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# 2021 ICC ARBITRATION RULES

A BRIEF ON THE KEY CHANGES

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As the most preferred arbitral institution across the world, the International Court of Arbitration of the International Chamber of Commerce has recently taken a landmarking step by introducing the 2021 ICC Arbitration Rules in order to tackle the necessities arising out of recent arbitral practices and anticipating the needs of the arbitration community. The Rules, which entered into force on January 1st 2021, is primarily intended to “mark a further step towards greater efficiency, flexibility and transparency”, as stated by the ICC itself. To this end, the 2021 Rules introduce a set of revised provisions to ensure more efficient adjudication of disputes. Some of the key changes are as follows:

- **Duty to Disclose Third-Party Funders**

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Capturing the concerns revolving around the heated debate on the disclosure of third-party funding agreements in international arbitration, for the purpose of increasing transparency, Article 11 (7) of the Rules- contrary to its predecessor which was silent on the issue- imposes an *explicit* duty on the parties to disclose all third-party funder arrangements, if any.

In this regard, new Article 11(7) sets as follows:

“In order to assist prospective arbitrators and arbitrators in complying with their duties under Articles 11(2) and 11(3), *each party must 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 defenses and under which it has an economic interest in the outcome of the arbitration.*” [emphasis added]

- **Joinder of Additional Parties Post-Constitution of Arbitral Tribunal**

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According to Article 7(1) of the 2017 Rules, no additional party may be joined *after* the confirmation of appointment of any arbitrator, unless all parties, including the additional party, agree otherwise. The new Article 7, in addition to containing the aforesaid, in the newly-added paragraph 5 allows a request for joinder of a third party to be made even after the confirmation or appointment of an arbitrator. This, however, is subject to making a decision by tribunal in this respect upon considering “all relevant circumstances”, and the acceptance of the additional party of the constitution of the tribunal and the Terms of Reference.

## ▪ **Consolidation of Arbitration Proceedings**

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Both the 2017 and 2021 ICC Rules address and provide for consolidation of different arbitration proceedings between the same or different parties. In addition, they both provide for a set of elements to be considered by the ICC Court for deciding on the consolidation of the proceedings. The 2021 Rules, however, expands in Article 10 the factors to be taken into account by the ICC Courts, in particular under Article 10 (b) and (c). According to the new Article 10(b), the claims that have arisen out of “same agreement or *agreements*” may be consolidated; it thereby recognizes mirror arbitration agreements. As the ICC explained, this is to allow “the consolidation of cases in presence of different parties”. In addition, Article 10(c) stipulates that claims between the same parties may be consolidated, even if the claims are not made under one arbitration agreement, provided that “the disputes in the arbitrations arise in connection with the *same legal relationship*, and the Court finds the arbitration agreements to be *compatible*.” This in fact dissolves the confusion as to whether consolidation is/was permitted where the claims to the arbitrations were brought under more than one arbitration agreement, which is a frequent case in construction sector.

## ▪ **Autonomous Power of the ICC Court to Appoint Arbitrators (*notwithstanding the parties’ agreement*)**

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Seemingly in line with the lessons learnt from the Dutco case, the 2021 Rules vest the ICC Court with the power to independently appoint members of the arbitral tribunal “*in exceptional circumstances*” regardless of “*any agreement by the parties on the method of constitution of the arbitral tribunal to avoid a significant risk of unequal treatment and unfairness that may affect the validity of the award*”. Among other things, it yet to be seen how the ICC Court will interpret the broad phrase of “*in exceptional circumstances*”, without exposing the final award to potential challenges in accordance to the Article V(1)(d) of the New York Convention or similar provisions contained in various domestic arbitration laws.

## ▪ **Specific Provisions for Treaty-Based Arbitrations**

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### ○ **Nationality of arbitrators in treaty-based arbitrations**

As mentioned earlier, the use of ICC Rules in investment treaty arbitrations has notably grown in the recent years. This has reasonably caused the ICC to move towards adapting the Rules for tackling the concerns and issues expressed because of the distinctive characteristic of the investment treaty

arbitration, comparing to international commercial arbitration. To this end, for the purpose of securing the neutrality of the arbitral proceedings in treaty-based arbitrations, the 2021 Rules disallow the appointment of an arbitrator who has the same nationality to that of any of the parties, unless the parties agree otherwise. Article 13(6), to some extent, coordinates the ICC Rules with some other arbitration rules such as that of the ICSID (see Rule 1(3) of the ICSID Arbitration Rules).

- **Lack of emergency arbitrator in treaty-based arbitrations**

Contrary to the 2017 Rules which was silent in this respect, Article 29(6)(b) of the 2021 Rules explicitly discard the possibility of having emergency arbitrator in the arbitrations that are based upon a treaty.

- **Arbitration hearings through electronic means**

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In order to be consistent with the electronic era and more particularly due to the current situation with the Covid-19, the Article 26(1) of the 2021 Rules empowers the tribunal to decide upon conducting the hearings via electronic means such as videoconference, telephone or any other tools of communication. Deciding on whether the hearings be held virtually or physically is dependent upon the facts and circumstances of the case, and upon the consultation with the disputing parties. The novelty of the new Rules in this part is that while under the 2017 Rules the virtual hearing was only permissible for conducting the case management conferences, under the 2021 Rules, the aforementioned means of communication have been recognized as permissible not only for such preliminary sessions, but also for conducting the main arbitration hearings.

- **Excluding new representatives of the parties to avoid conflict of interests**

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The new Article 17 contains three paragraphs, two of which are new, comparing to the 2017 Rules, and the third one contains the entire Article 17 as same as it was under the 2017 Rules. According to paragraph 1 and consistent to the common practice, the parties explicitly have the duty to inform the ICC Secretariat, the arbitral tribunal and the parties of any change in its counsel. Paragraph 2 contains a more vigorous change by virtue of authorizing the arbitral tribunal to exclude new representatives of any of the parties from taking part in the arbitral proceedings in whole or in part, or “*take any [other] measure[s] necessary to avoid a conflict of interest of an arbitrator*”.

- **Additional award**

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Article 36(3) which is a newly-added provision under the 2021 Rules allows the parties to file an application to the Secretariat seeking an additional award on the claims that were raised before the arbitral tribunal but were omitted by the tribunal while deciding on the matter. According to the said article, filing of an application for additional award may be done within 30 days of the receipt of the award that has been rendered and duly communicated to the parties in conformity with Article 35(1). In this case, the other party shall in turn be granted “a short time limit, normally not exceeding 30 days, from the receipt of the application” in order to submit any comment it may have. It seems that the new provision seeks to achieve a balance between the virtue of finality of arbitral awards and securing the awards from being challenged in enforcement phase before sates courts based on the *infra petita* ground (for similar provision in other arbitration rules, see Article 40 of the 2013 HKIAC Arbitration Rules, Article 33 of the 2016 SIAC Arbitration Rules, and Article 48 of the 2017 SCC Arbitration Rules).

## ▪ **Afterword**

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Elite Pars continues to closely track developments and impacts of the global pandemic in order to advise and support clients in the best possible way. Our experts while complying with all necessary health guidelines as a priority, are available to update you on the coronavirus legal impacts and to help you navigate related developments both legal and otherwise.

Please note: the present article is intended to provide you with a brief and general guide as to the last developments in the ICC Rules of Arbitration. It is advisable to ask for specialist advice about your specific circumstances.

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