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THE 2021 ICC ARBITRATION RULES – NEW COMMITMENTS TO ACHIEVING BETTER ARBITRATION

REGULILE DE ARBITRAJ ICC 2021 – NOI ANGAJAMENTE PENTRU UN ARBITRAJ MAI BUN

Raluca Maria PETRESCU, LL.M.[1], **Alexandru STAN**[2]

ABSTRACT

The amendments to the Arbitration Rules of the International Court of Arbitration of the International Chamber of Commerce announced in October 2020 have entered into force on 1 January 2021. While this new iteration does not attempt to overhaul the existing set of rules, the 2021 ICC Rules bring important updates to certain key areas of the arbitration process, such as joinder, consolidation, constitution of the arbitral tribunal, the holding of hearings, and many others.

This article aims to place these amendments in the greater context of institutional arbitration trends and experiences, while also shedding light on the most likely reasoning behind the introduction of such changes and the timing thereof. The commitment of the ICC Court to enhance the flexibility, efficiency and transparency of arbitral proceedings will also be highlighted by reference to the recent changes to the Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration, which was also published on 1 January 2021.

The 2021 ICC Rules amendments is compared below to the latest versions of the arbitration rules of other institutions based in Europe such as the LCIA, SCC,

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VIAC and the CICA-CCIR, with the purpose of highlighting the latest trends in institutional arbitration.

KEYWORDS: *2021 ICC Rules; institutional arbitration; Note to Parties and Arbitral Tribunals; joinder, consolidation; constitution of arbitral tribunal; remote hearings.*

REZUMAT

Modificările Regulilor de Arbitraj ale Curții Internaționale de Arbitraj a Camerei Internaționale de Comerț anunțate în octombrie 2020 au intrat în vigoare la 1 ianuarie 2021. Deși această nouă versiune nu își propune să revizuiască total setul de reguli existent, Regulile ICC 2021 aduc actualizări importante în anumite puncte cheie ale procesului arbitral, cum ar fi intervenția terților, conexarea, constituirea tribunalului arbitral, organizarea audierilor la distanță și multe altele.

Acest articol își propune să pună aceste modificări în contextul mai larg al tendințelor și experiențelor arbitrajului instituționalizat și în același timp să explice raționamentul cel mai probabil aflat în spatele adoptării acestor modificări precum și momentul ales pentru introducerea lor. Angajamentele Curții ICC de a spori flexibilitatea, eficiența și transparența procedurilor arbitrale vor fi evidențiate prin raportare la modificările recente aduse Notei ICC către părți și tribunale arbitrale privind desfășurarea arbitrajului, care a fost publicată într-o nouă revizuire tot la data de 1 ianuarie 2021.

Modificările Regulilor ICC 2021 vor fi comparate mai jos cu versiunile actualizate ale regulilor de arbitraj ale altor instituții din Europa precum LCIA, SCC, VIAC și CACI-CCIR, cu scopul de a evidenția cele mai recente tendințe în arbitrajul instituționalizat.

CUVINTE CHEIE: *Regulile ICC 2021; arbitraj instituționalizat; Nota către părți și tribunale arbitrale; intervenția terților; conexarea; constituirea tribunalului arbitral; audieri la distanță.*

I. Introduction

2020 marks a transition period for the business environment generated by the need to adapt to the new health policy, social and economic realities. The arbitration landscape is no exception and the leading arbitration institutions in Europe have reacted by enacting new regulations designed to increase the flexibility, efficiency and transparency of arbitration proceedings. These regulations include the updated Arbitration Rules of the London Court of International Arbitration (the **"LCIA Rules"**) in effect as of 1 October 2020,

described as a set of "progressive" rules for the use of technology in the proceedings,[3] the Vienna International Arbitration Centre ("**VIAC**") Protocol for the organization of remote arbitral hearings, and the Guidelines for the use of the Arbitration Institute of the Stockholm Chamber of Commerce ("**SCC**") online arbitration platform revised on 25 May 2020.

In this landscape, the International Court of Arbitration of the International Chamber of Commerce (the "**ICC Court**") also brought a series of much welcomed improvements to the ICC arbitration process, both through an update to the ICC Rules and a revision of the ICC Note to Parties and Arbitral Tribunals.[4] The text of the 2021 ICC Arbitration Rules (the **"2021 ICC Rules"**) was adopted by the Executive Board of the ICC on 8 October 2020 and, after their official launch on 1 December 2020,[5] became effective on 1 January 2021. The 2021 ICC Rules are applicable to cases registered from 1 January 2021 onwards regardless of the date of the underlying arbitration agreement.[6] The cases initiated between 1 March 2017 – 31 December 2020 will still be governed by the 2017 ICC Arbitration Rules (the **"2017 ICC Rules"**).

The new revision of the ICC Note to Parties and Arbitral Tribunals[7] was announced along with the unveiling of the 2021 ICC Arbitration Rules on 8 October 2020 and published on 1 January 2021. In contrast to the ICC Rules, the 2021 ICC Note to Parties and Arbitral Tribunals does not apply exclusively to cases initiated after its entry into force, but to all ICC arbitrations regardless of the version of the Rules under which they are conducted, although the articles in the Note refer to the 2021 ICC Rules.

While the changes to the Rules and the Note cannot be deemed to constitute an overhaul of the ICC arbitration framework, they are definitely an important step forward for aligning the ICC to the recent trends of institutional arbitration. The task of overseeing the application and interpretation of these changes and possibly of leading the design/revision of new ones will lie with

[3] See https://www.lcia.org/lcia-rules-update-2020.aspx (last accessed on 23 March 2021).

[4] Notably, the amendments to the ICC Rules did not come with an increase in the cost of the ICC arbitration. The ICC Court opted to maintain the scales of administrative expenses and arbitrator's fees contained in Appendix III to the ICC Rules.

[5] The 2021 ICC Rules were officially launched on 1 December 2020 during an online event held with the participation of Alexis Mourre (President of the ICC Court) and moderated by Alexander G. Fessas (Secretary General of the ICC Court), Ana Serra e Moura (Deputy Secretary General of the ICC Court) and Živa Filipič (Managing Counsel of the ICC Court) (the "**ICC Rules Launch Event"**).

[6] However, certain new provisions such as those related to the new threshold for the application of the Expedited Procedure shall apply only to disputes deriving out of arbitration agreements concluded after the entry into force of the 2021 ICC Rules (see Section II.9 below).

[7] The Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration 2021 (the "**ICC Note to Parties and Arbitral Tribunals"** or the **"2021 Note**").

Dr Claudia T. Salomon, who will succeed Mr Alexis Mourre as the President of the ICC Court on 1 July 2021.[8]

II. Amendments brought by the 2021 ICC Rules

According to the President of the ICC Court, Mr Alexis Mourre, the 2021 ICC Rules aim to increase the attractiveness of ICC as an arbitration institution handling big and complex arbitrations, as well as smaller and less complex ones, by increasing the efficiency, flexibility and transparency of the procedure.[9]

The purpose of this article is to present the most important amendments introduced by the 2021 ICC Rules, compared to the 2017 ICC Rules and other institutional rules. These analyses and comparison are done in the context of the recent trends in institutional international arbitration, while also briefly touching upon the relevant corresponding changes to the 2021 Note.

1. Amendments concerning the form of submission of procedural documents and the calculation of certain deadlines

By amending Art. 3 (1), the 2021 ICC Rules depart from the formality of submitting hard copy pleadings and communication in numerous copies. Nonetheless, the amendment retains the obligation that the documents must be communicated to each party, each member of the tribunal and to the ICC Secretariat.

This change has as precursor the ICC Guidance Note issued in the context of the COVID-19 pandemic, which severely limited the scope of hard copy communications for sanitary reasons.[10] Even irrespective of the pandemic, the amendment is a welcomed step forward towards an increasingly digitalised arbitration process, which addresses not only the environmental concerns regarding unnecessary printing, but also decreases the courier and mailing costs. The impact of this amendment will be most noticeable in proceedings

[8] The ICC announced the recommendation of Ms Claudia T. Salomon for election as President of the ICC Court on 11 March 2020 – https://iccwbo.org/media-wall/news-speeches/icc-announces-recommendation-for-icc-court-president-successor/. (last accessed on 23 March 2021).

[9] The comments of Mr Alexis Mourre were included in the official unveiling of the 2021 ICC Rules on the ICC website – https://iccwbo.org/media-wall/news-speeches/icc-unveils-revised-rules-of-arbitration/#:~:text=The%202021%20ICC%20Rules%20of%20Arbitration%20were%20formally%20adopted%20by,editorial%20corrections%20until%20that%20time (last accessed on 23 March 2021).

[10] ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic, dated 9 April 2020; The Secretariat's communication of 17 March 2020 https://iccwbo.org/media-wall/news-speeches/covid-19-urgent-communication-to-drs-users-arbitrators-and-other-neutrals/ (last accessed on 23 March 2021).

which involve voluminous written submissions and evidence, such as those in the construction or energy sector.

Institutional arbitration is indeed on the road of digitalisation including with respect to electronic submissions. For example, the 2020 LCIA Rules have affirmed the primacy of electronic communication in respect to all written communication.[11] This applies even with regard to the arbitral award, whose electronic form would prevail over the paper form in case of any disparities (Art. 26.7). Other arbitral institutions have also provided for electronic communications in their respective set of rules.[12] Under the CICA-CCIR Rules,[13] notifications and communications may, as a general rule, be transmitted via mail (including email), however the Request for Arbitration and the Answer must be delivered both in electronic and paper format.[14]

Nevertheless, hard copies are not excluded entirely from the ICC arbitrations and the amendment does not prevent the parties from opting for hard copy communication. In particular, if the claimant or the respondent requests the transmission of the Request or the Answer, by registered post or courier, the document shall be submitted in a sufficient number of hard copies so each party, each arbitrator and the Secretariat gets a copy.[15] The same rule applies in emergency arbitrations too.[16]

The parties should be mindful, however, of any mandatory applicable rules of the law of the seat of arbitration which may require certain formalities incompatible with electronic filings.

The 2021 Note has also been amended to reflect the new text of Art. 3 (1) of the 2021 ICC Rules, and provides a further commitment to dispense with paper submissions and communications. Art. 10 of the 2021 Note provides that the Request for Arbitration, the Answer and any Request for Joinder shall be sent to the Secretariat by email "*as a general rule*". It further stresses that hard copies of other documents "*should not be sent to the Secretariat*" even when the arbitral tribunal requested such copies. The email has been affirmed to be the default means of communication with the Secretariat, unless circumstances warrant otherwise.[17]

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[11] Article 4 of the 2020 LCIA Rules.

[12] Article 7 of the VIAC Rules, Article 2 of the SIAC Rules, or Article 3 of the HKIAC Rules.

[13] The Arbitration Rules of the Court of International Commercial Arbitration of the Chamber and Commerce and Industry of Romania, in force as of 1 January 2018 (the "**CICA-CCIR Rules"**).

[14] Articles 5, 10 and 14 of the CICA-CCIR Rules.

[15] Article 4 (4) b) and Article 5 (3) of the 2021 ICC Rules.

[16] Art. 1 (2) of Appendix V *Emergency Arbitration Rules*.

[17] Article 11 of the 2021 Note.

Lastly, the text of Art. 5 (1) and (6) of the 2021 ICC Rules clarifies that the 30-day deadline for submitting the Answer to the Request for Arbitration or to the Counterclaim starts running from the "*day following the date of receipt*" of the Request for Arbitration or the Reply to Counterclaim, respectively, communicated by the ICC Secretariat.

2. Joinder of additional parties

In order to cater for more complex multi-party arbitrations, Article 7 of the ICC Rules was supplemented by a new paragraph (5) providing for a situation where third parties may be joined in an arbitration following the constitution of the arbitral tribunal.[18]

Under the 2017 ICC Rules, the procedure for joining third parties provided that requests for joinder be submitted to the Secretariat which will then decide whether to join the third party or not. As a general rule, the joinder of third parties after the confirmation or appointment of any arbitrator was not possible, unless all parties agreed otherwise, including the additional party.

The 2021 ICC Rules maintain the rule that no additional party may be joined after the confirmation or appointment of any arbitrator, unless all parties, including the additional party, otherwise agree.[19] However, the new paragraph (5) provides an exception to this rule: the arbitral tribunal may join the third party without the agreement of all parties, but only if the additional party accepts the authority of the constituted arbitral tribunal and agrees to the concluded Terms of Reference. The latter requirement is essential in order to avoid the risk of annulment or challenge of the award on grounds related to the constitution of the arbitral tribunal.[20]

The 2021 ICC Rules clarify that if the joinder request is submitted after the confirmation or appointment of any arbitrator, the decision on the admissibility of the request rests with the arbitral tribunal. In assessing the admissibility of a joinder request, the arbitral tribunal shall take into account its *prima facie* jurisdiction over the additional party, the timing of the request, possible conflicts of interest and the impact of the joinder on the arbitral proceedings.

[18] The amendments to Article 7 have also been reflected in the 2021 Note (Articles 16-18).

[19] Article 7 (1) of the 2021 ICC Rules.

[20] For example, under Art. V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the **"New York Convention"**), recognition and enforcement may be refused if (i) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case, or (ii) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.

One may reasonably argue that after the constitution of the arbitral tribunal, it is unlikely that all the parties would agree to the joinder of an additional party.[21] Thus, by relaxing this condition, the 2021 ICC Rules paved the way for the tribunal to further promote procedural efficiency by way of granting a request for joinder even at a later stage of the proceedings. The procedural efficiency is achieved by avoiding parallel proceedings between parties to the same arbitration agreement in cases where, for whatever reason, the additional party was not introduced at the outset of the proceedings, or by ensuring that all parties that have a vested interest in the outcome of the dispute are subject to the award and can challenge it.[22]

In contrast, some commentators have seen the tribunal's power to bypass the parties' consent for joining a third and possibly unwanted party as a risk to be considered a violation of the principle of party autonomy.[23] In the authors' view, the amendments do not encroach on the principle of party autonomy since the consent of all parties was (and still is) not required before the confirmation or appointment of an arbitrator. Even after that point, the principle of party autonomy would not be affected so long as the request for joinder is made by an existing party to the proceedings[24] and such request is compatible with the arbitration agreement and the law at the seat of arbitration.[25]

The 2021 ICC Rules also clarify that the arbitral tribunal's decision to join an additional party is without prejudice to its decision on the jurisdiction over the additional party.

The 2021 ICC Rules and the LCIA Rules adopt the same approach providing that the arbitral tribunal requires only the consent of the applicant and the additional party in order to grant a request for joinder.[26] In contrast, the SCC has adopted a

[21] M. Bühler, *et. al.*, *The Launch of the 2021 ICC Rules of Arbitration*, December 2020, p. 2, available at https://media.orrick.com/Media%20Library/public/files/insights/launch-of-2021-icc-rules-of-arbitration-orrick.pdf (last accessed on 23 March 2021); Valeria Galindez, Partner, Galíndez arb, São Paulo, Brazil, speaker at the ICC Rules Launch Event.

[22] S. Menon, C. Tian, *Joinder and Consolidation Provisions under 2021 ICC Arbitration Rules: Enhancing Efficiency and Flexibility for Resolving Complex Disputes*, 3 January 2021, published on Kluwer Arbitration Blog, accessible at http://arbitrationblog.kluwerarbitration.com/2021/01/03/joinder-and-consolidation-provisions-under-2021-icc-arbitration-rules-enhancing-efficiency-and-flexibility-for-resolving-complex-disputes/ (last accessed on 23 March 2021).

[23] G. Vlavianos, S. Michalopoulos, *The 2021 ICC Rules: Presentation and commentary*, 28 October 2020, accessible at https://www.dlapiper.com/en/oman/insights/publications/2020/10/the-2021-icc-rules-presentation-commentary/ (last accessed on 23 March 2021).

[24] J. Fry, *Commentary on the 2012 ICC Rules*, published in „The Secretariat's Guide to ICC Arbitration", 2012, par. 3-294: "*The ICC Rules do not allow a third party to file a request for intervention in an arbitration file, if it learned of its existence. In such rare cases, the ICC Secretariat explained that the confidentiality obligation prevents it from even acknowledging the existence of the arbitration*".

[25] G. Born, *International Commercial Arbitration,* Second Edition, 2014, Kluwer Law International, pp. 1612-1614*.*

[26] Article 22.1 (x) of the 2020 LCIA Rules.

more rigid approach: no requests for joinder are considered unless the SCC Board decides otherwise.[27] The VIAC Rules allows requests for joinder formulated also by the third party itself, and leaves the decision on the joinder (and the manner of such joinder) to the arbitral tribunal.[28]

The CICA-CCIR Rules also favour a flexible joinder process, allowing third parties to join arbitral proceedings either through a joinder request made by an existing party, and through a main or accessory voluntary intervention by the third party itself (Art. 16 of the CICA-CCIR Rules).[29] The agreement of all parties (including the third parties) is required only if the request for main voluntary intervention or the request for joinder is submitted after the first case management conference in the case it takes place. In contrast, the accessory voluntary intervention is admissible at any time before the closing of the proceedings, provided that the third party proves the existence of an arbitration agreement concluded with all parties in the case or, in absence of such agreement, that all parties agree.

The authors expect these amendments to the 2021 ICC Rules to be relied upon particularly in construction and energy disputes, which usually involve multi-party contracts or multi-contract projects and account for approximately 40% of all ICC cases.[30] Disputes arising from mergers and acquisitions deals may also see an increased use of the joinder mechanism, as one may envisage the need to obtain an award that is binding also on the parties to a commercial transaction that were not initially parties in the arbitral proceedings.

3. Consolidation of arbitrations

The 2021 ICC Rules aim to facilitate the consolidation of arbitration proceedings in disputes arising out of multi-layered contractual relationships, expand the scope of cases where multiple ICC arbitrations may be consolidated, and ensure the foreseeability of the ICC Court's decision-making regarding the consolidation of multiple proceedings.

On the one hand, by amending Article 10 (b), the 2021 ICC Rules facilitate the consolidation of proceedings under the same arbitration agreements without the requirements that the arbitrations must take place between the same parties, and that the disputes arise in connection with the same legal relationship.

[27] Article 13 of the SCC Rules.

[28] Article 14 of the VIAC Rules.

[29] The voluntary intervention may be of two types: main (where the intervening party claims for itself the same right subject matter of the dispute) or accessory (where the third party does not claim rights for itself).

[30] *ICC Dispute Resolution 2019 Statistics*, published in the ICC Dispute Resolution Bulletin 2020, Issue 2.

On the other hand, by amending Article 10 (c), the 2021 ICC Rules provide for the possibility of consolidating arbitration proceedings even if the requests were not made under the same arbitration agreement or agreements, provided that the arbitrations take place between the same parties, concern disputes arising from the same legal relationship, and the ICC Court finds that those arbitration agreements are compatible.

The other criteria which the ICC Court may take into account (introduced by the 2012 ICC Rules and preserved by the 2021 Rules) is whether one or more arbitrators have been confirmed or appointed in more than one of the arbitrations subject to the consolidation.

During the 2021 ICC Rules Launch Event, it was revealed that these amendments aim to clarify the criteria for consolidation so as to reflect what the ICC Court actually intended from the first enactment of the consolidation provisions under the 2012 ICC Rules.[31] Indeed, as several commentators pointed out, the amendment of Article 10 (b) reflects the already existing ICC practice.[32] However, the revised 2021 Note acknowledges that the provisions related to consolidation contained in previous iterations of the Rules seemed to limit the mechanism of consolidation to cases where all the claims are made under the same arbitration agreement.[33]

The practice of the ICC was also consistent with that of other arbitral institutions, some of which had already provided in their rules that consolidation may also be ordered if the proceedings were commenced under compatible arbitration agreements.[34] The CICA-CCIR Rules also allow the consolidation of disputes arising from different arbitration agreements provided the claims arise out of the same transaction or series of transactions and the arbitral tribunal considers the arbitration agreements to be compatible.

These amendments are expected to be of particular importance in disputes arising out of projects implemented through back-to-back contracts concluded among multiple parties, which are prevalent in the construction and energy sectors.[35] Notably, however, the newly amended text of Article 10 does not, for example, allow for automatic consolidation of the disputes between the employer

[31] Valeria Galindez, Partner, Galíndez arb, São Paulo, Brazil, speaker at the ICC Rules Launch Event.

[32] Anna Masser, Marieke van Hooijdonk, *The ICC's 2021 Arbitration Rules bring new focus on efficiencies and streamlined process, including through the use of technology*, November 2020, accessible at https://www.allenovery.com/en-gb/global/news-and-insights/publications/the-iccs-2021-arbitration-rules (last accessed on 23 March 2021).

[33] Article 19b of the 2021 Note.

[34] For example, Article 22.7 (ii) of the 2020 LCIA Rules, Article 15 (1) of the SCC Rules and Article 15 (2) of the VIAC Rules.

[35] S. Menon, C. Tian, *loc. cit.*, accessible at http://arbitrationblog.kluwerarbitration.com/2021/01/03/joinder-and-consolidation-provisions-under-2021-icc-arbitration-rules-enhancing-efficiency-and-flexibility-for-resolving-complex-disputes/ (last accessed on 23 March 2021).

and the main contractor, on the one hand, and between the main contractor and its subcontractors, on the other. When deciding whether consolidation is warranted, the ICC Court will determine on a case-by-case basis if the conditions of Article 10 are fulfilled, in particular with regard to the compatibility of the arbitration agreements. In this respect, while the wording of the agreements need not be identical, it is important that the material elements (such as: the seat, the substantive law, or the language of arbitration) are the same, or, at least they do not contradict each other, and that the clauses do not contain incompatible supplementary provisions (such as a different number of arbitrators).[36]

When drafting the arbitration clauses to be included in several interrelated contractual instruments, the parties may have felt compelled to expressly regulate the possibility of consolidation of parallel disputes. The 2021 ICC Rules dispenses with such concerns as the amendments put an end to the uncertainty whether the consolidation was possible where the arbitrations were initiated under more than one arbitration agreement.

4. Disclosure of third-party funders

The use of third-party services for financing the costs of arbitration has been increasing in the past years, with the global market for funding both litigation and arbitration exceeding USD 10B.[37] In addition, the appetite for engaging the services of a third-party funder has only expanded since the start of the COVID-19 pandemic. As such an instrument proved to be an effective tool in managing cash flow.[38]

Moreover, third-party funding has even been described in some jurisdictions as "*one of the key instruments to provide access to justice*" or as "*a feature of modern litigation*" making it an integral part of international dispute resolution.[39]

Against this backdrop, the existence of such entities with a direct economic interest in the result of the arbitration raises the legitimate concern that situations of conflict of interest may affect the obligation of the arbitrators to remain independent and impartial throughout the arbitration proceedings.

In order to avoid such conflicts of interest, the 2021 ICC Rules changed the encouragement of the parties to disclose third party funders[40] into a genuine

[36] For a detailed account on the compatibility of arbitration agreements, see J. Fry, *loc. cit.*, paras. 3-243 – 3-247.

[37] The 2018 ICCA-Queen Mary Task Force Report, pp. 1, 17.

[38] Sara Koleilat-Aranjo, Senior Associate, Al Tamimi & Company, Dubai, speaker at the ICC Rules Launch Event.

[39] J. Barnett, L. Macedo, J. Henze, *Third-Party Funding Finds its Place in the New ICC Rules*, 5 January 2021, available at http://arbitrationblog.kluwerarbitration.com/2021/01/05/third-party-funding-finds-its-place-in-the-new-icc-rules/ (last accessed on 23 March 2021).

[40] General Standard no. 7 of the IBA Guidelines on Conflicts of Interests in International Arbitration and the ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration of 1 January 2019.

obligation. Thus, according to the new paragraph (7) of Article 11, the parties have the obligation to promptly inform the ICC Secretariat, the arbitral tribunal and other parties of the existence and identity of any non-party entities which they have concluded dispute financing agreements with, and which may have an economic interest in the outcome of the arbitration.

The 2021 Note has also been amended to provide further guidance on the scope of the disclosure obligations. It clarifies that disclosure is required where the non-party is entitled to receive proceeds of the award, even if partial. However, a party would not be required to disclose (i) inter-company funding within a group of companies, (ii) fee arrangements between a party and its counsel, or (iii) an indirect interest, such as that of a bank having granted a loan to the party in the ordinary course of its ongoing activities rather than specifically for the funding of the arbitration.[41]

By introducing this amendment in the 2021 ICC Rules, the ICC Court joins the trend of other arbitral institutions that acknowledged the role of third-party funding in arbitration and provided for targeted disclosure regulation in their respective rules.[42]

5. The appointment of arbitral tribunal members by the ICC Court notwithstanding the parties' agreement

Perhaps the most controversial change of the 2021 ICC Rules is the new paragraph (9) to Article 12 regulating the constitution of the arbitral tribunal. In effect, the ICC Court is authorized to disregard the agreement of the parties concerning the method of constitution of the arbitral tribunal and to appoint each member of the tribunal itself. However, the ICC Court may only exercise this right in "*exceptional circumstances*" and with the sole purpose of avoiding "*a significant risk of unfair treatment and unfairness that may affect the validity of the award*." Consequently, this is only allowed in situations where the agreement of the parties is unconscionable.

The ICC Court may apply the Article 12 (9) mechanism only if two conditions are met: (i) there must be exceptional circumstances where upholding the parties' agreement would create a significant risk of unequal treatment and unfairness, and (ii) such may affect the validity of the award.

First, while the entire spectrum of circumstances where the ICC Court would be willing to trigger the mechanism is unknown, it is expected that such circumstances would include an arbitration agreement where (i) one party may

[41] Articles 20-21 of the 2021 Note.

[42] For example, Article 44 of the HKIAC Rules, Article 22 l) of the SIAC Investment Rules, or Article 43 of the Arbitration Rules of the Milan Chamber of Arbitration, in force as from 1 July 2020.

unilaterally appoint the sole arbitrator, the president of the tribunal,[43] or even all the members of the arbitral tribunal,[44] (ii) a co-arbitrator would be designated a sole arbitrator if the other co-arbitrator is not nominated,[45] or (iii) multiple parties with common interests are allowed to nominate more arbitrators than the other side (as in the case discussed above).

Second, the ICC Court will have to justify its decision to intervene based on the law of the seat, reasoning that upholding the parties' agreement may affect the validity of the award. Moreover, following the spirit of Article 42 of the 2021 ICC Rules, the ICC Court may also turn to the law of the place where the arbitral award is likely to be enforced.

The ICC Court's decision on the application of Article 12 (9) is listed as one of the situations where the Court must communicate to the parties the rationale of its decision, upon a party's request. In a new amendment introduced by the 2021 ICC Rules, Appendix II *Internal Rules of the International Court of Arbitration* was supplemented by a new Article 5 which deals with the communication of the reasons of the Court's decisions. Under this provision, the Court is bound to communicate the reasons for some of its decisions[46] when a party requests such communication in advance of the Court's decision.[47] However, the provision allows the ICC Court to avoid communication of the decision, albeit only in "*exceptional circumstances*". The authors believe that, in the interest of transparency and in the spirit of the provision, the ICC Court should communicate to the parties the

[43] K. Betaneli, *The 2021 ICC Arbitration Rules further improve the efficiency, flexibility and transparency of the arbitral process*, 16 November 2020, accessible at https://riskandcompliance.freshfields.com/post/102gk9r/the-2021-icc-arbitration-rules-further-improve-the-efficiency-flexibility-and-tr (last accessed on 23 March 2021).

[44] The 2021 Note expressly provides that the ICC Court will enforce Art. 12 (9) in this situation, provided the unilateral right of the party to appoint the arbitral tribunal is not admitted by the law at the place of arbitration (Art. 43 of the 2021 Note).

[45] A. Leoveanu, R. Giosan, *The 2021 ICC Arbitration Rules: Changes to the Arbitral Tribunal's Powers*, 4 January 2021, accessible at http://arbitrationblog.kluwerarbitration.com/2021/01/04/the-2021-icc-arbitration-rules-changes-to-the-arbitral-tribunals-powers/ (last accessed on 23 March 2021).

[46] Article 5 of Appendix II provides that the cases where the ICC Court will communicate its reasons refer to (i) the decision whether and to what extent the arbitration shall proceed if a party does not submit an Answer or raises certain pleas (Art. 6 (4) of the 2021 ICC Rules), (ii) the ICC Court's decision on consolidation pursuant to Article 10 of the 2021 ICC Rules, (iii) the decision regarding the appointment of each member of the arbitral tribunal by the ICC Court under Art. 12 (8) and 12 (9) of the 2021 ICC Rules, (iv) the ICC Court's decision on a challenge of arbitrators submitted under Article 14 of the 2021 ICC Rules, and (v) the Court's decision to replace an arbitrator on its own initiative in the conditions of Art. 15 (2) of the 2021 ICC Rules.

[47] The parties may request the communication of the decision at any time before the ICC Court makes the decision, with the exception of the decision pertaining to Art. 15 (2) of the ICC Rules, where the party must address the request when invited to comment pursuant to Art. 15 (3) of the ICC Rules.

reasoning for its decision whereby it invokes exceptional circumstances to avoid communicating another decision under Art. 5 (3) of Appendix II.

It is not the first time that the ICC Rules confer enhanced powers on the ICC Court in connection with the constitution of the arbitral tribunal. As a reaction to the French Supreme Court in the well-known *Dutco* case,[48] the ICC overhauled the 1988 Arbitration Rules then in force with respect to the mechanism for the appointment of the arbitral tribunal. Accordingly, the amended Article 10 (2) of the 1998 ICC Rules (now Art. 12 (8) of the 2021 ICC Rules) empowered the ICC Court to appoint all members of the arbitral tribunal where all parties are unable to agree upon a method for the constitution of the arbitral tribunal, thereby observing the principle of fairness and equality affirmed in *Dutco*.[49]

Additionally, the newly enacted Article 12 (9) of the 2021 ICC Rules regulates the scenario where the parties' agreed method for constituting the arbitral tribunal could lead to unequal treatment and unfairness. In such situations, the ICC has the power to appoint the whole tribunal. The provision was inspired by a very recent ICC case, where the arbitration agreement provided for five arbitrators, each nominated by a signatory party to a shareholders' agreement.[50] The problem with such mechanism, as it was proved in that case, was that if three of the parties had common interests and were allowed to nominate three arbitrators, there would be a significant imbalance between the claimants' and respondents' side. The ICC Court's solution was to trigger the "boiler-plate" provision of Article 42. Pursuant to that Article, the Court had a duty to act in the spirit of the Rules and to make every effort to ensure the award is enforceable at law, thereby deciding to disregard the parties' agreement and instead appointing all members of the arbitral tribunal itself.[51]

The ICC Court introduced Article 12 (9) with the express intent of further protecting the integrity of the arbitration process against unconscionable arbitration agreements.[52] The Court therefore indirectly affirms that the "*spirit*

[48] *Siemens AG & BKMI Industrienlagen GmbH V. Dutco Consortium Constr. Co*., Cass. ass. plen., Jan. 7, 1992. In the Dutco arbitration, the ICC Court invited the two respondents (BKMI and Siemens) to jointly nominate one arbitrator, while confirming the arbitrator nominated by Dutco. The respondents nominated an arbitrator under protest and subsequently sought the annulment of an interim award of the arbitral tribunal. The French Supreme Court dismissed the Appeal Court's decision and held that the appointment procedure violated French public policy, for all parties to an arbitration agreement should have the same right to participate in the constitution of the arbitral tribunal.

[49] J. Fry, *loc. cit.*, par. 3-484.

[50] The authors have not read or accessed this case but rely on the summary presented by Valeria Galíndez (Partner at Galíndez arb, São Paulo, Brazil) at the ICC Rules Launch Event.

[51] *Idem.*

[52] The official unveiling of the 2021 ICC Rules on the ICC website included comments on the purpose of Article 12 (9) – https://iccwbo.org/media-wall/news-speeches/icc-unveils-revised-rules-of-arbitration/ (last accessed on 23 March 2021).

of the Rules" provided under Article 42 requires that the constitution of the arbitral tribunal be balanced with respect to the sides/interests which the parties represent, and not necessarily to each party individually.

As one could have easily anticipated, the enactment of Article 12 (9) of the 2021 ICC Rules sparked concerns among arbitration practitioners,[53] and for a good reason. The provision regulates an exception to the parties' right to select the arbitrators and to the principle of party autonomy. Most importantly, the New York Convention expressly provides under Article V (1) d) that recognition and enforcement of the arbitral award may be refused if "*the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties*". At first glance, it seems that the wording of Article 12 (9) of the 2021 ICC Rules, allowing the ICC Court to appoint the arbitral authority, "*notwithstanding any agreement by the parties on the method of constitution of the arbitral tribunal*", is incompatible with the New York Convention.

While the purpose of Article 12 (9) is to "*avoid a significant risk of unequal treatment and unfairness that may affect the validity of the award*", it is questionable whether the most appropriate means for achieving this goal is disregarding the parties' agreement, which may in itself endanger the enforceability of the award under the New York Convention. Since the effect of the provision is yet to be tested in courts, it is unclear in what circumstances the ICC Court may trigger it, so as to avoid the unenforceability of the award under the New York Convention or maybe a request for setting aside the award at the seat of arbitration.

It may be, however, that the courts will consider the application of Article 12 (9) as the ICC Court actually upholding the will of the parties, who accepted its authority to appoint the entire arbitral tribunal despite their express agreement, by choosing and agreeing to this particular provision of the 2021 ICC Rules. It seems unlikely though that the same interpretation would apply to disputes arising from arbitration agreements concluded before the entry into force of the 2021 ICC Rules. Thus, it remains to be seen how the ICC Court and local courts will approach the application of Article 12 (9) in such circumstances. In any case, the authors expect that the courts will place the ICC Court's decision under careful scrutiny and decide on a case-by-case basis whether the measure of disregarding the parties' agreement was indeed warranted.

[53] C. Tevendale et al., *The New ICC Rules 2021: What You Need to Know*, 9 October 2020, available at https://hsfnotes.com/arbitration/2020/10/09/the-new-icc-rules-2021-what-you-need-to-know/ (last accessed on 23 March 2021); A. Tzevelekou, *Revised 2021 ICC Arbitration Rules: Key Changes*, 14 November 2020, available at https://www.international-arbitration-attorney.com/revised-2021-icc-arbitration-rules-key-changes/ (last accessed on 23 March 2021); V. Naish, R. Warder, *Draft ICC Rules 2021: drawing a line under some issues of debate in arbitration?*, 13 November 2020, published in Practical Law. Arbitration Blog, accessible at http://arbitrationblog.practicallaw.com/draft-icc-rules-2021-drawing-a-line-under-some-issues-of-debate-in-arbitration/ (last accessed on 23 March 2021).

The right of the parties to choose the arbitral tribunal is fundamental in arbitration and at the same time one of the reasons why parties resort to arbitration and not to national courts. Since the provisions of Article 12 (9) represent an exception to the principle that the parties may choose their arbitrators, the authors consider it essential that, in exercising these prerogatives, the ICC Court interpret the mandatory requirements of Article 12 (9) strictly and narrowly and intervene within the limits allowed by these provisions only if both requirements are met.

6. Changes to party representation

By amending Article 17, the 2021 ICC Rules establish new measures for the prevention of conflicts of interest between the arbitrators and the conventional representatives of the parties.

First, each party must promptly inform the ICC Secretariat, the arbitral tribunal and the other parties of any change in its representation. This measure aims to increase the transparency of the arbitration process, with the ultimate goal of early identification of possible conflicts of interest between the participants in the process.

Second, the arbitral tribunal may take any measure to avoid a conflict of interest of an arbitrator resulting from a change in party representation, also by excluding a new representative of the party from the arbitration proceedings, in whole or in part. Such a measure may be taken by the arbitral tribunal only in respect of new party representatives, should a situation of conflict of interest thereby arise.[54] It is understood that it is the duty of the arbitrator not to accept the appointment if this would generate a situation of conflict of interest with the representative of a party, particularly in the late stages of the proceedings. The party representatives present before and at the time of the appointment of the arbitrators may not be excluded through this mechanism.

Situations where the second measure may come into play are not new to the arbitration community. For example, in the case of *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*,[55] administered by the International Centre for Settlement of Investment Disputes ("**ICSID**"), the arbitral tribunal ruled that one of the respondent's representatives may not participate further as counsel in the case. In *Hrvatska*, the respondent disclosed the involvement of one of its representatives only at a late stage in the proceedings, and it was revealed that the respective counsel was part of the same Barristers' Chambers as the president of the tribunal. Under these circumstances, the tribunal held that the presence of the counsel in

[54] Indeed, the Secretary General of the ICC was adamant in during the 2021 ICC Rules Launch Event that the power of the arbitral tribunal to exclude counsel would not extend to other reasons than those provided under Art. 12 (9), and that misconduct or guerrilla tactics may instead be addressed in the award on costs.

[55] ICSID Case No. ARB/05/24, accessible at https://www.italaw.com/cases/3242 (last accessed on 23 March 2021).

the case was "*for all practical purposes incompatible with the maintenance of the Tribunal in its present proper composition*".[56]

The reasoning behind the ICC Court's decision to amend Article 17 in the form provided under the 2021 ICC Rules may be inferred from the ICSID tribunal's ruling in *Hrvatska*. There, the tribunal affirmed the principle that while the parties are entitled to seek and choose representation as they see fit prior to the constitution of the arbitral tribunal, they are not entitled to subsequently amend the composition of the legal teams "*in such a fashion as to imperil the tribunal's status or legitimacy*".[57]

Moreover, by requiring a prompt disclosure of the changes in representation, Article 17 (1) of the 2021 seeks to prevent an "*atmosphere of apprehension and mistrust*" to which the late announcement of the counsel's involvement in *Hrvatska* was considered to contribute.[58]

The authors' inclination to believe that the ruling in *Hrvatska* was a source of inspiration for Article 17 of the 2021 ICC Rules is further reinforced by the common goal of both the tribunal in *Hrvatska* and the ICC Court. According to the ICC, the measures regulated under Article 17 are meant to protect the integrity of the process.[59] Likewise, the arbitral tribunal in *Hrvatska* also sought to preserve this value affirming that one of the fundamental rules of procedure in arbitration is that the proceedings should not be tainted by any justifiable doubt as to the impartiality or independence of any member of the tribunal.[60]

Since *Hrvatska*, there were considerable scholarly discussions surrounding the source of the arbitral tribunal's powers to exclude a party's counsel from the proceedings, in absence of an express provision. The right of the tribunal to decide upon such a question of procedure was confirmed to be a corollary to the tribunal's wider powers to preserve the integrity of the proceedings, which may however only be "*exercised rarely, and then only in compelling circumstances*".[61] Moreover, the power of the arbitral tribunal to exclude counsel from the

[56] *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia,* ICSID Case No. ARB/05/24, Ruling of 6 May 2008, par. 29.

[57] *ibidem*, paras. 24-26.

[58] In Hrvatska, the arbitral tribunal actually qualified the tardy disclosure of the counsel as an "error of judgment on the Respondent's part" - *ibidem*, par. 31.

[59] The official unveiling of the 2021 ICC Rules on the ICC website included comments on the purpose of Article 17 – https://iccwbo.org/media-wall/news-speeches/icc-unveils-revised-rules-of-arbitration/ (last accessed on 23 March 2021).

[60] *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia,* ICSID Case No. ARB/05/24, Ruling of 6 May 2008, par. 30.

[61] See, for example, the Decision of the Tribunal on the Participation of Counsel of 14 January 2010 in the ICSID Case No. ARB/06/03 *The Rompetrol Group N.V. v Romania*, where the tribunal denied the Respondent's application for removing one of the Claimant's counsels from the case, reasoning that the circumstances of the case did not require the interference of the arbitral tribunal in order to preserve the integrity of the proceedings.

proceedings has been mentioned as one of the possible inherent powers of the arbitral tribunals in the International Law Association Report for the Biennial Conference in Washington D.C. of April 2014. Based on the findings of this Report, the International Law Association issued the Resolution No. 4/2016, whereby it ascertained that arbitral tribunals have inherent powers separate from the powers conferred by the parties' agreement and by the laws and rules governing the arbitration. Further, it recommended arbitral tribunals to consider employing such powers if the issue before them risks undermining their jurisdiction, impugning the integrity of the proceedings, or the enforceability of the award, provided that such issue may not be resolved by reference to the arbitration agreement or relevant laws.[62]

The 2021 Note provides further guidance on the application of Article 17. First, it reassures the parties that they should only refrain from introducing a new representative in the proceedings "*if a relationship exists between that representative and one or more of the arbitrators that affects the arbitrator's independence and impartiality*".[63] Second, the 2021 Note expands on the criteria which the arbitral tribunal must consider when deciding whether to exclude a newly introduced representative. Namely, (i) the ability of the respective party to properly submit its case in absence of the targeted representative, (ii) the timing of the representative's introduction, and (iii) the disruption to the arbitration caused by a prospective successful challenge of an arbitrator due to the representative's participation in the proceedings.[64]

The 2021 ICC Rules are not the first rules to incorporate such measures. For example, Article 18.4 of the 2014 LCIA provided the arbitral tribunal with the power to "*withhold approval of any intended change or addition to a party's authorised representatives where such change or addition could compromise the composition of the Arbitral Tribunal or the finality of any award*". Moreover, Article 23.2 of the 2016 SIAC Rules and Article 13.6 of the 2018 HKIAC Rules contain the obligation of the parties to promptly communicate any change or addition to their representatives after the constitution of the arbitral tribunal. In contrast, Article 22 (3) of the CICA-CCIR Rules favour a hands-off approach, with no specific provisions in this regard.[65] In this context, there seems to be a continuous trend of granting more power to the arbitral tribunal with respect to appointments of counsels at a later stage of the proceedings.

[62] International Law Association Resolution No. 4/2016, available at https://www.ila-hq.org/images/ILA/docs/No.4_Resolution_2016_InternationalCommercialArbitration.pdf (last accessed on 23 March 2021).

[63] Article 13 of the 2021 Note.

[64] Article 15 of the 2021 Note.

[65] The CICA-CCIR Rules only restrict the party representation where the representative is listed as an arbitrator in the list of arbitrators of CACI-CCIR (*no double-hatting*).

7. Further streamlining the arbitration process

The new 2021 ICC Rules have introduced multiple subtle amendments related to case management, aimed at boosting the efficiency of the arbitration process.

First, the amended Article 22 (2) of the 2021 ICC Rules replaces the tribunal's possibility to adopt case management techniques (such as those contained under Appendix IV to the Rules) with a corresponding obligation: "*the arbitral tribunal, shall adopt such procedural measures as it considers appropriate*".

Second, underlying the urgency of holding the case management at the earliest convenience, Article 24 (1) now provides that the tribunal shall effectively hold (rather than merely convene) the case management conference when drawing up the Terms of Reference or as soon as possible thereafter.

Third, the amended Article 24 (2) stresses the importance of establishing the procedural timetable at the latest "*as soon as possible*" after the case management conference, thereby setting a flexible, albeit short deadline. In addition, the provision now emphasises that the procedural timetable shall reflect an "*efficient*" conduct of the arbitration.

Fourth, an amendment to (h) of Appendix IV of the ICC Rules reinforces the ICC Court's commitment to promote dispute settlement by providing that arbitral tribunals may actively "*encourage*" the parties to consider a settlement of their disputes (as opposed to merely *informing* them of such a possibility). While this change in itself does not lead the arbitral proceedings into the "arb-med" territory, where the arbitration is transformed into a mediation, arbitrators should be mindful of the compatibility concerns between adjudicating a dispute and promoting settlement. This concern has also been raised by some authors.[66]

Lastly, certain amendments to the 2021 Note also emphasize that it is imperative for the arbitral tribunal to conduct the proceedings in an efficient manner.[67]

8. Online hearings

In light of the need to adapt to the social distancing rules imposed by the COVID-19 pandemic, the ICC decided to amend the already existing possibility of conducting hearings by means of distance communication.[68]

Pursuant to Article 26 (1) of the 2021 ICC Rules, a hearing shall take place if requested by either party or if the tribunal "*on its own motion*" deems it necessary. After consulting the parties, the tribunal may decide whether the hearing(s) will

[66] K. Fan, *The Risk of Apparent Bias When an Arbitrator Acts as a Mediator*, published in the Yearbook of Private International Law, Vol. 13 (2011), pp. 535-556.

[67] Articles 92-94 of the 2021 Note.

[68] This measure was one of the case management techniques provided under Annex IV of the 2017 ICC Rules.

be conducted by physical attendance or remotely by videoconference, telephone conference or another appropriate means of communication.

The amended Article 26 (1) does not prioritise one means over another, but it eliminates the presumption that if a hearing is to be held, it would be in person. To reinforce this principle, the "in-person" hearing requirement under the old Article 25 (2) of the 2017 ICC Rules has been removed. Moreover, the new amendment removes any uncertainties regarding the tribunal's authority to decide the manner in which the hearing will be conducted, despite possible objections from one of the parties.

Nonetheless, the discretion of the tribunal must be exercised after consulting the parties. The authors find that, under the new regulation, the parties are disincentivised to object to a remote hearing proposal unless there are concrete arguments in support of such objections. A party may no longer unilaterally force the holding of a hearing in person only to inconvenience the opponent.

The mandatory consultations provided by Article 26 (1) imply an important caveat. Namely, the tribunal would have to take into account any impediments provided under the arbitration agreement or the law of the seat,[69] as well as any logistical concerns the parties might have regarding the conduct of the hearing.[70] Moreover, according to Article 100 of the 2021 Note, an arbitral tribunal deciding to hold a remote hearing despite a party's objection must be mindful of the enforceability of the future award and take extra precautions in justifying its reasoning.

Indeed, videoconferences have the advantage that they eliminate the need for people from all around the world to travel to the same place for the hearing, as well as all costs associated therewith. However, this convenience comes at the cost of having to manage different time-zones, which in cases where the participants are situated on multiple continents can become quite a challenge. Of course, scheduling a hearing outside business hours only for one party may place the respective party at a tangible disadvantage, which may encroach upon its ability to present its case. Likewise, ensuring that the timing is favourable for the parties, to the expense of the convenience of the arbitral tribunal is not to be desired, as it is in the parties' own interest for the members of the tribunal to function at full capacity during the hearing.

[69] For example, there have been discussions whether a decision of the Swiss Federal Tribunal of 6 July 2020 where it was held that the COVID-19 pandemic does not serve as a sufficient justification to impose virtual hearings in state court proceedings could extend also to arbitral proceedings – N. Zaugg, Roxana Sharifi, *Imposing Virtual Hearings in Times of COVID-19: The Swiss Perspective*, 14 January 2021, accessible at http://arbitrationblog.kluwerarbitration.com/2021/01/14/imposing-virtual-arbitration-hearings-in-times-of-covid-19-the-swiss-perspective/ (last accessed on 23 March 2021).

[70] Stephanie Cohen, Independent Arbitrator, FCIArb, New York, speaker at the ICC Rules Launch Event.

The circumstances which the arbitral tribunal must consider when deciding on a remote hearing are further exemplified in Article 99 of the 2021 Note. In the ICC Court's view, such circumstances may include the nature of the hearing, its planned duration, possible travel constraints, the number of participants and of witnesses/experts to be examined, the size and complexity of the case, the need for the parties to properly prepare for the hearing, cost/time savings for not conducting a hearing in person, or whether rescheduling the hearing would entail unwarranted or excessive delays.

Therefore, the tribunal would need to make a balancing act in accommodating all the relevant factors, and in some cases even reconsider whether videoconferencing is indeed the most appropriate manner of holding the hearing in that particular case.

At the outset of the COVID-19 pandemic, the ICC Court released the ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic of 9 April 2020,[71] which also included guidance on how to conduct a remote arbitration hearing. The Guidance Note and the 2021 Note stress the importance of concluding a "cyber-protocol" laying out the specifics for organising the remote hearing, including with respect to the privacy of the hearing and the protection of the confidentiality of the communications and any electronic documents. The ICC Guidance Note provides proposed language for such "protocol" clauses under Annex II thereof. Nevertheless, the parties now have at their disposal a plethora of sample procedural orders, protocols and checklists from multiple organizations, which they may choose to follow in organising the remote hearing.[72]

Notably, the new Article 26 (1) of the 2021 ICC Rules does not limit the tribunal's choices to either a hearing in person, or one held via videoconferencing or telephone. The provision underlines that hearings may also be held through "*other appropriate means of communication*" which serves two functions. On the one hand, it reinforces the ICC's availability to engage with future technological developments. On the other hand, it gives the arbitral tribunal the freedom to select a more adequate alternative that would not put at disadvantage parties that may encounter difficulties with videoconferencing, for example due to lack of access to modern technologies or slow internet speed.[73]

[71] Accessible at https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf (last accessed on 23 March 2021).

[72] For example, the sample Procedural Order for Video Conference Arbitration Hearings published by Thomson Reuters (Practical Law), accessible at https://uk.practicallaw.thomsonreuters.com/w-025-0244?view=hidealldraftingnotes&transitionType=Default&contextData=(sc.Default)&firstPage=true (last accessed on 23 March 2021), or the Checklist on Holding Arbitration and Mediation Hearings in Times of COVID-19, developed by Delos, accessible at https://delosdr.org/index.php/2020/03/12/checklist-on-holding-hearings-in-times-of-covid-19/ (last accessed on 23 March 2021).

[73] A. Leoveanu, R. Giosan, *loc. cit.*, accessible at http://arbitrationblog.kluwerarbitration.com/2021/01/04/the-2021-icc-arbitration-rules-changes-to-the-arbitral-tribunals-powers/ (last accessed on 23 March 2021).

The experience of social distancing within the past year has allowed enough data to be generated on the conduct of remote hearings in arbitrations and statistics have begun to emerge. For example, the SCC reported that more than a third of its cases conducted during the COVID-19 pandemic had a hearing held via videoconference (23 out of 61 arbitrations). The arbitrators involved in those proceedings reported an overall satisfactory experience with the remote hearing, with a surveyed score of 4.4/5 for the procedural aspects and 4.6/5 for the technical aspects.[74] The CICA-CCIR proceedings have also seen a surge in hearings held via videoconference during the COVID-19 pandemic, either fully remote or hybrid hearings. The parties are increasingly relying on Article 31 (3) of the CICA-CCIR Rules and of Annex IV (g), regulating the manner in which hearings are held.

The shift to the digital medium for conducting arbitration hearings would not happen overnight but there seems to be an increased interest from other arbitral institutions as well to accommodate remote or hybrid hearings. The LCIA has revised the text of Art. 19.2 of the LCIA Rules which already provided that a hearing may take place online, emphasizing the possibility of holding hearings remotely. Other institutions which have yet to amend their rules in this respect have provided information and guidance to parties wishing to hold remote hearings.[75]

While the framework for a transition to more digital arbitration proceedings has been (or is in the course of being) established, it is equally important that the parties become receptive to participating at hearings through a screen. The traditional method is still embedded in the mindset of most of the participants and the adjustment to the virtual setting will require a lot of cooperation and goodwill. It remains to be seen if the trend towards online hearings continues even after the end of the pandemic, or if it will revert to the traditional in person hearings.

9. Increasing the value threshold for applying the expedited procedure

On the basis of the overall positive experience with the expedited procedure introduced in the 2017 ICC Rules,[76] the ICC Court decided to increase the value threshold from $2,000,000 to $3,000,000 for the applicability of the expedited procedure. The new threshold applies to disputes arising from arbitration agreements concluded after 1 January 2021, while the former threshold of

[74] SCC Virtual Hearing Survey, October 2020, accessible at https://sccinstitute.com/media/1773182/scc-rapport_virtual_hearing-2.pdf (last accessed on 23 March 2021).

[75] For example, the SCC https://sccinstitute.com/about-the-scc/information-from-the-scc-relating-to-covid-19/ (last accessed on), the HKIAC https://www.hkiac.org/our-services/facilities/virtual-hearings (last accessed on 23 March 2021) or VIAC https://www.viac.eu/en/arbitration/general-measures-covid-19 (last accessed on 23 March 2021).

[76] Of the 50 final arbitral awards issued in ICC expedited proceedings, 37 were issued within 6 months of the case management conference, and in another 10 the extension did not exceed one month - ICC Dispute Resolution 2019 Statistics, p. 16.

$2,000,000 will continue to apply to disputes arising from arbitration agreements concluded between 1 March 2017 and 31 December 2020. If the arbitration agreement was concluded prior to 1 March 2017, the expedited procedure may apply only if all parties agree, regardless of the amount in dispute.

This change aims to broaden the scope of application of the expedited procedure and will probably not be the last. According to ICC officials, the question was not whether to raise the bar, but rather how much to raise it.[77] It is therefore expected that the threshold might be raised periodically based on the feedback from the arbitration community. Indeed, studies show that there is an increased appetite for greater efficiency in arbitrations of lower value disputes, since 43% of the surveyed in-house counsel considered that an arbitration worth pursuing had to be of a value higher than USD 11 million.[78]

Interestingly, the ICC opt-out threshold for the expedited proceedings does not set the highest amount among arbitral institutions which provide for such a procedure. For example, the HKIAC Rules provide for a USD 3.2 million threshold, and the SIAC Rules for USD 4 million. There are also arbitral institutions (such as SCC and VIAC) that do not provide for an opt-out threshold. Instead, the parties have to expressly agree to be bound by such a procedure if they so wish. Also, while the CICA-CCIR Rules do regulate a simplified arbitral procedure (Annex V of the CICA-CCIR Rules), the opt-out threshold is rather low, at approximately 10.000 EUR. In contrast, the LCIA Rules have not yet expressly provided for an expedited procedure. Rather, the LCIA Rules only contain provisions for an expedited formation of the arbitral tribunal or an expedited appointment of a replacement arbitrator.[79]

10. Expressly regulating the additional award

By supplementing Article 36, the 2021 ICC Rules introduced a new type of application which either party may make to the ICC Secretariat in connection to the arbitral award. This application is complementary to the already existing mechanisms of correction and interpretation of the award.[80] In particular, within

[77] Alexander G. Fessas (Secretary General of the ICC Court), moderator of the 2021 ICC Rules Launch Event.

[78] F. Quintard, S. Dubash, *ICC Rules 2021: a focus on increased efficiency*, citing the Queen Mary University of London arbitration survey of November 2019, accessible at https://www.pinsentmasons.com/out-law/analysis/ica-rules-2021-increased-efficiency (last accessed on 23 March 2021).

[79] Articles 9A and 9C of the LCIA Rules. Nevertheless, the LCIA has expressed its availability to discuss modifications to its standard clauses including "*for expedited procedures*" – Annex to the 2020 LCIA Rules.

[80] The ICC Rules are now aligned with the arbitration rules of most other preeminent arbitral institutions (Art. 27.3 of the LCIA Rules, Art. 48 of the SCC Rules, Art. 39 of the VIAC Rules, Art. 33.3 of the SIAC Rules or Art. 40 of the HKIAC Rules). The CICA-CCIR Rules also provide the possibility for the arbitral tribunal of supplementing the award in case of omissions to decide upon a claim (Art. 49).

30 days of the communication of the arbitral award, the parties may request that the arbitral tribunal issue an additional award ruling on those claims which the tribunal omitted in the award, despite being made in the proceedings (*infra petita* or *minus petita*).

If such an application is made, the arbitral tribunal must grant the other parties the opportunity to comment and raise any objections to its admissibility within a time-limit normally not exceeding 30 days of the receipt of the application.[81] The tribunal shall submit its decision on the application within 30 days from the expiry of the time limit for receiving comments made by the other parties. The decision shall be submitted in draft form to the ICC Court for scrutiny according to Article 34 of the 2021 ICC Rules.

This amendment is of particular importance, considering that ever since the 2012 ICC Rules, commentators have pointed out the lack of express authority of ICC arbitral tribunals to supplement arbitral awards on matters beyond strictly correcting or interpreting the award.[82] Arbitral tribunals could revise the arbitral award by correcting any omissions on the merits of the parties' claims only if expressly permitted by the law at the place of arbitration.[83] Notably, the jurisdictions based on the UNCITRAL Model Law 2006 expressly allow a party to request the arbitral tribunal to issue an additional award.[84]

Despite the ICC scrutiny process, there were possibilities in which arbitral tribunals could issue awards *infra petita* without the parties having an expressly provided recourse against such omissions in the ICC Rules which could lead to the award being subject to a successful action for setting aside.[85] For example, in Turkey an award may be set aside on grounds of *infra petita*, even though the *lex arbitri* expressly allows the arbitral tribunal to issue an additional award on the unresolved claims.[86] In contrast, courts in other jurisdictions have dismissed the applications for setting aside of an award on grounds of *infra petita*, where the

[81] Paras. 211-212 of the 2021 Note.

[82] J. Fry, *loc. cit.*, par. 3-1277 – 3-1278.

[83] *Idem*.

[84] Art. 33 (3) of the UNCITRAL Model Law 2006 provides that „*Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.*"

[85] At the time of developing the 2012 ICC Rules, it was found that a mechanism for issuing additional awards was "counterintuitive to the ICC Court's system of scrutinizing and approving awards", so it was not implemented. However, it happened that *infra petita* awards would sometimes escape even the ICC Court scrutiny process. - M. Bühler, *et. al.*, *loc. cit.,* p. 4.

[86] Article 14B of the Turkish International Arbitration Law no. 4686/2001 – B. Tiryakioglu, A. B. Canyaş, *Challenges to Arbitral Awards*, published in *Arbitration in Turkey*, 2015, Kluwer Law International, p. 195.

applicant did not use the available mechanism of requesting an additional award provided in the Model Law.[87]

In the authors' view, the lack of recourse against the *infra petita* award would leave the parties no other option but to commence new arbitration proceedings with respect to the omitted claims, even if they were duly raised in the initial proceedings. The authors find that this would not raise *res judicata* concerns, since the tribunal did not issue a decision with regard to that particular claim. The claimant would only be precluded from raising the same claims in subsequent proceedings if the claims have already been decided upon (and are therefore under the effect of *res judicata*).[88]

The amended Article 36 of the 2021 ICC Rules remedies this shortcoming by expressly enabling the parties to all arbitration proceedings commenced after 1 January 2021 to request an additional award, if the situation so requires.

To reflect the aforementioned change, the definition in Article 2 (v) was also amended to qualify the additional award under the broad term of "award" within the meaning of the 2021 ICC Rules. It follows that the parties may request the correction and interpretation of the additional award under Article 36 of the ICC Rules as with any other final award issued under the auspices of the ICC Rules. Furthermore, the additional award would benefit from the recognition and enforceability of foreign arbitral awards under the provisions of the New York Convention 1958.

11. Settlement of disputes regarding administration of arbitral proceedings by the ICC Court

One novelty is that the 2021 ICC Rules provide under the new Article 43 that claims arising out of or in connection with the administration of the arbitral proceedings by the ICC Court under the ICC Rules shall be governed by French law and settled by the Paris Judicial Tribunal (*Tribunal Judiciaire de Paris*), France. This Tribunal shall have exclusive jurisdiction. In other words, by submitting disputes for settlement under the ICC Rules, the parties accept the jurisdiction of the Paris Judicial Tribunal to adjudicate any disputes concerning the liability of the arbitral institution. The selection of the territorial jurisdiction of Paris, France,

[87] G. Bajrami, *Why Bother Going Back to the Errant Tribunal When You Can Turn to the Court Instead? Or Should You?*, 2 November 2020, accessible at http://arbitrationblog.kluwerarbitration.com/2020/11/02/why-bother-going-back-to-the-errant-tribunal-when-you-can-turn-to-the-court-instead-or-should-you/ (last accessed on 23 March 2021).

[88] The International Law Association Recommendations on Res Judicata and Arbitration annexed to the ILA Resolution no. 1/2006 provide that "*An arbitral award has conclusive and preclusive effects in further arbitral proceedings if: […] it has decided on or disposed of a claim for relief which is sought or is being reargued in the further arbitration proceedings*".

is in line with the general principle that the defendant may be sued at the place of its domicile, since the ICC Court is based in Paris.[89]

This amendment was most likely introduced to prevent litigation against the ICC Court in jurisdictions which may have less or not as developed arbitration experience or even a hostile attitude towards it.[90]

12. Amendments related to investment arbitration

Although the ICC Court predominantly administers commercial arbitration proceedings, its services also extend to investment disputes.[91] The ICC Court has administered a total of 42 cases based on investment treaties from 1996 until 2019, while as many as 851 total cases were registered under the ICC Rules of Arbitration in 2019 alone.[92]

It is therefore commendable that the ICC Court paid attention also to the practices and needs of investment disputes when crafting the current revisions to the Rules. Two noteworthy amendments relating to investment treaty arbitration have made their way into the 2021 ICC Rules.

First, the new Article 13(6) affirms the principle that the arbitrators appointed in a treaty dispute have to be of a different nationality than all the parties to the proceedings, unless the parties agree otherwise.[93] Due to the nature of investment disputes, where arbitrators are called upon to pass judgment on the policy of states, it would not be appropriate for an arbitrator to share the nationality of a party to the proceedings.[94]

Second, Article 29 (6) c) precludes the emergency arbitrator procedure from being applied in treaty disputes. This change is in line with the two most prevalent sets of arbitration rules for settlement of investment disputes (ICSID and UNCITRAL), both of which do not provide for the possibility of appointing

[89] Certain international law instruments provide that the place of domicile of the defendant shall have default jurisdiction, subject to special jurisdiction provisions – for example the Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 (Art. 4 (1)).

[90] B. A. Warwas, *The Liability of Arbitral Institutions: Legitimacy Challenges and Functional Responses*, 2017, The Hague: Springer, p. 151.

[91] For a detailed account of the ICC arbitration in relation to disputes involving states and state entities, see the ICC Commission Report on States, State Entities and ICC Arbitration, June 2017 revision, available at https://iccwbo.org/publication/arbitration-involving-states-state-entities-icc-rules-arbitration-report-icc-commission-arbitration-adr/ (last accessed on 23 March 2021).

[92] *ICC Dispute Resolution 2019 Statistics*, published in the ICC Dispute Resolution Bulletin 2020, Issue 2.

[93] The ICSID Rules of Procedure for Arbitration Proceedings (Art. 1) and the UNCITRAL Arbitration Rules (Art. 6) also provide restrictions to the appointment of arbitrators by reference to the nationality of the parties.

[94] Keynote speech of Alexis Mourre, President of the ICC Court, at the ICC Rules Launch Event. See also the newly introduced Art. 45 of the 2021 Note.

an emergency arbitrator. Nevertheless, some institutions with a tradition in administering investment arbitrations allow for the emergency arbitrator procedure to apply also in treaty disputes (SCC, SIAC and CIETAC[95]).

The elimination of investment disputes from the scope of the emergency proceedings under the 2021 ICC Rules may have been driven by the scholarly criticism of such proceedings and reflects in fact the current practice of the ICC Court on Emergency Arbitrator proceedings. The objections range from the incompatibility of a short emergency procedure with the general complexity and sheer volume of the investment disputes, to concerns regarding the legitimacy of an emergency arbitrator over a sovereign party, enforceability hurdles, and even the inability of a state respondent to react swiftly in defending itself due to public procurement regulations.[96]

III. Conclusion

Overall, the changes introduced by the 2021 ICC Rules do indeed enhance efficiency, flexibility and transparency of ICC arbitral proceedings, and are welcomed. Most amendments follow particular trends already discernible in the practice of institutional arbitration, some of which have demonstrated positive results.

However, a few unanswered questions still remain. In particular, with respect to how the augmented powers granted to the ICC Court and arbitral tribunals will be exercised in practice, and how the arbitration community will take advantage of the recently enhanced flexibility. In any case, the authors trust that an experienced arbitral institution such as the ICC will find the right approach to turn the commitments framed under the 2021 ICC Rules into tangible benefits for achieving a better arbitration process for all practitioners and participants.

[95] China International Economic and Trade Arbitration Commission.

[96] K. Chung, *Emergency Arbitration in Investment Treaty Disputes*, The Journal of World Investment & Trade, Issue 1, Vol 20, 2019, Section 3.3.