

In the face of global change, international arbitration proves its flexibility

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As members of our arbitration team [wrote](#) recently, the global pandemic has led parties to consider arbitration as the optimal process to resolve disputes given its key advantages as an effective, customizable and efficient mechanism. The international arbitration community has shown its ability to pivot quickly and adapt relatively seamlessly in changing global circumstances. In a testament to the flexibility of arbitration, arbitral institutions globally have responded with updates and practice guides to clarify and streamline their rules and procedures in order to better suit the reality of disputes in the post-2020 landscape.

2021 ICC Rules

The revised rules of the International Chamber of Commerce (ICC), one of the leading international arbitration institutions, came into effect on January 1, 2021 (2021 ICC Rules). These changes have been [described](#) as “a further step towards greater efficiency, flexibility and transparency” according to the President of the ICC Court, Alexis Mourre. Any disputes filed with the ICC as of January 1, 2021, are now subject to the 2021 ICC Rules. These updates respond to current trends in international arbitration including the use of virtual hearings, increasing efficiency and flexibility and increasing transparency and fairness. It is also notable that the 2021 ICC Rules include provisions tailor-made for investment-treaty arbitration in addition to commercial disputes. Some of these key updates are summarized below:

Virtual hearings

Following the ICC [Guidance Note](#) on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic, the [2021 ICC Rules](#) now explicitly include a provision regarding remote hearings. Tribunals formerly had the discretion to conduct virtual hearings, but the new rules have overtly clarified this jurisdiction. After consulting with the parties, and based on the circumstances and facts of the case, an arbitrator can decide whether a hearing will be held remotely or in-person. Furthermore, paper copies of submissions are no longer required, and submissions can be made electronically.

The embrace of technological advances in arbitral rules has been a trend across international institutions. For example, the London Court of International Arbitration (LCIA) also released updates to the [LCIA Arbitration Rules](#), which came into effect on October 1, 2020. These revisions similarly embraced technological options in procedures such as virtual hearings, electronic communication and data protection. It will be interesting to see what practices will continue to be utilized in the post-pandemic global reality. Developments such as hybrid hearings and witnesses attending virtually are likely to remain commonplace in international

arbitration proceedings.

Increasing efficiency and flexibility

The expedited procedure under the ICC Rules accelerates the arbitration schedule and requires a final award to be rendered within six months of the initial case conference. The upper limit for the application of the expedited process, subject to opt-out, has been increased in the 2021 ICC Rules from US\$2 million to US\$3 million – expanding the scope of its application and therefore promoting efficiency.

The 2021 ICC Rules incorporate changes that affect multi-party proceedings in recognition of the complex disputes and multi-layered contractual relationships that tend to come before ICC tribunals. In particular, it is now clear that matters can be consolidated when they are under one or several similar clauses – the provision was amended to include “under the same agreement or agreements” (i.e., explicitly including more than one agreement).

After the tribunal is constituted, joinder can now be requested by any party and is only subject to the additional party agreeing – essentially removing the veto power that other original parties previously had. This recognizes the reality that it is much more difficult to get parties to agree once a dispute has started. Removing the need for all parties to agree will also promote efficiency.

Increasing transparency and fairness

Several of the new changes point to the further promotion of transparency and fairness. For example, a new provision expressly allows the ICC Court, in “exceptional circumstances,” to appoint the arbitral tribunal itself, deviating from the arbitration agreement to “avoid a significant risk of unequal treatment and unfairness that may affect the validity the award.”

There are also new provisions that seek to further protect against conflicts of interest. One such new provision obliges parties to disclose the existence and identity of any third-party funder. This will confirm there are no undisclosed conflicts of interest with the tribunal and help ensure its impartiality and independence. Notably, there was already a similar provision in the International Bar Association (IBA) Rules on Conflict of Interest in International Arbitration [PDF]. There is also a new provision that empowers the tribunal to take “any measure necessary” to prevent a conflict of interest that arises from a change in a party’s representation.

Investor-treaty arbitration

Finally, in the 2021 ICC Rules, two updates specifically apply to investor-treaty arbitration. The inclusion of these changes shows increased initiative for the ICC to be a desirable option for these sorts of disputes. The first change provides that when a dispute arises from a treaty, no arbitrator can be of the same nationality as one of the parties – this is similar to a provision under the International Centre for Settlement of Investment Disputes (ICSID) Convention and is therefore reflective of existing practices. The addition of this provision recognizes the need for a tribunal to be and appear to be impartial.

Furthermore, the emergency arbitrator provisions are not applicable when a dispute arises from an investment treaty. Similarly, emergency arbitration is not available under the ICSID Convention or United Nations Commission on International Trade Law Arbitration Rules, which are typically used for these sorts of disputes. This is in recognition of the fact that state-owned entities cannot always comply with the associated short time limits. Notably, this

exclusion is only applicable to investment-treaty disputes, and the emergency arbitrator provisions are still applicable to investment contracts.

Takeaways

Other institutions will likely also make changes to their rules in 2021. For example, a number of proposed changes to the International Centre for Dispute Resolution International Arbitration Rules are currently under discussion. The adoption of new changes by international arbitral tribunals indicates that arbitration is living up to its reputation as a mechanism that is efficient, flexible and effective – and is seeking to be even more so in the face of global change.

It is important to take the changes adopted by international arbitral institutions into account when drafting arbitration clauses. For example, the explicit clarification of the tribunal's jurisdiction to proceed by virtual hearing and the enhanced ability to consolidate disputes in the 2021 ICC Rules could be attractive to parties. Further, different rules can be attractive to users in different industries. Companies in the infrastructure or construction industries, where it is common to have multiple related contracts, may now be inclined to adopt the 2021 ICC Rules in their agreements. Additionally, if a dispute is likely to be under US\$3 million, the expedited procedure under the ICC Rules will apply, which may be attractive for lower dollar value disputes. Experienced arbitration counsel can advise on the advantages and disadvantages of selecting certain institutional rules and should therefore be consulted in the drafting process.