



The updated ICC arbitration rules

The International Chamber of Commerce (**ICC**) has amended its arbitration rules effective January 1, 2021.

These amendments apply to all ICC arbitrations to be commenced from that date, irrespective of when the underlying Arbitration Agreement was concluded, unless the parties "have agreed to submit to the Rules in effect on the date of their arbitration agreement" (Article 6 (1)).

Although some of the amendments recently introduced are intended to overcome challenges posed by the Covid-19 pandemic, they should, nevertheless, continue to make ICC arbitration more flexible, transparent and efficient in the years to come.

We hope the following may help you keeping track of the amended rules applicable to ICC arbitrations.

1. Conflict of Interests

The 2021 ICC Rules introduce three Articles that mainly prompt to ensure the independence and impartiality of the arbitral tribunal.

Article 11 (7) requires the parties to notify the ICC Secretariat, the arbitral tribunal and other parties of the existence and identity of non-litigant third parties funding the claims pursued in the arbitration, considering that such third parties have an economic interest in the outcome of the arbitration.

In addition, Article 13(6), applying to investment arbitrations based on a treaty, ensures complete neutrality of the arbitral tribunal by providing that no arbitrator shall have the same nationality of any party to the arbitration.

To prevent the emergence of conflicts of interests between arbitrators and new party representatives, after the establishment of the tribunal, Article 17 (1) obliges the parties to inform the Secretariat, the arbitral tribunal and the counterparties of any changes of its representatives.

Also, once a party communicates an alteration of its representatives, the arbitral tribunal may take any measures to avoid a conflict of interests, including rejecting the proposed change or limiting the new representatives' participation in part of the proceedings (Article 17 (2)).

2. The Virtualization of Arbitration

The 2021 ICC arbitration rules seek to adapt the arbitration proceedings to the new context of circulation restrictions and the technological breakthrough carried by the COVID-19 pandemic, simultaneously aiming to reduce the delays and costs of arbitration procedures.

As a result of the Covid-19 pandemic, virtual hearings became an increasing option for parties. To align with what is now common practice in arbitration, the revised Article 26 (1) gives discretion to the tribunal to decide, after consulting the parties and considering the circumstances of the case, if a hearing shall be conducted in person or remotely, by videoconference, teleconference, or other possible means of communication.

The amended ICC arbitration rules seek to bolster greater efficiency, flexibility and transparency, in order to make ICC arbitration proceedings more attractive, both for large and complex cases as for smaller cases.

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Interestingly enough, the previous ICC Rules already included a recommendation to hold hearings through telephone or video conferencing whenever personal attendance was not necessary (Appendix IV – case management techniques, Article 1 (f)).

In what concerns written submissions, notifications and communications, the revised Article 3 (1) abandons the rule of its physical presentation and allows the parties to choose any means of telecommunication that provide a record of the sending.

By removing the rule of paper filings, the ICC affirms its call for “greener” arbitrations while expanding the principles of efficiency and flexibility.

3. Joinder and consolidation provisions

The new Article 7 (5) establishes some requirements for the acceptance of a Request for Joinder of additional parties after the appointment of any arbitrator. Besides the agreement of all the parties (Article 7 (1)), the additional party must accept the constitution of the arbitral tribunal and the Terms of Reference, if they exist.

Once these requirements are fulfilled, the arbitral tribunal decides on the request, considering “all relevant circumstances”, including, without limitation, the “*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”.

Regarding the consolidation of arbitrations, the Court may now order the consolidation of two or more arbitrations when the claims are made under various common arbitration agreements (Article 10 (b)) or when the claims are not made under the same arbitration agreement or agreements, but the arbitrations have common parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the arbitration agreements are compatible (Article 10 (c)).

Thus, the consolidation of arbitrations becomes easier and more flexible.

4. Tribunal appointments

The new Article 12 (9) confers the Court competence to, in exceptional circumstances, appoint all the arbitrators, regardless of any agreement between the parties. The 2017 version of ICC Rules only allowed the Court to appoint the arbitrators when parties were unable to agree on the constitution of the arbitral tribunal.

The purpose of the norm is to prevent the violation of fundamental principles of the arbitration procedure, like the equality of the parties and the fair trial, thereby avoiding the nullity of the arbitral award. Actually, the mentioned principles are limitations to the principle of freedom to choose the arbitrators and the mechanisms for their selection.

Bearing this in mind, the intervention of the Court will be justified, *v.g.*, when the information or power asymmetry between the parties generates appointment agreements that ascribe the choice of all arbitrators to one party or prevent one party to choose certain people or people with certain characteristics to be the party appointed arbitrator.

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It should be noted that the application of Article 12 (9) may generate problems of compatibilization with Article V(1)(d) of the 1958 New York Convention, according to which an award may be refused recognition if the composition of the arbitral tribunal is not in accordance with the parties' agreement.

5. Additional Award

The 2021 ICC Rules introduce the possibility of an application for an additional award in case the arbitral tribunal omits a ruling on any of the parties' claims. This application must be presented to the Secretariat within 30 days from receipt of the award by the parties. After granting the other parties the possibility to submit any comments to the application, the arbitral tribunal drafts a decision to be submitted to the Court.

If the Court accepts the arbitral tribunal's decision to grant the application, that decision takes the form of an additional award.

6. Expedited Procedure Rules

2021 ICC Rules raise the threshold to opt-out of the expedited procedure rules from USD 2 million to USD 3 million when the arbitration agreement is concluded on or after 1 January 2020. Thus, arbitration agreements concluded on or after 1 March 2017 and up to the end of 2020 remain subject to the USD 2 million threshold established on 2017 ICC Rules.

Conclusions

The changes introduced by ICC 2021 Rules will likely increase the efficiency and flexibility of ICC arbitrations, reducing costs and allowing the adjustment of the procedures according to a multiplicity of factors, like the complexity of the dispute, the participants' availability to travel or any restrictions to the free movement of persons.

At the same time, the 2021 ICC Rules strongly invest in guaranteeing the tribunal's independence, impartiality and transparency, raising the public's confidence in arbitral institutions and the reliability of the arbitral awards.

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