New ICC 2021 Arbitration Rules: Enhancing efficiency, flexibility and transparency

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Introduction

The International Chamber of Commerce (ICC) has released its draft 2021 Arbitration Rules (with the final version to be officially launched in December 2020). The Rules will regulate the management of cases submitted to the International Court of Arbitration from 1 January 2021, with the 2017 Arbitration Rules continuing to apply to cases registered before this date.

The 2021 Rules are aimed at making ICC arbitrations more efficient, flexible and transparent, and in turn more attractive for both large complex arbitrations and small cases.

Key Changes

10 of the key changes are the following:

1. **Joinder**: Article 7(5) provides a new mechanism for additional parties to be added after the appointment of an arbitrator. This can now be ordered by the arbitral tribunal, without the consent of all parties, provided that the additional party accepts the constitution of the arbitral tribunal and agrees to the Terms of Reference. Previously no additional parties could be joined after the appointment of an arbitrator unless all parties, including the additional party agreed.

2. **Consolidation**: A minor change has been made to Article 10(b) and (c) which clarifies that two or more arbitrations can be consolidated under 10(b) where the claims are made under the same arbitration agreement(s). Previously it was not clear if consolidation was possible under clause 10(b) where there were multiple agreements with mirror arbitration clauses, or if under this scenario it was necessary to also satisfy the requirements under clause 10(c).

3. **Virtual hearings**: Article 25(2) of the 2017 Rules arguably provided for each party to have a right to a physical hearing in person. It says in part “after studying the written submissions of the parties and all documents relied upon, the arbitral tribunal shall hear the parties together in person if any of them so requests...”. That provision has been removed from the new rules. Instead, Article 26(1) now provides that the arbitral tribunal may decide after consultation (and based on 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. Previously this article only referred to the arbitral tribunal summoning parties to appear before it and did not refer to any alternative means of communication.

4. **Written communications by email**: Article 3(1) has been amended to remove the references to all pleadings and written communications being 'supplied in a number of copies sufficient to prove one copy for each party, plus one for each arbitrator, and one for the Secretariat.' It now simply provides that the documents ‘shall be sent to each party, each arbitrator and the Secretariat.’

5. **Disclosure of third-party funding**: Article 11(7) has been introduced which requires each party to 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 (under which it has an economic interest in the outcome of the arbitration). The rationale for this addition is to avoid potential conflicts of interest with parties operating behind the scenes to ensure that the arbitral tribunal remains independent and free from any bias (real or perceived). A similar obligation was previously found in guidance but it is now expressly incorporated into the rules.

6. **Party representation**: Article 17(1) now requires each party to promptly inform the Secretariat, the arbitral tribunal and the other parties of any changes in its representation. Significantly, article 17(2) now allows the arbitral tribunal to take any measure necessary to avoid a conflict of interest arising from a change in party representation, including the exclusion of new party representatives from participating in the arbitral proceedings. Parties are provided with an opportunity to comment in writing about any such measure. This is similar to Article 18(3) of the LCIA Rules which requires the approval of the arbitral tribunal for any change in representation.
7. **Constitution of arbitral tribunal**: Article 12(9) has been introduced which allows the Court in exceptional circumstances (even where the parties have agreed on the method of constitution of the arbitral tribunal) to 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.’

8. **Investment Treaty**: Article 13(6) has been introduced which provides that whenever the arbitration agreement upon which the arbitration is based arises from a treaty, no arbitrator shall have the same nationality of any party to the arbitration (unless the parties agree otherwise).

9. **Expeditied Procedure**: Appendix VI has been amended so that the amount in dispute referred to in Article 30(2) as the limit for the Expedited Procedure Rules to apply will increase from US$2 million (for arbitration agreements concluded between 1 March 2017 to 31 December 2020) to US$3 million (for arbitration agreements concluded on or after 1 January 2021).

10. **Additional award**: Article 36(3) now provides a process for making an application for an ‘additional award’ where the arbitral tribunal has omitted to decide any claims made in the arbitral proceedings.

**Comment**

The release by the ICC of the 2021 Rules follows hot on the heels of the LCIA’s new rules which took effect from 1 October 2020. We commented on the LCIA’s updated rules here.

The LCIA’s rules had not been updated since 2014 and so those changes were more significant than the updates to the ICC’s 2017 Rules which are, in the main, relatively light touch updates which do not constitute a departure from the arbitration rules offered by comparable institutions. However, it is worth noting that the ICC has steered a different path from the LCIA by not including an express reference to a power of early determination in the 2021 Rules. Instead, parties wishing to make such applications will need to continue to refer to the ICC’s guidance which maintains that the immediate dismissal of manifestly unmeritorious claims or defences is a case management tool available under the general rules found in Article 22, rather than any express provision. It remains to be seen whether there is greater take-up of summary determination in LCIA arbitrations going forward and whether it ultimately serves to reduce or increase costs. For our part, we would welcome the inclusion of an express power of early determination because we expect it will encourage arbitral tribunals to be more robust in dealing with clear issues and thereby discourage parties from taking bad points for strategic reasons.

Perhaps as a counterbalance to its resistance to an express early determination power, the ICC has increased the applicable cap for the expedited procedure to enable a greater number of cases to be dealt with by the streamlined procedure. The increase to US$3 million still, however, leaves it lagging behind the Singapore International Arbitration Centre (“SIAC”) whose rules on expedited procedures can apply to arbitrations with a value of up to SGD 6 million (approximately US$4.4 million at the time of writing).

The changes to the ICC 2021 Rules are similar to the LCIA update in many ways as they are both intended to make the procedure compatible with the limitations imposed by the COVID-19 pandemic, and both sets of changes seek to address the latest thinking on the consolidation of arbitral proceedings.

In summary, the 2021 Rules should serve to make arbitrations under the ICC more efficient, flexible and transparent (as was their stated aim) but do not break new ground.
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