

SCHOUPS

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New ICC Rules of Arbitration as of 1 January 2021: what's changing?

The International Chamber of Commerce (ICC) is one of the largest arbitration institutions in the world. 869 cases were submitted to it for arbitration in 2019, and the construction sector - with 211 new cases - represented a substantial share of them.

Like all arbitration bodies, the ICC regularly amends its arbitration rules in order to keep them up-to-date, to respond to changing (business) practices and social developments, and to deal with problems that have arisen in the administration of the rules.

Thus on 6 October 2020 the ICC Executive Board approved amended ICC Rules of Arbitration that will enter into force on 1 January 2021, replacing the current rules that date from 2017. Although their official launch is scheduled for December, the 2021 Rules can already be found on the ICC's website.

The new rules will apply to ICC arbitrations that commence on or after 1 January 2021.

Below we will briefly review the most striking innovations, all of which are designed to improve the efficiency, flexibility and transparency of ICC arbitrations:

Joinder after constitution of the arbitral tribunal – Earlier, joining a new party to the arbitration proceeding after the appointment of the arbitral tribunal was only possible with the consent of the new party as well as *all* of the other parties in the arbitration proceeding; under the new rules, this becomes possible simply if the arbitral tribunal and the new party agree on this. Consent from the other, already-involved parties is therefore no longer required (art. 7.5 of the new Rules).

Transparency of third party funding - In order to enable the arbitrators to properly assess their independence and impartiality, the parties are obliged to communicate whether there are any third parties with whom the party has concluded an arrangement for financing the proceeding, as a result of which this third party too would have an economic interest in the outcome of the arbitration (art. 11.7 of the new Rules).

Departure from an agreed method for constituting the arbitral tribunal - In exceptional circumstances, if there is a significant risk of unequal treatment or unfairness that may affect the validity of the arbitral award, the ICC Court can depart from the method for constituting the arbitral tribunal that had been agreed by the parties and directly appoint the arbitrators itself (art. 12.9 of the new Rules).

Intervention if new representatives of a party give rise to a conflict of interest - After the arbitral tribunal is constituted, it can take steps to prevent a conflict of interest resulting from the appointment of new representatives by a given party, including prohibiting such new representatives from participating in the proceeding (art. 17.2 of the new Rules).

Virtual hearings - Most likely inspired by the current pandemic, hearings can now be held via video conference, telephone or some other appropriate means of communication. This rule already existed for the Expedited Procedure Rules and has thus been incorporated into the new general Rules (art. 26.1 of the new Rules).

Additional award for “forgotten” claims – If the arbitral tribunal failed to decide on certain claims, within 30 days after receipt of the award a request can be submitted to receive an additional ruling on those claims (art. 36.3 of the new Rules). This possibility comes in addition to the already-existing possibilities for having errors corrected and decisions interpreted.

Disputes about the administration of the arbitration proceeding – If the administration of the arbitration proceeding by the ICC Court gives rise to a dispute, French law will apply and the Paris judicial tribunals will have exclusive jurisdiction. This article is entirely new (art. 43 of the new Rules).

Expansion of the scope of application of the Expedited Procedure Rules – For arbitration agreements that are concluded on or after 1 January 2021, the Expedited Procedure will be applicable to disputes with a value below 3,000,000.00 USD (unless the parties agree not to apply the Expedited Procedure). Previously the threshold value was 2,000,000.00 USD. The ICC justifies this substantial increase by pointing to the success that the Expedited Procedure has enjoyed.

In sum, while the amendments do not introduce anything revolutionary, they are steps in the right direction to allow ICC arbitrations to take place as smoothly as possible and to block potential abuses by the parties.

CEPANI, the most important Belgian arbitration body, hasn't been resting on its laurels either. After already having adopted new Rules of Arbitration that entered into force on 1 January 2020 (see our earlier newsflash on this), as of 1 July 2020 it explicitly allows hearings to be held using any suitable means of communication, after the parties have been consulted with (art. 24.3). Moreover, the arbitral tribunal can also reach its decision solely on the basis of documents (without hearings), so long as none of the parties actually requests a hearing. CEPANI has thus responded quite nimbly to the COVID-19 pandemic.

For further questions on this topic you can contact the authors, Geert De Buyzer and Sophie Deckers.

De Burburestraat, 6-8 bus 5 2000 Antwerpen
Regentschapsstraat 58, bus 8 B-1000 Brussel
t. +32 3 260 98 60 f. +32 3 260 98 61 info@schoups.be www.schoups.be