

Launch of the ICC 2021 Rules of Arbitration

1 December 2020, online

Vladi Hennessee

Deputy Counsel (Common Law case management team), ICC International Court of Arbitration

Stella Leptourgou

Deputy Counsel (Eastern Mediterranean and Middle East case management team), ICC International Court of Arbitration

The global launch event for the revised Rules of Arbitration, which gathered over 1,600 online participants from 100+ jurisdictions, was an opportunity to introduce and discuss the changes in the new Rules in force as of 1 January 2021. Following opening remarks by Alexis Mourre (President, ICC Court), practitioners Stephanie Cohen (Independent Arbitrator, New York; Chair, Working Group on Information Technology in International Arbitration, ICC Commission on Arbitration and ADR), Valeria Galindez (Partner, Galindez Arbitragem, Sao Paulo), Sara Koleilat-Aranjo (Partner, Al Tamimi & Co., Dubai) and Smitha Menon (Partner, WongPartnership, Singapore) addressed the background, the impact and some illustrations of the 2021 amendments. Alexander G. Fessas, Ana Serra e Mourra and Živa Filipič (respectively Secretary General, Deputy Secretary General and Managing Counsel of the ICC Court) moderated the discussions.

Opening remarks

Alexis Mourre opened the conference by acknowledging that 2020 has been a difficult year due to the pandemic but at the same time probably an all-time record year for ICC in terms of number of cases.¹ He emphasized the reforms and new policies put in place over the past five years with the aim of increasing efficiency, transparency and diversity and establishing the highest possible standards of ethics. He explained that the 2021 Rules will allow parties and tribunals to deal with recent challenges and evolutions in the field of arbitration in the most efficient way.

Alexis Mourre highlighted the key changes in the new rules starting with the ones aiming at increasing the *efficiency* of ICC Arbitration:

- > Expedited Procedure Provisions ('EPP'): increase of the threshold for the automatic application of the EPP from two to three million US\$ (Article 30 and Appendix VI).
- > Joinder: power of the arbitral tribunal to join an additional party if certain conditions are met, which is particularly useful in complex multi-party and multi-contract disputes (Article 7(5)).

- > Consolidation: possibility for the Court to order consolidation of cases where different parties are involved and the claims are based on the same arbitration agreements; this preserves the existing policy of ensuring foreseeability as to when consolidation will be allowed by the Court (Article 10(b)).
- > Additional awards: possibility for arbitral tribunals to render an additional award for claims omitted in the final award (Article 36(3)).

He further discussed the amendments introduced in the 2021 Rules aiming at increasing *transparency*:

- > Inclusion in the Rules of provisions on the communication of reasons for some of the Court's decisions (Appendix II, Article 5).
- > Obligation for parties to disclose the existence and identity of a third-party funder (Article 11(7)).
- > Power of the arbitral tribunal to exclude a counsel introduced at a late stage of the proceedings when such introduction creates conflicts of interest (Article 17(1)).
- > Power of the Court to disregard an unconscionable arbitration agreement that infringes the principle of party equality in the constitution of the arbitral tribunal (Article 12(9)).
- > Prohibition for an arbitrator to share the nationality of a party in treaty disputes (Article 13(6)).

¹ See 'ICC announces record 2020 caseloads in Arbitration and ADR'. In 2020, 946 new arbitration cases were filed and 77 new cases were registered with the ADR Centre

- > Inapplicability of emergency arbitration provisions in treaty-based arbitration (Article 29(6)(c)).

He finally mentioned the revision regarding the governance of the Court (Appendix I of the Rules):

- > Selection of the President of the Court by an independent selection committee;
- > Acknowledgment of the existence of the Bureau (laying the policy strategy of Court).

Introduction

Alexander G. Fessas noted the two-fold goal of the 2021 Rules, which is to crystallize (i) long standing practices developed by the Court and Secretariat and (ii) the need for dispute resolution services and case management to reflect in a contemporary way new procedural options.

Electronic notifications (Articles 4 & 5) and virtual hearings (Articles 25 & 26)

Stephanie Cohen first addressed the changes regarding electronic notifications. She started by referring to Article 4 of the 2021 Rules, according to which the Request can now be filed by the claimant and notified to the respondent electronically, unless the claimant requests hard copy delivery, in which case the claimant will still need to submit hard copies of the Request. She stressed the importance of notifying in accordance with any applicable mandatory rules to ensure the enforceability of the award.

She then highlighted that a new case management platform is shortly being launched by ICC will facilitate electronic communication between the parties, the tribunals and the Secretariat and will streamline the arbitration process. She also clarified that although the ICC Note to Parties and Arbitral Tribunals and the ICC COVID Guidance Note,² include detailed provisions encouraging parties and tribunals to sign the Terms of Reference electronically and in counterparts or allowing for the electronic signature and notification of awards, these practices are not incorporated in the Rules because they raise complex questions of enforceability.

Stephanie Cohen then discussed the issue of virtual hearings explaining that the 2021 Rules, by way of Article 26(1), address the question as to whether there is an obligation for an in-person hearing if a party so requests. Stephanie Cohen pointed out in this regard that this new provision creates no presumption in favor of an in-person hearing but leaves it entirely up to the arbitral tribunal to determine the suitability

of an in-person or a virtual hearing after considering any relevant facts and circumstances of the case (e.g. resources, logistics, time zones, etc.) and the impact this may have on the principles of fairness and equal treatment of the parties.

Complex and multiparty arbitrations (Articles 7, 10 & 12)

Ana Serra e Moura gave a brief overview of joinder of additional parties since the introduction of the relevant provision in 2012 (Article 7).

Valeria Galindez explained that the new Article 7(5) now allows for an additional party to be joined after the confirmation or appointment of any arbitrator without the agreement of all parties provided that two conditions are met: (i) the additional party must agree to the constitution of the arbitral tribunal and the Terms of Reference, where applicable and (ii) the tribunal decides to allow such joinder. In deciding on the Request for Joinder, the arbitral tribunal shall take into account 'all relevant circumstances' such as:³

- > 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.

Valeria Galindez highlighted that this addition provides greater flexibility and enhances efficiency, while reflecting a trend of increasing complexity in contractual relations and procedures in matters submitted to ICC Arbitration. She added that although Requests for Joinder of additional parties after the constitution of the arbitral tribunal are rare, this would be a very used tool in the context of sale of shares/ corporate and construction disputes.

With respect to consolidation, **Valeria Galindez** stressed that the revisions introduced in the 2021 Rules now explicitly allow for consolidation where all of the claims made in the arbitration arise from the 'same arbitration agreement or agreements', expressly allowing for the application of Article 10(b) to more than one arbitration agreement, while it previously could only be applied when one arbitration agreement was being relied upon. The revised Article 10(c) now clarifies that it applies to claims not made under the same arbitration agreement or agreements.

² Available at <https://iccwbo.org/dispute-resolution-services/arbitration/practice-notes-forms-checklists/>.

³ Art. 7(5) of the 2021 Arbitration Rules.

Ana Serra e Moura and **Valeria Galindez** finally discussed the introduction of Article 12(9) which mainly addresses pathological situations and grants the Court the power to appoint each member of the arbitral tribunal notwithstanding any agreement by the parties on the constitution of the arbitral tribunal, in exceptional circumstances ‘to avoid a significant risk of unequal treatment and unfairness that may affect the validity of the award’. **Valeria Galindez** referred to a case administered by ICC that triggered the addition of paragraph 9, in which the arbitration agreement provided for a five-member tribunal, with the four party-appointed arbitrators to be nominated by the four parties to a shareholder agreement. In that case, however, the interests of the three respondent parties were aligned in such a way that following the text of the arbitration agreement would have led to unequal treatment of the parties as to the constitution of the tribunal. The Court ultimately appointed all five members of the tribunal relying on Article 42.⁴ **Valeria Galindez** stressed that the BVI Courts decided that the award was enforceable welcoming the Court’s decision.⁵

General procedural aspects: increased efficiency and transparency

Sara Koleilat-Aranjo and **Živa Filipič** first discussed the 2021 revisions that would help increase the *efficiency* of arbitration proceedings.

First, the panelists discussed the increase of the threshold for Expedited Procedure Provisions cases from US\$ 2 million to US\$ 3 million in the 2021 Rules.

Živa Filipič commented that following the high adoption rate of these provisions through opt-in and automatic application, this change will allow more cases to benefit from the efficiencies observed in cases governed by the Expedited Procedure Provisions, resulting in high quality awards rendered within the six-month time limit with few minor extensions.

Sara Aranjo clarified that *ratione temporis*, the new threshold would be applied starting 1 January 2021, that parties could still opt-out, but that the US\$ 3 million threshold would apply to arbitration agreements entered into after 1 January 2021 (the old US\$ 2 million threshold would apply to arbitration agreements signed before 1 January 2021 and after March 2017).

With regard to new Article 17, which gives the arbitral tribunal the power to exclude newly added counsel, **Sara Aranjo** commented that such power is given to the arbitral tribunal when the addition of new counsel may create grounds for a challenge. **Sara Aranjo** went on to comment that it would be interesting to see how tribunals will use this power and how they will find the proper balance between procedural fairness and right to counsel on one hand, and the integrity of the proceedings on the other. **Sara Aranjo** clarified that this power would not constitute a ‘carte blanche’ for tribunals but would entail careful consideration of various factors (timing of the addition of new counsel, necessity for change of counsel and integrity of the proceedings).

On Article 11(7) of the new Rules which imposes an obligation on parties to inform the tribunal and the Secretariat of the existence and identity of a third-party funder. **Sara Aranjo** commented that this would facilitate arbitrators’ disclosures and shield them from challenges. **Živa Filipič** stated that certain arrangements clearly do not fall within the scope of Article 11(7) such as a loan for ongoing business operations, inter-company funding, and contingency fees agreed with counsel, as explained in the updated Note to Parties and Arbitral Tribunals.⁶

The panelists then addressed the long-awaited addition of additional awards to Article 36(3) of the Rules. **Sara Aranjo** commented that this helps resolve situations where as certain *lex arbitri* do not provide the tribunal with the power to issue an additional award, the lack of an inherent power of the tribunal to do so would lead to inefficiencies resulting in a party having to start new arbitration proceedings so that claims that were forgotten by the tribunal may be dealt with. **Sara Aranjo** added that while the trigger for the 30-day time limit is the receipt of the award, further submissions may be required and accordingly additional time for the additional award to be rendered.

Finally, the panelists discussed the change to paragraph (h) of Appendix IV which invites tribunals to ‘encourage’ the parties to consider settlement rather than just ‘informing’ parties of this alternative. This was seen by **Sara Aranjo** as part of ICC’s proactive efforts toward identifying case management techniques for more efficient proceedings.

4 Art. 42: ‘In all matters not expressly provided for in the Rules, the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law’.

5 *PT Ventures SGPS SA v. Vidatel Ltd*, BVIHC (COM) 2015/0017 and 2019/0067, 13 Aug. 2020. On 26 January 2021, the Paris Cour d’appel dismissed the annulment action against the Final Award and Addendum in ICC case n° 21404/ASM/JPA (N° RG 19/10666).

6 Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, 1 Jan. 2021, para. 21.

Alexander Fessas and **Smitha Menon** discussed *transparency* resulting from the new provisions in Appendices I and II regarding the organization and workings of the Court thereby demystifying its functioning, and Article 5 of Appendix II on the communication of reasons. **Smitha Menon** clarified that the decisions for which reasons could be requested⁷ are now decisions pursuant to Article 6(4) (decisions on *prima facie* jurisdiction), Article 10 (consolidation), Article 12(8) and 12(9) (constitution of the arbitral tribunal), Article 14 (challenges) and Article 15(2) (replacement of arbitrators). She added that the request for reasons must be made prior to the decision of the Court and for decisions based on Article 15(2) at the stage when the parties' comments are invited.

Q&A

During the Q&A, the following questions were discussed among others:

Can the tribunal decide to hold a virtual hearing even if a party objects?

Stephanie Cohen emphasized the 'may decide' language of the Rules, stating that the tribunal's decision is taken after consulting the parties and that any relevant requirements under the law of the seat should be taken into consideration. She further commented that it is a balancing act for tribunals who will have to consider relevant facts and circumstances as well as issue of fairness, equality and the ability for a party to present its case, as well as procedural disadvantage due to differences in time zones and physical presence of one party but not the other.

How do tribunals deal with the difficulty to remain concentrated in a virtual hearing and the need for a longer duration of the hearings?

Stephanie Cohen emphasized the importance of breaks and limits to the daily duration of the hearing, as well as organizing the equipment for virtual hearings.

In complex arbitrations where an additional party is joined to the proceedings, must there always be a claim made by or against the additional party who can't be joined merely as a co-litigant?

Valeria Galíndez commented that there are cases such as shareholder corporate disputes where a party may be joined to the proceedings without claims against it or by it simply to have that party be bound by the award. **Alexander Fessas** confirmed that the existence of claims has not been considered as a hard condition

by the Court but emphasized the importance of not allowing the intervention of a party with no nexus to the dispute.

Would disclosing third-party funders make it more difficult to obtain funding?

Živa Filipič emphasised that ICC does not take a stance against third-party funding nor is trying to discourage it but rather recognises the increased role of third-party funding in international arbitration and aims to provide more transparency and integrity to the proceedings.

Now that tribunals are invited to 'encourage' settlement, will they be allowed, when no party objects, to reveal preliminary views on certain disputed points?

Smitha Menon expressed her reservations as revealing preliminary views on the merits could lead to allegations of bias.

The 2021 Arbitration Rules and the revised Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration are available at <https://iccwbo.org/dispute-resolution-services/>.

⁷ Appendix II, Art. 5.