

REVISTA ROMÂNĂ DE ARBITRAJ

ROMANIAN ARBITRATION JOURNAL

ANUL 15
NUMĂRUL 1/2021
(IANUARIE-MARTIE 2021)



CAMERA DE COMERȚ ȘI INDUSTRIE A ROMÂNIEI
IMPREUNĂ PENTRU AFACEREA TA



Wolters Kluwer
Romania

TABLE OF CONTENTS

EDITORIAL by Cristina ALEXE	9
------------------------------------	---

ARTICLES

Raluca Maria PETRESCU, Alexandru STAN The 2021 ICC Arbitration Rules – New Commitments to Achieving Better Arbitration	15
Martina MAGNARELLI More Fox or Hedgehog? Arbitral Tribunals' Decisions on Document Production	41
Vasuda SINHA, Gabriel FUSEA Counterclaims in Investment Arbitration: Key Threshold Issues for Claimants, Respondents and Tribunals	54
Cremona Ana Maria COTOVELEA DAB/DAAB - A comparative view between FIDIC 1999/2017 editions. Part 1 – Constitution	80
Mihaela MARAVELA Applicable Law in Domain Name Arbitrations	91

YOUNG ARBITRATION PRACTITIONERS' ESSAYS

Irina M. COMAN The Role of 'Consent Awards' in International Arbitration	113
--	-----

CASE AND LAW REVIEW

Karolina MIESZANIEC Would a dissenting opinion in a foreign arbitral award violate German public policy? – expanding on the decision of the OLG Frankfurt am Main, 16.01.2020 – 26 Sch 14/18	129
--	-----

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 STAN²

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,

¹ Raluca Maria Petrescu is a partner at SCA Popovici Nițu Stoica & Asociații. Raluca has completed a double degree in Romanian and French law, with the Faculty of Law, University of Bucharest (Degree in Law and Master's Degree) and the University of Paris 1 Panthéon - Sorbonne, France (Master's Degree in Business Law). With over 18 years of experience as an attorney, Raluca has been involved in various arbitral proceedings before international and domestic arbitration courts in sectors such as mergers and acquisitions, construction, commercial, energy, or privatisations, being one of the coordinators of the arbitration practice of PNSA. Raluca Petrescu may be contacted at raluca.petrescu@pnsa.ro.

² Alexandru Stan is a senior associate at SCA Popovici Nițu Stoica & Asociații. Alexandru holds a degree in Law from The University of Kent, Canterbury, United Kingdom. Alexandru Stan has over 5 years of experience in legal assistance and representation in civil and commercial law cases, as well as in arbitration proceedings in sectors such as construction, energy and commercial. Alexandru Stan may be contacted at alexandru.stan@pnsa.ro.

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 Tribunals⁷ 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

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.