Information Briefing

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UPDATE OF THE ICC ARBITRATION RULES

Following a preview of the text, the International Chamber of Commerce officially launched its new Arbitration Rules on 1 December 2020. These new Rules will enter into force on 1 January 2021 and will apply to proceedings initiated on or after that date (the **"ICC Rules 2021"** or the **"Rules"**).

The ICC Rules 2021 are an update which aims to bring the previous 2017 rules, which were in force to date, into line with current arbitration practice. With the amendments that have been introduced, the ICC primarily aims to **strengthen the independence and impartiality of arbitrators**. To this end, various powers available to the arbitrators to conduct the proceedings have been increased and new ones have been included, such as the possibility of excluding the parties' representatives in the event of a conflict of interest. In addition, the economic criterion for arbitration to be carried out under the **expedited procedure** has been amended to include cases with a value of less than USD 3,000,000.

On the other hand, the ICC is also committed to **prioritising electronic files** and has removed the requirement to submit physical copies of the initial submissions and accompanying documents. Furthermore, in response to the situation created by the pandemic, the ICC has expressly provided for the possibility of holding the hearings remotely.

The main new features of the ICC Rules 2021 are summarised below.

1. The joinder of additional parties and consolidation of arbitrations

In the rules currently in force, the possibility of joining additional parties to the arbitration once any arbitrator has been confirmed or appointed was limited to cases where all the parties, including the additional party, agreed to it. With the amendments made to Article 7(1) and 7(5), **the decision on the joinder of an additional party is left to the arbitral tribunal**. What is required is that the additional party accept the constitution of the arbitral tribunal and, where appropriate, the terms of reference. In making its decision, the arbitral tribunal must take into account the relevant circumstances of the case, including (i) whether the tribunal has *prima facie* jurisdiction over the additional party; (ii) the time at which the request for joinder was made; (iii) the possibility of conflicts of interest arising; and (iv) the impact of the joinder on the arbitral procedure.

Another area in which amendments are introduced is Article 10, which refers to the consolidation of arbitrations. With the new wording of subsections b) and c), it is clarified that claims in consolidated proceedings may be based **on the same arbitration agreements** (not necessarily on a single arbitration agreement); or even that claims may be made under different arbitration

agreements, provided that the arbitrations are between the same parties, the disputes are connected to the same legal relationship, and the Court considers the arbitration agreements to be compatible.

2. Measures to strengthen the independence and impartiality of arbitrators

The protection of the impartiality and independence of the arbitral tribunal is perhaps the area in which the most significant changes have been included.

Firstly, a section 7 is added to Article 11. This new section provides for the obligation of the parties to inform the Secretariat, the arbitral tribunal and the other parties of the **existence and identity of a third party with whom an agreement to fund the claims or defences has been reached**, and under which the third party has an economic interest in the outcome of the arbitration. In the same paragraph, it explicitly states that this obligation is introduced to help arbitrators to fulfil their obligations concerning impartiality and independence, both before and after accepting their appointment.

In this regard, the ICC Rules 2021 echo the concern in the arbitration community about the impact on the impartiality and independence of the tribunal of the existence of an unknown third party with an interest in the arbitration. It is clear that there is no way of controlling the possible role of a funder, if the existence thereof is not known. For this reason, it seems appropriate to oblige the disclosure of essential information in order to be able to assess whether there is a risk to the arbitrator's impartiality and independence. It is worth noting that the ICC Rules 2021 do not appear to require that the funding agreement be submitted, but merely that the identity of the funder be disclosed. In any case, what remains to be seen is how this section will interpreted by the arbitral tribunals and by the Court, as well as the practice that will be established regarding the information to be disclosed.

There has also been a development in the amendment of Article 17, the previous wording of which was limited to granting the arbitrators the power to require lawyers to provide proof of their authority to represent the parties. Firstly, the ICC Rules 2021 include an **obligation to promptly communicate changes in the parties' representation**. While this cannot be considered a new obligation, the fact that it is included in an express manner underlines its importance in terms of the proceedings progressing correctly.

This requirement is linked to the following very significant amendment introduced in Article 17. Once the arbitral tribunal has been constituted, and after hearing from the parties, the **tribunal may take any measure necessary to avoid a conflict of interest** arising from a change in the representation of one of the parties. These measures may result in the exclusion of the new representative, in whole or in part, from the arbitration proceedings. This possibility, like other developments introduced in these Rules, is not alien to the practice of ICC cases and had come to be seen as an inherent power of arbitral tribunals. However, given the potential significance of such a decision in terms of a party's right to defence, it is right that the power of the tribunal to

exclude a representative should be unequivocally stated in the Rules, since they are known and accepted by the parties when they enter into an arbitration agreement submitted to the administration of the ICC. What the ICC seems to consider with this measure is that the right to choose a party representative, although a matter of the utmost importance, is not an absolute right. Consequently, this right must be subject to the condition that it does not create a significant distortion in the arbitration procedure, for example due to the need to replace an arbitrator in the event of a conflict of interest.

3. The power of the Court to appoint all members of the arbitral tribunal in exceptional circumstances

The provision contained in the new Article 12(9) draws on the Court's own experience in a situation where the mechanism for appointing the tribunal provided for in the arbitration agreement had become uneven. Prior to this amendment, the Court had exercised this power under Article 42 of the Rules, which provides for a general rule requiring the Court and the arbitral tribunal to make every effort to ensure the enforceability of the award.

For this reason, and for the sake of transparency, this power has been expressly included, allowing the Court to appoint the members of the arbitral tribunal when three **requirements** are met: (i) there are exceptional circumstances; (ii) there is a significant risk that an unfair or unequal situation may arise; and (iii) the validity of the award may be affected. It is to be expected that this power will rarely be used, inasmuch as it involves disregarding the provisions of the arbitration agreement in relation to such an important issue as the appointment of the tribunal.

4. Amendments relating to treaty-based arbitrations

Two amendments are introduced for arbitrations based on a treaty (i.e. essentially investment arbitrations):

(i) Firstly, an express provision is added (Article 13(6)) whereby, unless otherwise agreed by the parties, if the arbitration agreement is based on a treaty, **the arbitrators must have a nationality other than that of the parties**. Although the nationalities of one of the parties and the investor could coincide, we understand that the aim is to avoid states being able to appoint arbitrators of their own nationality. This provision is consistent with what is provided for in the ICSID Arbitration Rules for the most frequent cases (those decided by a single arbitrator or by a three-arbitrator tribunal).

(ii) In addition, Article 29(6)(c) has been amended to **exclude the application of the emergency arbitrator provisions** in treaty-based arbitrations.

5. Amendment of the criterion for the application of the expedited procedure rules

As from the entry into force of the ICC Rules 2021 on 1 January, the provisions of the expedited procedure will apply to disputes that **do not exceed USD 3,000,000**, when the arbitration agreement is entered into as from the same date. This represents an increase of USD 1,000,000 compared to the limit envisaged so far, thus including a greater number of cases in the scope of this expedited procedure. As stated by the Court when presenting these Rules, this amount may be increased further in the future.

6. The preference for electronic means

In line with the approach of other courts, the ICC Rules 2021 have given priority to communication by electronic means, as was already becoming commonplace in ICC arbitrations. In this respect, **the need to provide physical copies has generally been removed** (Article 3(1)). Notwithstanding the above, such copies of the Request for Arbitration (Article 4(4)(b)), the Answer to the Request for Arbitration (Article 5(3)), or the Application for Emergency Measures (Article 1(2) of Appendix VI, on the Emergency Arbitrator Rules) may still be provided when the party filing the submission requests notification by post with acknowledgement of receipt or by courier service. The removal of the need for hard copies also applies to applications for the correction of errors in the award (Article 36(2)).

In the circumstances created by the pandemic, and as we are also seeing in other regulations, Article 26 now expressly gives the arbitral tribunal the authority to **decide whether the hearing is to be held physically or remotely**, and if so, by what means. Such a decision may be made after consulting the parties and taking into account the relevant facts and circumstances of the case. In this case, the ICC Rules 2021 reflect the practice of recent months in view of the difficulty of holding physical hearings. Notwithstanding the above, we consider that it is appropriate for the Rules to incorporate this provision in order to avoid disputes over the scope of the tribunal's powers in this regard.

7. Possibility of issuing additional awards

The possibilities of amending an award that has already been made have also been extended. Until now, the Rules have only expressly provided for the correction of a material error or a request for clarification of a matter decided on in the award. However, it did not cover the situation where the arbitral tribunal had omitted to decide on a claim duly raised by one of the parties. This possibility is indeed provided for in many national arbitration regulations, such as the Spanish regulations. The ICC has decided to include this option in the Rules, so that **an application to supplement the award can be made within 30 days of its notification** (Article 36(3)). The decision of the arbitral tribunal on the application in this regard will take the form of an additional award, expressly mandated by Article 36(4), as opposed to the form of an addendum to the original award, which corresponds to decisions on substantive errors or on the interpretation of the award.

8. Introduction of a dispute resolution clause in relation to the administration of the arbitration

Another significant change is introduced by Article 43, which provides that **any dispute arising in connection with the administration of the arbitration by the Court under the Rules will be governed by French law and settled by the Paris Judicial Tribunal**.

Consequently, for decisions to be taken by the Court, the provisions of French law must be taken into account, but this is not necessarily the case for the application of the rest of the Rules. The relevance and scope of this measure will have to be assessed when practical experience of its application is available.

This Information Briefing has been prepared by Ignacio Santabaya and Cristina Rodríguez, Partner and Associate of the Litigation and Arbitration practice.

The information contained in this Information Briefing is of a general nature and does not constitute legal advice. This Briefing was prepared on 2 December 2020 and Pérez-Llorca does not undertake any commitment whatsoever to update or review its content.

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