



Mr. Fatos Lazimi
Member of ICC Court of
Arbitration (Albania)/ Partner



NEW AMENDMENTS 2021 RULES OF ARBITRATION

The newly introduced 2021 Rules of Arbitration portray the parties and arbitral tribunals' most encountered needs and expectations in facing challenges of arbitration in the most effective way possible. In addition, such amendments inherently mark an affirmed, steady and consistent policy that ICC Rules of Arbitration are the most responsive institutional arbitration Rules that are highly adaptive to new realities.

In essence, the Amendments introduced through 2021 Rules of Arbitration intend to increase the efficiency, foreseeability and transparency of arbitration proceedings by introducing tools and mechanisms that may be used by Arbitral Tribunals and Courts to serve the highest interests of the arbitration proceedings and its litigants.

Below are the introduced amendments to 2021 ICC Rules of Arbitration and the advantageous novelties they bring forth from a procedural standpoint.

Financial threshold in Expedited Procedure Provisions (ICC Rules Article 30 and Appendix VI).

The increase of the financial threshold of the claimed amount from 2 to 3 million USD is introduced. This change, which will be effective from January 2021, will allow more cases to benefit from the efficiencies already observed in cases governed by the

Expedited Procedure Provisions, resulting statistically in high quality awards rendered within the six-month time limit, albeit exceptional minor extensions.

Joinder

Joinder as provided for in Article 7(5) of the ICC Rules shapes the power of the arbitral tribunal to join an additional party if certain conditions are met, which is particularly useful in complex multi-party and multi-contract disputes. This additional power recognized to Arbitral Tribunals increases the efficiency of arbitration proceedings, reduces doubled costs in cases where various claims based on the same legal relationship could involve other third parties; and therefore such claims could be resolved more efficiently in a single arbitration proceeding.

Consolidation Power granted to the ICC Court of Arbitration.

This is a sound possibility for the Court to order consolidation of cases where different parties are involved and the claims are based on the same arbitration agreements; this preserves the existing and now strongly affirmed policy of ensuring foreseeability as to when consolidation will be allowed by the Court (Article 10(b) of the ICC Rules).



Additional Awards

A new possibility for arbitral tribunals to issue an additional award for claims omitted in the final award (Article 36(3) of the ICC Rules). This amendment could be seen as a procedural tool to resolve situations where law of place of arbitration does not provide the tribunal with the power to issue an additional award. Consequently, the lack of an inherent power of the tribunal to do so would lead to inefficiencies resulting in a party having to start anew the arbitration proceedings, so that claims that were missed by the tribunal may be dealt with.

Communication of reasons in relation to Decisions made by ICC Court of Arbitration

Including the provisions on the communication of reasons for some of the Court's decisions (Appendix II, Article 5) in the Rules is an amendment aiming to increase transparency, which is a pillar of ICC Court of Arbitration work. There are some specifics in relation to what types of decisions' reasons could be sought. These are typical decisions pursuant to Article 6(4) of the ICC Rules (decisions on prima facie jurisdiction), Article 10 (consolidation), Article 12(8) and 12(9) (constitution of the arbitral tribunal), Article 14 (challenges) and Article 15(2) (replacement of arbitrators). Being a well-established practice now of ICC Court of Arbitration, the request for reasons must be made prior to the decision of the Court and for decisions based on Article 15(2) at the stage when the parties' comments are invited.

Obligation for parties to disclose the existence and identity of a third-party

funder (Article 11(7) of the ICC Rules).

The identity of the third funder in arbitration proceedings has been a recurring issue. This obligation is believed to facilitate arbitrators' disclosures and shield them from challenges.

Power of the arbitral tribunal to exclude a counsel

Power of the arbitral tribunal to exclude a counsel introduced at a late stage of the proceedings when such introduction creates conflicts of interest pursuant to (Article 17(1) of the ICC Rules). Interestingly enough, this power is added to eliminate grounds for challenge that could be triggered with addition of a new counsel. However, it remains to be seen as to how the Arbitral Tribunal will use such power in order to balance, on the one hand, the procedural fairness and right of the counsel and, on the other hand, the integrity of the whole proceedings. Notwithstanding, such power will be used at the Tribunal's discretion on a case-by-case basis, due consideration however should be paid to the stage where the proceedings stand, the time when the addition of new counsel is requested or the necessity for such addition and other relevant circumstances.

Power of the ICC Court of Arbitration (the Court) to disregard an unconscionable arbitration agreement that infringes the principle of party equality under the constitution of the arbitral tribunal (Article 12(9)).

This amendment refers to very exceptional or rare situations like in so-called pathological arbitration agreements, where the Court is vested with the power to



appoint each member of the arbitral tribunal notwithstanding any agreement by the parties under the constitution of the arbitral tribunal. This amendment is highly motivated with the argument that such exceptional intrusion of the Court in parties arbitration agreement intends to avoid a significant risk of unequal treatment and unfairness that may affect the validity of the award as per the *lex arbitri*.

I think the above amendments introduced to the 2021 ICC Rules of Arbitration will pave the way for new dynamics in ICC arbitration practices, to which both Tribunals and the ICC Court have a key role to play. With such amendments in place, it is hoped that procedural benefits would outweigh any possible disadvantage that may result if Tribunals would not effectively or appropriately use the new powers granted to them.

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