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The 2021 ICC Arbitration Rules – Key Changes

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On October 6, 2020, the International Court of Arbitration of the International Chamber of Commerce (“ICC”) approved and [released](#) its draft 2021 Rules of Arbitration (“**2021 Rules**”) to replace its 2017 Rules of Arbitration. The 2021 Rules came into force on January 1, 2021. The ICC Rules were last substantially updated in 2012, and amended in 2017 primarily in respect of expedited arbitrations. The new 2021 Rules contain significant changes in several areas but do not fundamentally change the ICC Rules.

One of the most notable changes in the 2021 Rules is a provision regarding the power of the ICC Court of Arbitration to appoint all arbitrators in a given case to ensure fairness and equal treatment of parties. The ICC has also clarified the tribunal’s power to conduct virtual hearings, which is a timely effort in light of the COVID-19 pandemic, while making some key amendments, among other things, to the rules regarding party representation and disclosure of third-party funders.

We have summarized some of the most significant changes below. Wherever new provisions have been added, we have provided the text of the provision.

1. New measure to ensure equal treatment of parties

Article 12 deals with the constitution of an arbitral tribunal, detailing the process through which a tribunal is appointed under the ICC Rules. Generally, the ICC Rules allow the parties to agree to their own process of appointing arbitrators and provide for a default mechanism if parties have not adopted a specific process for appointing arbitrators. Now, the addition of Article 12(9) to the ICC Rules allows the ICC Court to appoint **each** member of the tribunal in cases where the process adopted by the parties causes “significant risk of unequal treatment and unfairness that may affect the validity of the award.” Nevertheless, it should be pointed out that Article 12(9) is to be used only in “exceptional circumstances” to ensure the validity of the award.

The new Article 12(9) reads: “*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.”

2. New measure requiring declaration of funders by parties

Through its “Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration” (January 1, 2019), the ICC made it clear that arbitrators have an obligation to disclose if they have a relationship with “any entity having a direct economic interest in the dispute.” However, there are several instances in which the relationship between a funder and a party to an arbitration is either protected by a confidentiality clause or simply not disclosed to the ICC or the tribunal. This led to circumstances where an arbitrator simply had no way of disclosing (or even knowing) if he or she had a relationship with “any entity having a direct economic interest in the dispute” in cases where the arbitrator was not informed of the involvement of a funder.

The ICC has now fixed this loophole by adding Article 11(7) to Article 11, which contains General Provisions governing the conduct of the tribunal. Under the newly added Article 11(7), parties must “promptly inform the Secretariat, the arbitral tribunal and the other parties” of the “existence and identity” of any third party that has entered into an arrangement for funding the claims or defenses through which such third party “has an economic interest in the outcome of the arbitration.”

The new Article 11(7) reads: *“In 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.”*

3. Clarifications regarding virtual hearings and electronic communication

The COVID-19 pandemic has fundamentally altered how people do business, with long-lasting impact to be felt in the future. One of the most remarkable changes was how international arbitration quickly transitioned from physical hearings to virtual hearings as both travel and gathering in hearing venues became difficult or impossible. The ICC recognized this change and endeavored to avoid potential challenges to the integrity of virtual hearings and electronic communication by expressly providing for them under the new rules.

Specifically, under the 2021 Rules, the tribunal has the authority to conduct virtual hearings at the request of either or both parties or *sua sponte*. The tribunal can decide to conduct the hearing over whatever medium or media it thinks is the most appropriate after consulting with the parties: by physical attendance, by video conferences, or by telephone or any other media of communication. As the Rules do not exhaustively list the media that may be used, this will allow the tribunal to use one or a combination of multiple media that are best suited for each case.

Additionally, to promote electronic communication and reduce the use of paper, the amended Articles 3, 4, and 5 now provide that hard copies of pleadings are required only upon a party's specific request for "transmission . . . by delivery against receipt, registered post or courier." (See Articles 3(1), 4(4)(b), and 5(3) and Article 1(2) of Appendix V).

4. New measures to govern change of party representation

New Article 17 of the ICC rules, concerning party representation, requires parties to timely notify the ICC Secretariat, the tribunal and other parties of any change in their legal representation. The arbitral tribunal is empowered to decline the proposed change in counsel or limit their role in the proceedings. The measure is chiefly aimed at preventing conflicts of interests between arbitrators and new party representatives.

The newly added provisions under Article 17 read:

"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."

5. New measures to allow the issuance of an additional award

Under the 2017 Rules, after an award is issued, parties are only allowed to make applications to correct clerical, computational, or typographical errors in the award. However, under the newly added Article 36(3), a party may, within 30 days from the receipt of the award, make an application for an "additional award" to address any claims that the tribunal "omitted to decide." This is important in situations where parties are left with an award that fails to decide a contended issue. Correspondingly, Article 2(v) is revised to include an "additional award" in the definition of an "award."

6. Conclusion

The 2021 Rules represent ICC's efforts to clarify some grey areas and conflict issues, and have made the ICC arbitration process more capable of dealing with some of the real-world problems in international arbitration today.

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