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Entry into force of the new ICC Arbitration Rules and ICC Note to Parties and Arbitral Tribunals

The International Chamber of Commerce (the "ICC") has unveiled a revised version of its Rules of Arbitration (the "Revised Rules"). This new version, which came into force on January 1, 2021, applies to arbitration proceedings initiated on or after that date, unless otherwise agreed by the Parties. Although it does not introduce major substantive changes, this revision corresponds to the stated objective of the ICC President to "*mark a further step towards greater efficiency, flexibility and transparency.*"

An amended version of the Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (the "Note to Parties") dated January 1, 2021 has also been circulated.

The following is a presentation of the main changes that have caught our attention.

1. The main changes introduced by the Revised Rules

- **Towards a greater efficiency of the ICC arbitration proceedings**

In order not only to adapt to the new constraints resulting from the Covid-19 pandemic – in accordance with the Note published in the spring of 2020[1] – and to codify an already existing practice in order to reduce costs and timelines, Article 26 (1) of the Revised Rules provides for the possibility of holding hearings remotely, in particular by videoconference[2].

With this objective in mind, the Revised Rules expand the scope of application of the expedited procedure

provisions by raising the opt-out threshold to US$ 3 million (as opposed to US$ 2 million, previously).

A further move towards greater efficiency is planned for complex arbitrations – complex because they involve multiple parties or are based on several agreements – by allowing the arbitral Tribunal to authorize in certain circumstances the joinder of third parties even after the arbitrators have been appointed, subject to the additional party accepting the constitution of the arbitral Tribunal and agreeing to the terms of reference. In addition, several arbitrations can now also be consolidated, even if they are based on several agreements.

- **Changes allowing for more flexibility**

Until January 1, 2021, no additional party could be joined to the proceedings after an arbitrator had been appointed or confirmed, unless all Parties had agreed otherwise (in accordance with Article 7(1) of the 2017 Arbitration Rules).

The Revised Rules provide more flexibility by allowing the already constituted arbitral Tribunal to order a request for joinder on the dual condition that the additional party agrees to the constitution of the Tribunal and to the terms of reference.

When deciding whether to order a joinder, particularly where not all Parties agree to it, the arbitral Tribunal will consider whether it has "*prima facie jurisdiction over the additional party, the timing of the request for Joinder, possible conflicts of interest and the impact of the joinder on the arbitral procedure*".

- **Increased transparency**

The Revised Rules now provide interesting mechanisms concerning the independence and impartiality of arbitrators and conflicts of interest.

In particular, the Parties must now inform the Secretariat, the International Court of Arbitration and the other Parties of the existence of any funding arrangement with a non-party which has an economic interest in the outcome of the arbitration. Only the identity of that non-party must be disclosed in order to assess the risk of conflict of interest, not the terms and content of the funding arrangement itself.

It should be underlined that "in exceptional circumstances", notwithstanding any agreement by the Parties, the International Court of Arbitration 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 (Article 12(9) of the Revised Rules).

In addition, the Revised Rules expressly provide that each party must promptly inform the Secretariat, the arbitral Tribunal and the other Parties of any changes in its representation and consequently authorize the arbitral Tribunal to take any measure necessary to avoid a conflict of interest. In particular, the arbitral Tribunal may now preclude the new Party representatives from participating in whole or in part in the arbitral proceedings (Article 17(2) of the Revised Rules).

2. The main changes introduced by the Note to Parties

The Note to Parties has been significantly amended to align with the changes introduced by the Revised Rules. It provides enhanced guidance on the application and interpretation of the Revised Rules.

We found the following modifications and clarifications particularly interesting:

- **Regarding the obligation to disclose any funding arrangement with a third party,** the Note to Parties specifies that Article 11(7) of the Revised Rules should not *a priori* apply to inter-company funding within a group of companies, fee arrangements between a party and its counsel, or indirect interests, such as that of a bank having granted a loan to the party in the ordinary course of its ongoing activities;
- **Regarding the duty of independence and impartiality of arbitrators,** the Note to Parties specifies that in assessing whether a disclosure should be made, an arbitrator should consider relationships with non-parties having an interest in the outcome of the arbitration, such as third-party funders, the other members of the arbitral Tribunal, as well as experts or witnesses;
- **Regarding the constitution of the arbitral Tribunal where the Parties have not agreed upon the number of arbitrators**, the International Court of Arbitration will "in general" appoint a sole arbitrator, save where it appears that the complexity of the dispute or the interests at stake warrant the appointment of three arbitrators. It sets thresholds: A sole arbitrator should "normally" be appointed where the amount in dispute does not exceed US$ 10,000,000 and three arbitrators where it exceeds US$ 30,000,000;
- **Regarding data security**, the Note to Parties insists on the need to put in place appropriate technical and organizational measures to ensure a reasonable level of security appropriate to the arbitration.

In the current pandemic context, the Note to Parties provides particularly detailed guidance on the criteria to be considered by arbitrators for holding a hybrid or virtual hearing. In this respect, it suggests the implementation of a "cyber protocol" on data protection;

- **Regarding the possibility of settling the dispute amicably during the arbitration proceedings,** the Note to Parties provides that the arbitral Tribunal may encourage the Parties to consider settling all or part of their disputes, either by negotiation or through any form of amicable dispute resolution method under the ICC Mediation Rules.

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[1] https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf

[2] *"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".

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