



High-impact features of the revised ICC Arbitration Rules for commercial arbitrations

The International Court of Arbitration of the International Chamber of Commerce (ICC) is a leading institution in international commercial arbitration. In 2020 alone, the ICC administered 946 new arbitration cases world-wide. The ICC has updated its arbitration rules, which have been in force since March 2017, with effect from January 2021 (ICC 2021 Rules). The aim of the reform is to further improve the efficiency, transparency and flexibility of ICC administered arbitrations. The Covid19 pandemic has further accelerated these developments in arbitration law and practice. In this briefing, we highlight the most important changes for commercial arbitrations conducted under the ICC Rules. The new rules emphasize the importance of a carefully drafted arbitration agreement for the smooth conduct of an arbitration proceeding. Users of international arbitration should be aware of the rule changes since they will shape the future of ICC arbitrations considerably while still giving parties room to manoeuvre.

Relaxing the requirements for multi-party arbitrations

Under the ICC 2017 Rules, joining a third party prior to the constitution of the arbitral tribunal was possible and did not constitute a problem in practice. This remains unchanged. However, joining a third party after constitution of the tribunal was only possible with consent of all parties. Article 7(5) of the ICC 2021 Rules now provides an additional option: as long as the “new” party agrees, accepts the constitution of the arbitral tribunal and the Terms of Reference, the tribunal can join that party to the proceedings if this is in the interests of efficiency after considering all relevant circumstances, even without the consent of the original parties to the arbitration. The decision to join a new party does not, however, constitute a decision on jurisdiction over that party.

The new rules may lead to unforeseen complications, especially for claimants. If a respondent asks to join a third party, the arbitration proceedings can become significantly more demanding and complex. At the same time and with respect to the costs of arbitration, the amount at stake will increase for the claimant if the claim is unsuccessful and the claimant is ordered to bear the costs of the respondents. However, the tribunal has full discretion in allocating costs as well as deciding requests for joinder. Nonetheless, parties should be aware of these risks in multi-party arbitrations.

Excluding new party representatives from the arbitration

One of the most significant provisions of the new rules concerns changes in party representation while proceedings are underway. If such a change occurs – which must be notified by the parties without delay – the tribunal may take all necessary measures to avoid a resulting conflict of interest of an arbitrator (ICC 2021 Rules, article 17(2)). In particular, the tribunal may exclude the new party representative from the proceedings in whole or in part. This requires the balancing of party autonomy against the preservation of the integrity of the arbitral process with the aim of avoiding disruptions through tactical challenges to arbitrators.

This new provision presents some uncertainties. In the first instance, it is not immediately clear how excluding party representatives from part of the proceedings will work in practice. Additionally, conflicts may arise with national arbitration laws. For example, if the seat of the arbitration is Germany, an exclusion ordered by the arbitral tribunal could conflict with section 1042(2) of the Code of Civil Procedure (ZPO), under which lawyers cannot be excluded as authorised representatives. However, the code does not prevent the parties from having restrictions on the choice of lawyer (e.g.: only “specialist lawyers” for a particular area of law). Article 17 of the ICC 2021 Rules may be interpreted as such a restriction, limiting the choice of lawyer to those who present no conflict of interest to the tribunal already constituted. Such an interpretation could avoid a conflict with national arbitration law.

Obligation to disclose involvement of third-party funders

Pursuant to article 11(7) of the ICC 2021 Rules, the parties are obliged to disclose the identity of any non-participating third party who has an economic interest in the outcome of the arbitration (e.g.: a third-party funder with a contingency fee arrangement). This obligation is designed to assist the arbitrators in their ongoing duties of independence and impartiality. The funding agreement itself is not subject to disclosure. Article 11(7) of the ICC 2021 Rules does not cover financing within affiliated companies, fee agreements between lawyer and client, or financing that is not specific to arbitral proceedings (e.g. general bank loans). The revised rules likely do not require existing legal costs insurance to be disclosed.

Increased Transparency

The ICC has introduced enhanced requirements that tribunals provide reasons for their decisions to improve transparency. These requirements apply when at least one of the parties makes a request for reasons in advance of that decision (Appendix 2, article 5 of the ICC 2021 Rules). This, however, does not provide any additional opportunity to appeal or review the decision for which reasons have been communicated. Related to those efforts toward better transparency, the new rules provide for publication of information on the proceedings on the ICC homepage, such as awards or procedural orders. However, the parties are free to refuse consent to such publications.

As before, the ICC 2021 rules do not include special confidentiality provisions for the parties. If parties wish to include them, this will require separate arrangements early on to avoid later disputes and unpleasant surprises.

More expedited proceedings

According to Appendix 6 article 1(2) of the ICC 2021 Rules the expedited procedure will apply automatically for cases with up to US\$3 million in dispute if the arbitration agreement was concluded on or after 1 January 2021. An increasing number of expedited proceedings should be expected, which are supposed to be decided faster (usually within 6 months) and in a more cost-effective way. The parties remain free to decide on the automatic application of the expedited procedure provisions by either opting out or opting into the procedure.

Facilitating digital and virtual arbitrations

The Covid19 pandemic has reinforced the trend toward digitalisation in arbitration and this is reflected in the revised rules. For example, article 26(1) of the ICC 2021 Rules clarifies that the arbitral tribunal may – even without party consent – order a virtual hearing such as by video conference or by telephone. The tribunal must consult with the parties and consider all circumstances of the individual case. It is unlikely that tribunals will lightly disregard reasoned

objections by the parties. Anecdotal reports suggest that the arbitrators and party representatives usually agree whether a virtual hearing is suitable for a particular case at hand.

Under the revised rules, it will no longer be necessary for written communications between the parties, the tribunal and Secretariat to be in hard copy (see articles 3(1); 4(4); 5(3); 7(3) of the ICC 2021 Rules). Email will be acceptable, even for the Request for Arbitration. This codifies the flexible ICC practice highlighted by the Covid19 pandemic. Nonetheless this can raise practical questions, e.g. to whom such emails should be addressed. Parties should reach agreement on such matters in advance. In addition, the mandatory procedural rules of the place of arbitration must always be considered and complied with.

Selection of the entire tribunal by the ICC in exceptional circumstances

Under exceptional circumstances, the ICC can select all the arbitrators under article 12(9) of the ICC 2021 Rules even if this is contrary to the arbitration agreement. This is to avoid significant risks of unequal treatment and unfairness which may affect the validity of the award. We anticipate that the ICC will use this option cautiously and only in rare circumstances. For example, in situations where only one party can appoint all arbitrators and this is prohibited by the law of the seat of the arbitration, or in situations where a claimant faces multiple respondents who are unable to agree on an arbitrator.

Other

Article 10 of the ICC 2021 Rules clarifies the situations where it is efficient and appropriate to consolidate two or more arbitrations. This revision codifies the previous ICC practice, thus improving certainty.

If the tribunal in its award has not decided claims made in the proceedings, either party can apply for an additional award – without going through the difficulty of commencing new arbitration – within 30 days of receipt (article 36(3) ICC 2021 Rules).

Unless the parties have agreed otherwise, the tribunal can encourage the parties to consider settlement as a measure for effective case management (article 22(2); Appendix 4, h)(i) of the ICC 2021 Rules). This is somewhat of a paradigm shift. Whether a tribunal will encourage the parties to consider settlement and the extent of this encouragement will likely depend on the composition of the tribunal. Encouraging amicable settlement as an arbitrator is more in line with the continental European tradition yet is still not embraced by some common law arbitrators.

Finally, Emergency Arbitrator Provisions (article 29 ICC 2021 Rules) may now apply even if the parties have agreed to other pre-arbitral procedures that provide for interim relief.

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