HERBERT SMITH FREEHILLS

INSIDE ARBITRATION: THE NEW ICC RULES 2021: WHAT YOU NEED TO KNOW

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Legal Briefings

The new ICC Rules 2021 (2021 Rules) came into force on 1 January 2021. When released in draft in October 2020 they were announced as "*another step towards even more efficient, flexible and transparent ICC Arbitrations*". The 2021 Rules came hot on the heels of the release of the new LCIA Rules 2020. Despite the somewhat more muted announcement of the latter as an "update", they contained some fairly significant changes. From the press release, some might therefore have been expecting an even more fundamental shift in approach and language in the new 2021 Rules than they saw from the LCIA.

AT A GLANCE

The top changes in the 2021 Rules and ICC guidance are:

- Provision for virtual hearings and a shift away from paper filings;
- Amendments to the consolidation provision, and to the joinder provision to allow for joinder after the confirmation or appointment of a tribunal in certain limited circumstances;
- Allowing for the tribunal to limit changes to party representation where it causes conflicts of interest;
- A requirement that parties disclose certain third party funding agreements;
- ICC Court discretion in "exceptional circumstances" to deviate from party agreement on the method of constitution of the arbitral tribunal and appoint the entire tribunal to avoid unequal treatment; and
- Greater scope for transparency and publication of documents by the ICC, but greater clarity on how parties can ensure confidentiality.

Anyone expecting that level of change might be disappointed. Many of the changes are to be found not in the main body of the rules, but in Appendix I and Appendix II and relate to the internal running of the ICC Court. These include the appointment of the President of the ICC and the formation of committees and special committees to carry out the work of the ICC Court and to streamline process. There are also provisions about the constitution and decision–making processes of those committees. For many, particularly users of the ICC, the internal workings of the institution will be of passing interest, but of relatively little practical significance.

Where we have seen considerable change, however, is in the "Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration" (Note to Parties) which accompanies the ICC Rules. This latest version has been significantly expanded, revised and updated to reflect the changes to the 2021 Rules, but also to provide more extensive guidance on the application and interpretation of the ICC Rules more generally.

So where have the 2021 Rules and guidance taken a step further towards efficiency, flexibility and transparency? In this article we focus on the most important substantive changes, discussing why the changes have been made, and why these changes are of interest and importance to both practitioners and users.

THE PRACTICAL: THE COVID–19 RESPONSE

An obvious and expected change has been to include amendments that are necessary or helpful to smooth the administration of ICC arbitrations through the COVID–19 pandemic, and to provide more clearly for the practice of virtual or remote hearings. Article 26.1 (Hearings) now provides that "*the arbitral tribunal may decide, after consulting the parties, and on the basis of the relevant facts and circumstances of the case, that any hearing will be conducted by physical attendance or remotely by videoconference, telephone or other appropriate means of communication*." This provision gives a tribunal the discretion to order a virtual or remote hearing if appropriate, and, like the 2020 LCIA Rules, "future–proofs" the drafting with the phrase "other appropriate means of communication" to allow for remote hearing technology to continue to evolve over time. The Note to Parties includes a fairly lengthy new section VII C entitled "Virtual Hearings" which provides guidance to arbitrators and parties on when a virtual hearing may be appropriate and the procedural and logistical steps that may be necessary.

The 2021 Rules no longer presume that pleadings and written communications will be submitted in hard copy in multiple sets for each party, arbitrator and the ICC Secretariat. Article 3.1 (Written Notifications) now merely provides for pleadings and written communications to be "*sent*" to each party, arbitrator and the Secretariat, and that the Secretariat be copied into communication from the tribunal. Article 4 (Request for Arbitration), Article 5 (Answer to the Request) and Article 1 of the Emergency Arbitrator Rules have all seen an amendment as a result. The onus is now placed on the claimant and respondent to decide whether they request transmission of the Request, Answer or Emergency Arbitrator Application by "*delivery against receipt*, *registered post or courier*" and if so, they are required to submit a sufficient number of paper copies. This shift has been confirmed in the Note to Parties, which states in paragraphs 10 and 11 that "*as a general rule*" pleadings and correspondence will be sent by email and that the Secretariat will similarly communicate by email.

THE CLARIFICATORY: CHANGES RESOLVING ISSUES SURROUNDING THE ICC'S CONSOLIDATION AND JOINDER PROVISIONS AND CLARIFYING THE ICC'S MOVE TOWARDS GREATER TRANSPARENCY

Consolidation and joinder

The 2021 Rules introduced innovative and wide–ranging changes regarding consolidation and joinder. The 2021 Rules have sought to clarify some of the language in the consolidation provisions and have also provided for joinder after the formation of the arbitral tribunal.

In Article 10 (Consolidation), the 2021 Rules have tidied up the language in Article 10(b). It had been an open question under the previous drafting whether consolidation was only possible where all the claims in the arbitration were made under "*the same arbitration agreement*" (ie the same contract), or also allowed for consolidation under multiple agreements with mirror arbitration clauses. The 2021 Rules now confirm that consolidation may happen where "*all of the claims in the arbitrations are made under the same arbitration agreement or agreements*". Article 10(c) now confirms that it relates to claims that are "*not made under the same arbitration agreement or agreements*". These changes are helpful, and should be welcomed, as should the new guidance in Section II of the Note to Parties which provides significantly more detailed guidance on how the ICC will decide on issues related to consolidation.

Article 7 (Joinder) has also seen an interesting change. Under the framework of the 2012/2017 Rules, no additional party could be joined after the confirmation or appointment of the tribunal unless all parties, including the additional party, agreed. The 2021 Rules include new Article 7(5) which allows for a Request for Joinder to be made after the confirmation or appointment of any arbitrator. The tribunal, once constituted, may now decide on that Request, taking into account all relevant circumstances, including whether the tribunal has jurisdiction over the additional party, the timing of the Request, possible conflicts of interest and the impact of the joinder on the arbitral procedure. The additional party must also accept the constitution of the arbitral tribunal and agree to the Terms of Reference.

Practically speaking, the impact of this change may be minor. What new Article 7(5) will now allow is for a respondent to join a willing co–respondent without the express agreement of the claimant party (providing the tribunal considers it appropriate in the circumstances). Where the party to be joined is unwilling to participate and refuses to accept the constitution of the arbitral tribunal or the Terms of Reference, clearly, the prior hurdles remain.

Transparency

The 2019 Note to Parties contained significant changes focused on transparency and the publication of ICC Awards to aid transparency in commercial arbitration. There are further changes to the 2021 Note to Parties to clarify the earlier provisions, but also to broaden their scope. Section IV B now confirms that the Court will publish (from 1 January 2020) the law firms (where previously it was "counsel") representing parties in the case and (from 1 July 2021 for arbitrations registered as of 1 January 2021) the names of administrative secretaries. Section IV C also expands the material that the ICC may publish from an ICC Arbitration to cover "*ICC Awards and/or orders, as well as any dissenting and/or concurring opinions made as of 1 January 2019*". However, this section also sets out greater clarity regarding when confidentiality will prevent such material from being published. Importantly, this also includes the ability of any individual or entity to tell the Secretariat in advance that it does not wish, as a general policy, for any ICC award and related documents to which it is a party to be published. Clients who are frequent users of ICC arbitration may find this of particular interest.

GETTING TO GRIPS WITH THE CHANGES: RESOURCES TO HELP YOU

The new ICC Rules may not have changed substantially in tone or approach. However, if you are a user of ICC arbitration, you will still want to get to grips with what the changes mean for you and how the ICC Rules compare with those from similar international institutions.

Herbert Smith Freehills' Global Arbitration Team has produced an updated Step by Step Guide to Arbitration under the ICC Rules and an interactive PDF table which compares the rules of key arbitral institutions and the UNCITRAL Rules.

To receive an electronic copy of these documents, please contact arbitration.info@hsf.com

THE BOLD: TRYING TO ANSWER LONG–STANDING ISSUES IN ARBITRAL PRACTICE

Changes to party representation

Back in 2014 the new LCIA Rules introduced a novel provision, providing for a tribunal to be able to withhold the approval of any intended change or addition to a party's legal 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). At the time this provision caused considerable interest and some controversy. Some hailed it as an answer to situations similar to that which arose in the investment treaty case of *Hrvatska Elektroprivreda vs Slovenia* (ICSID Case No ARB/05/24), where the addition of new legal counsel (a barrister from the same chambers as one of the arbitrators) shortly before the final evidentiary hearing raised an issue as to the independence or impartiality of the arbitral tribunal. Other commentators viewed the new provision in the LCIA Rules as a limit on the parties' freedom to choose their legal representatives and as an excess of power for the tribunal.

Some 6 years have passed since the 2014 LCIA Rules. In that intervening period, we've seen a requirement in the SIAC and HKIAC Rules that parties immediately inform the tribunal of any change in their representation, but not a wider adoption of the LCIA's approach (which has been retained in the recent update to the LCIA Rules). However, the fast pace of change in the arbitration community is evident in the ICC's decision to adopt a very similar provision to that of the LCIA in its new Article 17.2. This article allows the tribunal to "*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*".

The intention behind new Article 17.2 is extremely sound, designed to prevent parties from making "tactical" appointments to derail an arbitration by creating a conflict of interest. However, a provision of this nature does expressly empower a tribunal to limit a party's ability to appoint legal representatives of its choice. It is to be hoped that the inclusion of the provision will act as a warning and deterrent to parties considering this sort of tactical game playing, rather than to limit party freedom to change representation where that is genuinely necessary.

Restrictions on unequal tribunal appointments

A further long–running question in arbitration has been whether parties may agree contractually to an unequal method of forming an arbitral tribunal, particularly in a multi–party situation. The issue became live in 1992 when the Supreme Court of France, the Cour de Cassation, gave judgment in the case of *Siemens v. BKMI and Dutco*. The decision focused on the potential conflict between the right to appoint an arbitrator against the right to an equal treatment of the parties in the appointment process and party autonomy. As was standard practice at the time, the two respondents in the ICC arbitration were asked to agree on a joint arbitrator, while the claimant appointed the other. The two respondents challenged the proper composition of the tribunal on the basis that their interests were not aligned, a position which was rejected by the Paris Court of Appeal. However, the Cour de Cassation disagreed, finding that the appointment process was contrary to public policy. The court held that each party must have equality in the appointment of arbitrators, and that this right could only be waived after the disputes in question had arisen. This threw into doubt any purported waiver of the right of appointment at the contractual stage (whether that was by incorporation of institutional rules into the parties' arbitration agreement, or by express waiver drafting in the arbitration clause itself).

The decision of the Court de Cassation in Dutco led to a series of changes to the rules of many arbitral institutions, including the ICC. The 1998 ICC Rules provided for the formation of claimant and respondent "sides" for the purposes of appointment in multi–party arbitrations, and, where the parties could not agree to those "sides", for the arbitral institution to appoint the entire tribunal, thus ensuring equal treatment. This approach was retained in the 2012, 2017 and 2021 amendments. However, the new 2021 Rules also include a new Article 12.9 which can be viewed as a further extension of that principle. Under this article the ICC Court now has a fall–back discretion "*in exceptional circumstances*" to deviate from any agreement by the parties on the method of constitution of the arbitral tribunal, and for the ICC Court to appoint the entire tribunal. The new provision states that this power may be invoked "*to avoid a significant risk of unequal treatment and unfairness that may affect the validity of the award*".

This provision may well raise some eyebrows, particularly amongst users who view their ability to nominate their preferred arbitrator as a fundamental right, a major advantage of using arbitration and a cornerstone of arbitral practice. Many may question where the limits of that party autonomy and choice lie, particularly in an arm's length contractual negotiation between experienced commercial parties. Fault lines on this issue could arise between common and civil law practitioners, particularly on whether any general public policy principle of equality in this area even exists. The ICC has a strict approach to the adoption of the full ICC Rules, and it will be interesting to see whether efforts to draft express provisions to limit or disapply these powers under the ICC Rules, or to confirm the parties' agreement to potential inequality in certain circumstances will be successful. Other users may be concerned by the fairly open and discretionary nature of the provision, how the ICC will interpret the requirement of "*exceptional circumstances*" in the future and how frequently it will be applied. In practice, these concerns may only be resolved with time and a clearer understanding of how the ICC intends to exercise its powers going forward.

Third party funding

Whether or not a party should be required to disclose its funding arrangements to its counterparty and any arbitral tribunal is a much debated issue that we also see addressed within the revisions to the ICC Rules. There is currently no general rule requiring parties to disclose a third–party funding agreement. In 2014 the IBA Guidelines on Conflicts of Interest in International Arbitration addressed the disclosure of third–party funding agreements (where funders and insurers have a "*direct economic interest in the award*") in the context of arbitrators' impartiality and independence. Arbitral institutions have adopted different approaches to this issue. The AAA, SIAC and LCIA do not include specific provisions within their rules requiring the disclosure of funding arrangements, while the HKIAC's Article 44 sets out an express requirement for the disclosure of funding agreements.

The ICC's 2019 Note to Parties and Arbitral Tribunals gave a steer on what was coming in future changes to the ICC Rules. Paragraphs 24 and 28 of the Note confirmed that arbitrators needed to identify in their disclosures of conflicts of interest any relationships with "*any entity having a direct economic interest in the dispute*". As with the IBA Guidelines, the obligation was placed firmly on the arbitrators themselves, and fulfilment of that obligation rested on the parties to supply the necessary information. New Article 11.7 of the 2021 Rules now requires that each party promptly notifies the Secretariat, 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*" in order to assist prospective and appointed arbitrators in complying with their duties of disclosure. This is a shift in approach, moving the requirement out of ICC guidance and into the Rules themselves. It has also placed a new express obligation and burden of disclosure on the parties, who must now disclose their funding arrangements throughout the life of their arbitration.

The decision to include this provision in the 2021 Rules is important and can be viewed as part of a broader acceptance at institutional level of the potential relevance of relationships between arbitrators and non–parties to questions of independence and impartiality. The drafting in the new provision of the Rules is quite narrow and does not appear to encompass all forms of funding that may be available to parties and their legal advisors (such as law firm insurance for damages based agreements). Based on the Note to Parties, this appears to have been intentional, as paragraph 21 confirms that, "*Article 11(7) would not normally capture (i) inter–company funding within a group of companies, (ii) fee arrangements between a party and its counsel*….". As with the HKIAC Rules, however, the 2021 Rules have not sought to go any further in addressing issues it has been suggested by some commentators that third party funding may raise in respect of the arbitral procedure and decision– making. There is currently no consensus in commercial or investment arbitration on the question of whether third–party funding arrangements should be relevant to issues such as security for costs, and this change to the ICC Rules certainly does not purport to answer that question.

SMALLER CHANGES

Ability of the tribunal to make "additional awards" where they omit to address claims in the main Award (Article 36.3)

Slight changes to clarify how the Rules work for investment treaty disputes (eg Article 13.6 on arbitrator nationality and 29.6(c) disapplying the Emergency Arbitrator provisions)

The value in dispute in order for the Expedited Procedure Rules to apply (under Appendix VI and Article 30(2)) has risen from $2m to $3m where the arbitration agreement was concluded on or after 1 January 2021

New Article 43 confirms that any claims arising out of or in connection with the ICC Court's administration of an arbitration shall be governed by French law and resolved by the Tribunal Judiciaire de Paris

PARTNERS CRAIG TEVENDALE, SIMON CHAPMAN QC AND THIERRY TOMASI DISCUSS THE 2021 RULES AND THE ICC'S GLOBAL REACH

Craig: The changes to the 2021 Rules aren't earth–shattering, and we wouldn't expect them to be. The ICC carried out a substantial revision and change in approach back in 2012. Those 2012 rules were extremely innovative and changed the landscape for arbitral institutions globally. It isn't surprising that the 2021 Rules leave the fundamental framework introduced in 2012, and then updated in 2017, largely unchanged.

Thierry: Some of the changes that have been introduced are ones we expected or hoped for – the "practical" and "clarificatory" changes we've mentioned above. But the "bold" changes we've identified are perhaps the most interesting.

Simon: Absolutely. The three changes we've discussed above do seem to be an attempt to draw a line under certain issues that have been troubling the arbitration community for some time. I'm not sure that the changes have necessarily done that – indeed, the provisions on unequal tribunal formation and third party funding in particular may have added to the debate rather than ended it!

Craig: In 2019 the ICC celebrated its centenary and the ICC Court registered its 25,000th case. The 2019 case numbers reflect growing global popularity, with 869 new cases registered by the ICC Court, the second highest number ever. This may be a direct result of the success of steps taken by the ICC over the last decade to extend its global reach and cement its position as a truly global arbitral institution. There has been a move away from a Paris–centralised Secretariat, opening regional case management teams in key arbitral hubs across the world, each of these administering arbitrations and offering more localised support. As an Arabic speaker with a MENA disputes focus, I have watched the ICC's efforts to attract parties within the MENA region with interest. The ICC opened an office in Abu Dhabi to serve the Middle East and North Africa in 2018. Given that UAE, Saudi Arabian and Qatari parties feature among the top nationalities for parties to ICC Arbitrations (167 in total in 2019), it certainly seems to be working.

Thierry: Likewise, as a practitioner with a substantial Latin American practice, that decentralisation has also been worth watching. Arbitration is becoming increasingly popular across the region, and approximately 15% of parties to ICC arbitrations come from Latin America. Unsurprisingly, the region is a focus for growth for the ICC, as it is for many other institutions. The ICC's New York office was opened in 2013 to administer arbitrations across the Americas, and in October 2017 the ICC opened a case management team in São Paulo in Brazil. The ICC's 2019 statistics show that since it was established in October 2017, it has administered over 83 cases. The ICC's São Paulo office has been classified by the State of São Paulo as a registered institution, allowing it to administer arbitral proceedings involving that state. This presents opportunities for foreign investors in Brazil, particularly those contracting with state entities.

Simon: There is a similar picture across Asia. Approximately 30% of parties in ICC arbitration come from across Asia and the Pacific. The ICC's Hong Kong "Asia" office was its first branch outside Paris and has been very successful. In September 2019 the Supreme People's Court of China and the Hong Kong Department of Justice confirmed that the Mainland Chinese courts would be able to order interim measures in support of Hong Kong– seated arbitrations administered by certain qualifying arbitral institutions. These include ICC Hong Kong, along with the HKIAC and other Hong Kong based institutions. This has real potential to increase the attractiveness of Hong Kong seated arbitrations to Chinese parties, and may benefit the ICC. The ICC also opened a case management office in Singapore in April 2018, its fourth overseas office, and the 2019 statistics show similar success there, with 130 cases being administered from Singapore. The ICC also administers India–related arbitrations from Singapore and appears to be witnessing real growth across India, with the number of Indian parties tripling to 147 in 2019. I'm sure the ICC is hoping that growth will continue and that it can tap into the potential for India–related arbitrations in the future.

PODCAST

This podcast discusses the key takeaways and changes following the release of the ICC's 2021 Arbitration Rules:

Herbert Smith Freehills Podcasts · ICC Rules 2021: the top 5 changes

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KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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