

Client Alert

New ICC Arbitration Rules Launched

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The ICC's updated Arbitration Rules will take effect on 1 January 2021. The new rules aim to increase the efficiency and transparency of ICC arbitration proceedings in order to make them "*even more attractive, both for large, complex arbitrations and for smaller cases*".¹ As with the recent update to the LCIA Arbitration Rules (see our briefing [here](#)), the amendments reflect recent changes in dispute resolution practice and demand. The new rules include:

1. express powers for the tribunal and the ICC Court to (i) exclude party representatives following a change in representation, and (ii) in exceptional circumstances, to overrule the parties' choice of arbitrator;
2. obligations on parties to disclose information regarding any third-party funding arrangement;
3. new provisions relating specifically to investment treaty arbitrations;
4. a shift to electronic communication and increased use of remote hearings;
5. increased flexibility for joinder of parties and consolidation of proceedings in complex cases;
6. the ability for parties to apply for an additional award in relation to claims which were heard in the arbitration but were not addressed in the tribunal's decision; and
7. an expanded scope for expedited proceedings.

The 2021 updates to the ICC Arbitration Rules are welcome – they offer increased flexibility for parties to complex disputes and maintain the high ethical standards that are essential to international arbitration. However, as discussed further below, the new power to disregard the parties' choice of arbitrators is potentially controversial and, it is hoped, will be used sparingly.

We summarise below a number of the more notable changes to the Rules.

Party choice and transparency

Choice of arbitral tribunal

A potentially controversial change in the 2021 Rules is the introduction of a new express power in Article 12(9) which enables the ICC Court to deviate from the parties' choice of arbitral tribunal "*in exceptional circumstances... to avoid a significant risk of unequal treatment and unfairness that may affect the validity of the award.*"² In such circumstances, the ICC Court would have the ability to appoint the tribunal members itself. Whilst parties may have concerns that this new power impinges on their fundamental right

¹ As described by ICC Court President Alexis Mourre, <https://iccwbo.org/media-wall/news-speeches/icc-unveils-revised-rules-of-arbitration/>.

² Article 12(9) of the 2021 ICC Arbitration Rules.

to choose the members of the tribunal, the ICC has indicated that the intention of the provision is just to allow the Court to “*disregard unconscionable arbitration agreements*”³ – it remains to be seen how the ICC Court will interpret this, but the new Article 12(9) indicates that the intention is to “*avoid a significant risk of unequal treatment and unfairness*”. Given the high threshold for exercising the power (i.e. that there are “*exceptional circumstances*” and that the “*validity of the award*” may be affected), it will, it is hoped, be used very rarely.

Party representation

Another potentially controversial change is the introduction of a new Article 17(1) regarding party representation. The new article provides that “[*e*]ach party must promptly inform the Secretariat, the arbitral tribunal and the other parties of any changes in its representation”, and, under Article 17(2), the tribunal now has the power to take any necessary measure to avoid conflicts of interest arising from a change in a party’s representation, including the power to exclude the representative. This is a significant change and aims to prevent tactical appointments of counsel which aim to disrupt the arbitration. Therefore, whilst it may be controversial on its face, the new power has practical merit and, in any event, is broadly reflective of the IBA Guidelines on Party Representation⁴ as well as the LCIA Arbitration Rules.⁵

Third party funding

Reflecting the rise in third party funding of arbitration proceedings, the 2021 Rules impose a new duty on parties to disclose the existence of any third party funding arrangements and the identity of the third party funder to the Secretariat, the tribunal and the other parties.⁶ This provision is aimed at enabling arbitrators to comply with their duties of impartiality and independence, and particularly their duties of disclosure in relation to potential conflicts of interest. The introduction of this duty is particularly timely given the recent Supreme Court decision in Halliburton Company v Chubb Bermuda Insurance Ltd,⁷ which clarifies arbitrators’ legal duties of disclosure (see our briefing [here](#)).

Investment arbitrations

The 2021 Rules include two new provisions relating to investment treaty arbitrations, which reflect the specific nature of, and the public interest in, these types of disputes. Under Article 13(6), where the relevant arbitration agreement is embodied in a treaty, no arbitrator may be of the same nationality as any of the parties, unless the parties agree otherwise. In addition, Article 29(6) now expressly excludes treaty-based arbitrations from the scope of the Emergency Arbitrator Provisions.

Increasing efficiency

Embracing technology

Article 3(1) of the new rules requires submissions, notifications and communications to be sent electronically, albeit parties can request service by hard copy.

Early on in the Covid-19 pandemic, and in an effort to address arguments raised by parties trying to resist virtual hearings, the ICC confirmed that hearings could take place remotely under the 2017 Rules.⁸ However, the new rules now expressly empower the tribunal to decide whether any hearings will be conducted in person, or remotely by “*videoconference, telephone or other appropriate means of communication*”, as long as the parties are first consulted and “*the relevant facts and circumstances of*

³ <https://iccwbo.org/media-wall/news-speeches/icc-unveils-revised-rules-of-arbitration/>

⁴ IBA Guidelines on Party Representation in International Arbitration, 25 May 2013.

⁵ Article 18.4 of the LCIA Arbitration Rules: “*The Arbitral Tribunal may withhold approval of any intended change or addition to a party’s authorised representatives where such change or addition could compromise the composition of the Arbitral Tribunal or the finality of any award (on the grounds of possible conflict of interest or other like impediment).*”

⁶ Article 11(7) of the 2021 ICC Arbitration Rules.

⁷ Halliburton Company v Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd) [2020] UKSC 48.

⁸ ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic, 9 April 2020.

the case” are taken into account.⁹ The new drafting does not prioritise one form of hearing over another and (as is the case for the 2020 LCIA Arbitration Rules¹⁰) allows for the development of future technology.

Joinder and Consolidation

Under the 2017 Rules, additional parties could not be joined to the arbitration after the confirmation or appointment of the arbitrator without the unanimous consent of all of the existing parties and the additional party. The new rules introduce an exception to this position in circumstances where the additional party agrees to the constitution of the tribunal and to the Terms of Reference (where applicable).¹¹ However, in deciding whether to allow the additional party to be joined, the tribunal must consider all relevant circumstances (including jurisdiction over the additional party, timing of the Request, conflicts of interest and the impact on the arbitration procedure).

The 2021 Rules also clarify the position on consolidation – making it clear that claims between different parties may be consolidated not only where the claims all arise under the same arbitration agreement but also where they arise under multiple identical arbitration agreements (for example in back-to-back contracts).¹²

Additional awards

The 2017 Rules provided a mechanism for parties to apply for the correction of clerical errors in an award but left a potential gap with regard to claims that had been heard by the arbitral tribunal, but which had not been addressed in the award. Whereas previously such an omission may have led to an award being challenged or even to a party submitting a new Request for Arbitration, a new provision under the 2021 Rules allows parties to make an application for an additional award in these circumstances – increasing the efficiency of ICC arbitration, and reducing the opportunities for an award to be challenged.¹³

Expedited arbitration

The 2021 Rules expand the application of the ICC’s expedited arbitration procedure to cases where the amount in dispute does not exceed US\$3m.¹⁴ This is a not-insubstantial increase in value of 50%, and the ICC anticipates that there will be further increases to its scope in the future. The expedited procedure provides an efficient mechanism for arbitration within a short timeframe. The increase in scope reflects the success of the expedited procedure so far, with the vast majority of awards under the expedited procedure being made within the six-month time limit.

⁹ Article 26(1) of the 2021 ICC Arbitration Rules.

¹⁰ Article 19.2 of the LCIA Arbitration Rules.

¹¹ Article 7(5) of the 2021 ICC Arbitration Rules.

¹² *Ibid*, Article 10.

¹³ *Ibid*, Article 36(3).

¹⁴ *Ibid*, Appendix VI, Article 1(2).

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