The revised 2021 ICC Arbitration Rules

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On 1 January 2021, the revised ICC Arbitration Rules ("2021 ICC Rules") will enter into force. The 2021 ICC Rules adopt several new provisions intended to provide greater efficiency, flexibility and transparency. They include some noteworthy modifications regarding multi-party arbitrations, third-party funders and the appointment of the arbitral tribunal. Furthermore, the 2021 ICC Rules expand the scope of the expedited procedure and allow for the issuance of additional awards. Another important and contemporary change concerns the facilitation of virtual hearings and electronic submissions.

Important amendments in the 2021 ICC Rules:

- **Extension of rules on joinder and consolidation in multi-party disputes**
- **Facilitation of efficiency through electronic submissions, virtual hearings and broader scope of application of the expedited procedure**
- **Disclosure obligation of third-party funding agreements**
- **Option to request an additional award on issues the arbitral tribunal omitted to decide**

Joinder and consolidation

Complex, high value disputes often involve multiple parties and contracts. The 2021 ICC Rules introduce several new rules to facilitate the joinder of third parties and the consolidation of arbitration proceedings.

Under the ICC Arbitration Rules of 2017 ("2017 ICC Rules"), a joinder after the confirmation or appointment of any arbitrator was only possible in the (rare) case where all parties agreed to the joinder. The 2021 ICC Rules change this: Article 7 (5) 2021 ICC Rules permits the joinder of additional parties during the course of the arbitration, i.e. after the appointment and

confirmation of an arbitrator. As a condition, the additional party must accept the constitution of the arbitral tribunal and agree to the Terms of Reference. The arbitral tribunal will decide on the request for joinder considering "all relevant circumstances". This includes questions such as "whether the arbitral tribunal has prima facie jurisdiction over the additional party, the timing of the Request for Joinder, possible conflicts of interests and the impact of the joinder on the arbitral procedure."

The revised Article 10 (b) 2021 ICC Rules gives more flexibility to consolidation by expressly including situations where "all of the claims in the arbitrations are made under the same arbitration agreement or agreements."

Disclosure obligation of third-party funding agreements and conflicts of interests

The 2021 ICC Rules contain a significant new provision regarding the disclosure of third-party funding. Article 11 (7) 2021 ICC Rules provides the party's obligation 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". The provision aims to assist the arbitral tribunal in complying with its disclosure obligations, thereby limiting the risk of conflicts of interests.

Another step to more transparency and the avoidance of conflicts of interests is the introduction of a new rule concerning party representation. Article 17 (2) 2021 ICC Rules requires the parties to promptly inform the ICC Secretariat about any changes in party representation. Further, it allows the arbitral tribunal, once constituted, to "take any measure necessary" to avoid a conflict of interest of an arbitrator arising from a change in party representation. The arbitral tribunal can also decide to exclude a new party representative from participating in whole or in part in the arbitral proceedings. Parties are advised to keep this scrutiny in mind from the beginning when choosing its counsels and the arbitrators.

Appointment of arbitrators

Under Article 12 (9) 2021 ICC Rules, the ICC 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". Furthermore, Article 13 (6) 2021 ICC Rules provides that in an investment treaty arbitration, "no arbitrator shall have the same nationality of any party to the arbitration" unless the parties agree otherwise. Both provisions aim at preventing risks of unequal treatment of parties, unfair conditions in arbitrations and, ultimately, challenges of awards for these reasons.

Virtual hearings and electronic submissions

The 2021 ICC Rules introduce new rules concerning the facilitation of electronic submissions, a particularly timely change in light of the global pandemic. According to Article 26 (1) 2021 ICC Rules, the arbitral tribunal may decide after consultation with the parties to hold evidentiary hearings by physical attendance or remotely by videoconference, telephone or other means of communications. This clarification confirms the tribunals' procedural discretion to decide on the modus operandi for hearings. Although this is not expressly mentioned in the 2021 ICC Rules, the arbitral tribunal may also allow hybrid hearings involving both physical and virtual elements.

Virtual hearings are a practical way of improving efficiency of the arbitration proceedings. While parties still have to coordinate their schedules with the tribunal to organize a hearing, additional tasks such as finding a venue and cost producing necessities such as travel arrangements can be minimized. Virtual hearings, however, also create their own challenges such as using the appropriate and reliable electronic tools and the coordination of parties, arbitrators and witnesses over different time zones.

Additionally, the new 2021 ICC Rules further shift towards electronic submissions and communications by simply requiring that they be "sent" (Article 3 (1) 2021 ICC Rules). Similarly, Article 4 (4) (b) and Article 5 (3) 2021 ICC Rules provide that the Request for Arbitration and the Answer may only be delivered "against receipt, registered post or courier" if a party so requests, removing the requirement of a paper submission as a default.

Expedited rules

The scope of application of the expedited procedure provisions has been broadened by raising the threshold from USD 2 million to USD 3 million. The new threshold of USD 3 million is applicable for arbitration agreements that are concluded on or after 1 January 2021. The increase of the threshold will allow more disputes to be conducted under the rules of the expedited procedure. The parties can opt out from the expedited procedure provisions.

Since the introduction of the expedited procedure in 2017, more than 140 cases had been or were being conducted under the expedited procedure provisions. From the 50 final awards rendered in expedited proceedings, 37 were concluded within the six-month time limit.

Emergency arbitrator

The new Article 29 (6) (c) 2021 ICC Rules clarifies that the emergency arbitrator provisions are not available in investment treaty arbitrations. This confirms the already established ICC practice under the 2017 ICC Rules.

Additional awards

Under the 2017 ICC Rules, a decision of the tribunal on issues not included in the final award was only possible if the law applicable at the seat of the arbitration provided for such an additional award. The new Article 36 (3) 2021 ICC Rules provides that a party may request an additional award "as to claims made in the arbitral proceedings which the arbitral tribunal has omitted to decide" within 30 days from receipt of the award by such party.

The new provision on additional awards is in line with developments in other international arbitration rules and laws. For instance, under the new Article 189a of the revised Chapter 12 of the Swiss International Private Law Act, which will enter into force on 1 January 2021, parties will have the option of requesting an additional award (see previous Pestalozzi Legal Update).

The issuance of an additional award can limit the risk of a challenge of the award on the basis of being infra petita. It is important for the requesting party to keep in mind that the time limits for filing an application to set aside the award may run parallel to the 30 days' time limit of its application to the ICC Court for an additional award, which may limit the practicability of an additional award.

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No legal or tax advice

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