

# ARTICLE

## PUBLICATION OF THE NEW ARBITRATION RULES OF THE INTERNATIONAL CHAMBER OF COMMERCE - EFFECTIVE AS OF 1 JANUARY 2021

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The International Chamber of Commerce ("ICC") adopted a new version of its arbitration rules (the "Rules") on 6th October 2020. The new version will **enter into force as of 1st January 2021** and will automatically apply to arbitration proceedings initiated **after that date**. The version of ICC the rules of arbitration dated 1 March 2017 will continue to apply to arbitration proceedings initiated before 1st January 2021.

Although this new version does not create any major procedural mechanism as was the case in previous versions (with the creation of the emergency arbitrator or the establishment of the expedited arbitration procedure...), it reflects the institution's desire to enhance transparency and efficiency of the arbitration proceedings.

### 1. Enhancing the efficiency of arbitration proceedings

Most of the newly introduced rules are aligned with the orientation that has been followed by the ICC for several years towards promoting efficiency of arbitration proceedings. In this respect:

- The pursuit of efficiency of the arbitration proceedings, which was put to the test of the global COVID-19 pandemic in 2020, is first renewed by the provision, in the Rules themselves, of the possibility for the arbitral tribunal to decide that **hearings be held remotely, notably by videoconference** (Article 26(1)).<sup>[1]</sup> This practice, already recommended by the institution in order to reduce time and costs, is regularly implemented, particularly as far as procedural hearings are concerned. The revision echoes the procedural case management techniques detailed in Annex IV of the Rules<sup>[2]</sup> without distinction regarding the nature of the hearings – procedural, on the merits, witness hearings or expert hearings.
- The objective is also pursued through the **extension of the expedited arbitration procedure mechanism** to cases with a value of up to US\$3 million, compared to the limit of US\$2 million under the 2017 version of the ICC rules of arbitration (Article 30 and Annex VI).<sup>[3]</sup>
- Concerning multi-party and/or multi-contract proceedings, the revised Rules allow the arbitral tribunal to decide, in certain circumstances, on **the joinder of third parties in the proceedings even after the arbitrators have been appointed**, subject to the agreement of the additional party to the constitution of the tribunal and to the terms of reference (Article 7(5)).<sup>[4]</sup> The revised Rules also clarify that several arbitrations may be **consolidated** into a single procedure, whether they are based on one or more arbitration agreements (Article 10(b)).<sup>[5]</sup>
- In order to safeguard efficiency of the award, the new version of the Rules provides, with regard to the constitution of the tribunal and the principle of party [6], that the ICC Court of Arbitration may disregard the methods agreed upon by the parties when exceptional circumstances so require and that the Court may **appoint each member of the arbitral tribunal** where such methods are unequal or unfair (Article 12(9)).<sup>[7]</sup> Likewise, an **additional award** may be rendered at the request of the parties if the tribunal has ruled *infra petita* (Article 36(3)).<sup>[8]</sup>

### 2. Enhancing trust and transparency

Following on from the introduction, in the past years, of tools promoting transparency of arbitration proceedings (e.g. in the constitution of the arbitral tribunals - with the indication, since 2016, of the names and nationalities of the arbitrators, their role within the tribunals, how they were appointed and the status of the proceedings, and since 2020, the sector involved and the names of the parties' counsel,<sup>[9]</sup> or the principle - which may be waived by the parties - of the publication of awards rendered as of 1st January 2019), the revised arbitration Rules provide for additional mechanisms, in particular **with regard to conflict of interest, independence and impartiality of arbitrators**. In this respect:

- The parties will now be required to inform the Secretariat, the arbitral tribunal and the other parties about **the existence of any financing agreement concluded for the purposes of the arbitration proceedings with a third party**, for they would have a financial interest in the resolution of the dispute (Article 11(7)).<sup>[10]</sup> The aim is to make it possible for arbitrators to accurately disclose any circumstance which might affect their independence and impartiality. While the identity of the third party must be disclosed in order to assess any potential conflict of interest, no requirement to disclose the terms and content of the financing agreement in question is made;
- Still on the issue of conflict of interest, the Rules set the parties' obligation **to inform the Secretariat, the tribunal and the other parties of any change of counsel** and allow the arbitral tribunal, in such case, to take any measure to avoid any situation of conflict of interest, **including by excluding new party representatives**

in whole or part in the arbitration proceedings (Article 17(2)).[11]

- Finally, as to investment arbitration, the rule of neutrality of the nationality of the arbitrators is enshrined in the new Rules (Article 13(6))[12], stating that none of the arbitrators (and not only the chairman of the arbitral tribunal or the sole arbitrator) shall be of the same nationality as one of the parties to the proceedings. The Rules finally clarify that the emergency arbitrator mechanism, which was created by the 2012 version of the ICC rules of arbitration, is not applicable in this area.[13]

Further innovations are likely to come from the revision of the "Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Arbitration Rules" (which already clarified in 2019, for example, the tribunal's power under Article 22 of the Rules to make an expeditious determination of claims or defences which are manifestly unfounded) – such revision is also expected to take place in the coming weeks.[14]

[1] *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. "*

[2] *" Using telephone or video conferencing for procedural and other hearings where attendance in person is not essential and use of IT that enables online communication among the parties, the arbitral tribunal and the Secretariat of the Court."*

[3] *" The amount referred to in Article 30(2), subparagraph a) of the Rules is:*

*i) US\$ 2,000,000 if the arbitration agreement under the Rules was concluded on or after 1 March 2017 and before 1 January 2021 or*

*ii) US\$ 3,000,000 if the arbitration agreement under the Rules was concluded on or after 1 January 2021."*

[4] *"Any Request for Joinder made after the confirmation or appointment of any arbitrator shall be decided by the arbitral tribunal once constituted and shall be subject to the additional party accepting the constitution of the arbitral tribunal and agreeing to the Terms of Reference, where applicable. In deciding on such a Request for Joinder, the arbitral tribunal shall take into account all relevant circumstances, which may include 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. Any decision to join an additional party is without prejudice to the arbitral tribunal's decision as to its jurisdiction with respect to that party."*

[5] *"The Court may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration, where: [...]*

*b) all of the claims in the arbitrations are made under the same arbitration agreement or agreements; [...]"*

[6] By judgment of 7th January 1992 in the *Dutco* case, the *Cour de cassation* invalidated the process whereby several respondents appointed one single arbitrator, based on a public policy principle of equality between the parties, which could not be waived in advance. The new rule makes it possible to discard any agreement of the parties that would jeopardize this principle.

[7] *" Notwithstanding any agreement by the parties on the method of constitution of the arbitral tribunal, in exceptional circumstances the Court may 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] *" Any application of a party for an additional award as to claims made in the arbitral proceedings which the arbitral tribunal has omitted to decide must be made to the Secretariat within 30 days of the receipt of the award by such party. After transmission of the application to the arbitral tribunal, the latter shall grant the other party or parties a short time-limit, normally not exceeding 30 days, from the receipt of the application by that party or parties, to submit any comments thereon. The arbitral tribunal shall submit its decision on the application in draft form to the Court not later than 30 days following the expiry of the time of the time limit for the receipt of any comments from the other party or within such other period as the Court may decide."*

[9] The tool can be accessed on the website <https://iccwbo.org/dispute-resolution-services/arbitration/icc-arbitral-tribunals/>.

[10] *" 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 defences and under which it has an economic interest in the outcome of the arbitration. "*



[11] " 1) Each party must promptly inform the Secretariat, the arbitral tribunal and the other parties of any changes in its representation.

2) The arbitral tribunal may, once constituted and after it has afforded an opportunity to the parties to comment in writing within a suitable period of time, 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."

[12] Whenever the arbitration agreement upon which the arbitration is based arises from a treaty, and unless the parties agree otherwise, no arbitrator shall have the same nationality of any party to the arbitration. "

[13] " 6) The Emergency Arbitrator Provisions shall not apply if: [...]

c) the arbitration agreement upon which the application is based arises from a treaty. "

[14] The version currently applicable is available on the website <https://iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf>.

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