

## ICC Launches Revised Arbitration Rules for 2021

*The amendments aim to increase transparency and efficiency in the arbitral proceedings.*

### Key Points:

- To increase transparency, parties must disclose “the existence and identity” of third-party funders.
- To increase efficiency, arbitral tribunals may decide to conduct hearings remotely, irrespective of any objections from the parties.
- New provisions allow the joinder of additional parties and the consolidation of multi-party or multi-contract arbitrations.

On 1 December 2020, the International Chamber of Commerce (ICC) published the ninth iteration of its arbitration rules (the 2021 Rules). The 2021 Rules — which came into effect on 1 January 2021 and will apply to all disputes submitted to the ICC thereafter — introduce a number of amendments to increase transparency and minimise the effects of the COVID-19 pandemic on proceedings, as well as new specific provisions for complex arbitrations and investment treaty disputes. This *Client Alert* provides a summary of these amendments.

### Transparency

Third-party funding has become increasingly popular in international arbitration. To increase transparency of third-party funding, Article 11(7) of the 2021 Rules requires parties to disclose “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”. Article 11(7) confirms the ICC’s approach in the 2019 Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration, which encourages arbitrators to consider, in evaluating whether to make a disclosure, “relationships with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award.” As such, the obligation under Article 11(7) intends to assist arbitrators in identifying potential conflicts of interest at the outset of the arbitration.

Article 11(7) reflects a practical and moderate approach to the question of third-party funding, it goes further than the policy of the Stockholm Chamber of Commerce, which simply “encourages” (but does not compel) parties to disclose the existence of a third-party funding arrangement. However, unlike Article 44.2 of the Rules of the Hong Kong International Arbitration Centre, Article 11(7) does not require disclosure of the funding agreement itself.

Similarly, in an effort to protect the integrity of the proceedings, Article 17(2) of the 2021 Rules empowers arbitral tribunals to “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”. In this way, Article 17(2) resembles Article 18.4 of the London Court of International Arbitration Rules (LCIA Rules), which allows arbitral tribunals to exclude new counsel from participating in the proceedings.

### **Party Equality**

Article 12(9) of the 2021 Rules allows the ICC Court, in exceptional circumstances, to appoint each member of the arbitral tribunal when there is a “significant risk of unequal treatment and unfairness that may affect the validity of the award.” In other words, Article 12(9) empowers the ICC Court to disregard arbitration agreements containing procedures for constituting the arbitral tribunal that do not treat the parties equally.

While prior iterations of the ICC Rules already entitled the ICC Court, under certain conditions, to appoint each member of the arbitral tribunal in multi-party arbitrations, Article 12(9) empowers the ICC Court to do so in any arbitration in which party equality may be at risk.

### **Efficiency**

The COVID-19 pandemic triggered a quick shift to remote hearings. However, under previous versions of the ICC Rules, it was not immediately clear whether an arbitral tribunal could hold remote hearings without agreement from the parties. The ICC has sought to resolve that ambiguity with Article 26(1) of the 2021 Rules, which expressly allows arbitral tribunals to “decide, after consulting with 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 appropriate means of communication”. Accordingly, under Article 26(1), a tribunal may decide to conduct a hearing remotely, irrespective of any objections from the parties.

Similarly, Articles 4(4)(b) and 5(3) of the 2021 Rules provide that all submissions and communications shall be made electronically unless the submitting party expressly requests transmission “by delivery against receipt, registered post or courier”. This is a clear departure from previous versions of the ICC Rules, in which there was a presumption in favor of paper filings and submissions.

In addition, the 2021 Rules increase the threshold for the automatic application of the expedited procedure provisions, from US\$2 million to US\$3 million. However, parties retain the right to opt out of the expedited procedure by agreement at any time.

With a view to strengthening parties’ due process rights and increase the arbitration’s efficiency, Article 36(3) of the 2021 Rules allows arbitral tribunals to issue an award “as to claims made in the arbitral proceedings in which the arbitral tribunal has omitted to decide”. By expressly allowing the possibility of additional awards, Article 36(3) is likely to reduce the risk of annulment of awards on *infra petita* grounds (as well as reduce the cost and delays associated with annulment applications).

## Complex Arbitrations

The 2021 Rules introduce novel provisions to facilitate the joinder of additional parties and the consolidation of multi-party or multi-contract arbitrations. In particular, Article 7(5) of the 2021 Rules allows parties to file requests for joinder after the confirmation or appointment of any arbitrator. Under the 2017 Rules, no additional party could be joined after the constitution of the arbitral tribunal, unless all parties, including the additional party, agreed. Now, under Article 7(5), the tribunal, once constituted, may decide on the request taking into account all relevant circumstances, including “whether the arbitral tribunal has prima facie jurisdiction over the additional party, the timing of the Request for Joinder, possible conflicts of interest and the impact on the arbitral procedure”, provided that the additional party accepts the constitution of the tribunal and agrees to the terms of reference.

In addition, Article 10 of the 2021 Rules significantly expands the scope for consolidation by providing that consolidation may occur in instances when “the claims are not made under the same arbitration agreement or agreements, but the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible”. Article 10 follows the approach of Article 22.7 of the LCIA Rules, which allows the consolidation of claims commenced under compatible arbitration agreements. Similarly, Article 10 clarifies that consolidation is available for claims under the same arbitration agreements.

## Investment Treaty Arbitration

Reflecting the increasing number of investment treaty arbitrations conducted under the ICC Rules, the 2021 Rules include two provisions specifically intended to apply to this type of dispute.

In particular, Article 13(6) of the 2021 Rules provides that, if the arbitration agreement is based on a treaty and unless the parties agree otherwise, the arbitrator shall not share the nationality of any of the parties. Article 13(6) mirrors Article 39 of the International Centre for Settlement of Investment Disputes (ICSID) Convention, which restricts the appointment of arbitrators that share the nationality of any of the parties.

In addition, Article 29(6)(c) of the 2021 Rules provides that the ICC Emergency Arbitrator Provisions are not available in treaty-based arbitrations. Article 29(6)(c) reflects the ICC’s view that emergency arbitrator proceedings are not suitable for investment treaty arbitration because states and state-owned companies do not have the ability to comply with their short time limits.<sup>1</sup>

## Conclusion

With the 2021 Rules, the ICC has taken a step forward to increase the efficiency and transparency of arbitral proceedings. In addition, the 2021 Rules helpfully clarify and refine the language of certain provisions, as well as codify the ICC’s current practice. However, some of the amendments (particularly Articles 17(2) and 12(9)) could potentially impinge on party autonomy in the constitution of the arbitral tribunal or the appointment of counsel. The ways in which the ICC Court or arbitral tribunals will apply these amendments in practice remains to be seen.

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**Endnotes**

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<sup>1</sup> See ICC Commission Report: States, State Entities and ICC arbitration, 2017  
<https://iccwbo.org/content/uploads/sites/3/2016/10/ICC-Arbitration-Commission-Report-on-Arbitration-Involving-States-and-State-Entities.pdf>.