*, Articles 1(3), 1(4), 2(2), 4, 14(3) and 19(2) of the 2020 LCIA Rules.

13 *See*, *e.g.*, 2017 ICC Rules, Article 3(1).

14 *See*, *e.g.*, 2021 ICC Rules, Article 3(1).

15 *See also,* ICSID Convention, Article 38, which prohibits the Chairman of the Administrative Council from appointing arbitrators who are nationals of the Contracting State party to the dispute or of the Contracting State whose national is a party to the dispute.

tribunal in the context of investment treaty disputes, which are frequently subject to greater transparency and enhanced public scrutiny due to the public interests often at stake.

Second, Article 29(6)(c) provides that the emergency arbitrator provisions in the ICC Rules are not applicable in the event that the arbitration agreement upon which the request for arbitration is based arises from an investment treaty. This new rule codifies existing ICC Court practice. It further clarifies Article 29(5) of the 2017 ICC Rules, which arguably already excludes investment treaty disputes from the scope of application of emergency arbitration.

This new rule also reflects existing practices of other arbitral rules and institutions more commonly used to resolve investment treaty disputes. For instance, under both the ICSID Arbitration Rules and the UNCITRAL Arbitration Rules – which have traditionally been used for the greatest number of investment treaty disputes – emergency arbitration is not available.[16]

However, the automatic carve-out of the 2021 ICC Rules' emergency arbitrator provisions is intended to apply solely to treaty-based disputes. Thus, for disputes which have their jurisdictional basis in an investment contract and not in an investment treaty, the ICC's emergency arbitration regime would continue to be applicable, if relevant. In that case, sovereign and commercial parties alike would be well-advised to include in their investment contract an express opt-out of the ICC Rules' emergency provisions, if so desired by the parties.[17]

New Articles 13(6) and 29(6)(c) of the 2021 ICC Rules are the only two rules in ICC-administered arbitrations which are specifically tailored to the resolution of investment treaty arbitrations. At the same time, these new provisions demonstrate the ICC's willingness to take into account the specificities of treaty-based disputes and to encourage sovereign parties to consider the ICC Rules as a preferred option for resolving disputes.

Thus, although investment treaty disputes have traditionally constituted only a small portion of the ICC's case docket,[18] the draft 2021 ICC Rules reflect the institution's ambition to enhance its position as a favoured dispute resolution forum and mechanism for commercial and sovereign actors alike.

Conclusion

The 2021 ICC 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 concern the introduction of a disclosure requirement of third-party funding arrangements as well as amended rules on joinder and consolidation, which facilitate and clarify the management of complex arbitrations involving multiple parties on the basis of multi-layered contractual arrangements.

Other amendments more likely to provoke controversy concern the ICC Court's heightened scrutiny over the constitution of the arbitral tribunal, with the introduction of a provision enabling the Court to disregard, in "*exceptional circumstances*," the parties' agreement on the method of constitution of the arbitral tribunal. It remains to be seen whether certain parties question the Court's interpretation of the "*exceptional circumstances*" standard, by basing challenges to arbitral awards on the ground that the composition of the arbitral tribunal was not in accordance with the parties' agreement.

Finally, the 2021 ICC Rules' introduction of provisions specifically tailored to treaty-based disputes reflects the ICC's ambition to enhance its role as an attractive dispute resolution forum not only for commercial parties but also for sovereign actors.

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[16] Other, institutional rules extended the application of the emergency arbitrator provisions to investment treaty disputes. *See,* Arbitration Rules of the Stockholm Chamber of Commerce ("SCC"), Appendix II; SIAC Investment Arbitration Rules, Schedule 1; China International Economic and Trade Arbitration Commission International Investment Arbitration Rules ("CIETAC IA Rules"), Appendix II.

[17] Parties to an investment contract may also consider expressly opting out of the 2021 ICC Rules' expedited procedure rules as laid out in Article 30 and Appendix VI of the Rules, and which would otherwise be applicable, in the event that the amount in dispute does not exceed US$ 2,000,000 if their investment contract was concluded on or after March 1, 2017 and before January 1, 2021, or US$ 3,000,000 if their investment contract was concluded on or before January 1, 2021.

[18] ICC Dispute Resolution 2019 Statistics ("In 2019, two cases were filed on the basis of bilateral investment treaties (BITs). […] Since 1996, when the first BIT case was registered, to date, ICC has administered 42 cases based on BITs.")