

INTERNATIONAL ARBITRATION PRACTICE

New Year's Rules and Resolutions

By [Crystal Wong Wai Chin](#) and Anis Raihan Asmadi¹

23 December 2020

In an effort to promote greater efficiency, flexibility and transparency of arbitration proceedings, the International Chamber of Commerce (ICC) has recently revised its Rules of Arbitration (the [2021 ICC Rules](#)).² The 2021 ICC Rules came into force on 1 January 2021,³ marking a fresh start to the new year. Notable changes include provision for virtual hearings, an expansion of the consolidation provisions, revisions to the joinder provisions, as well as a need for disclosure of third-party funding arrangements.

In this article, we seek to compare the key features of the 2021 ICC Rules with:

- The newly revised London Court of International Arbitration (LCIA) Rules ([2020 LCIA Rules](#)), which came into force on 1 October 2020;
- The Asian International Arbitration Centre (AIAC) Rules ([2018 AIAC Rules](#)); and
- The Singapore International Arbitration Centre (SIAC) Rules ([2016 SIAC Rules](#)) (expected to be updated in the third quarter of 2021).⁴

Key Changes

1. *Virtual Hearings as the New Normal*

2021 ICC Rules	Article 26(1) Under the 2017 ICC Rules, case management conferences may be conducted remotely by video conference, telephone or other similar means of communication. ⁵ However, with respect to the
-----------------------	---

¹ Partner and pupil-in-chambers, respectively, with the International Arbitration Practice of Lee Hishammuddin Allen & Gledhill.

² ICC Court of Arbitration President Alexis Mourre's statement <<https://iccwbo.org/media-wall/news-speeches/icc-unveils-revised-rules-of-arbitration/>>

³ The 2021 ICC Rules will apply to cases filed from 1 January 2021. Any cases submitted to the ICC and registered prior to 1 January 2021 will be governed by the 2017 ICC Rules, unless the parties have agreed otherwise.

⁴ The SIAC is currently reviewing its 2016 Rules and plans to release an updated set of Rules in the third quarter of 2021, as announced [here](#). The updated Rules will include revisions on consolidation and joinder, new technology and arbitral procedure, expedited and/or emergency arbitration and powers of the tribunal.

⁵ 2017 ICC Rules, Article 24(4).

	<p>main hearing, Article 25(2) provided that “<i>the arbitral tribunal shall hear the parties together in person</i>” upon a party’s request or on the tribunal’s own motion.</p> <p>The ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic, published in April 2020, clarified that the wording of Article 25(2) of the 2017 ICC Rules was only to provide parties with an opportunity for “<i>live adversarial exchange</i>”, which is considered to be satisfied even if the parties conduct all or part of a hearing in the form of a virtual hearing.⁶</p> <p>Under the 2021 ICC Rules, the old Article 25(2) has been removed. The new Rules appear to provide more clarity on the arbitral tribunal’s jurisdiction to conduct hearings either in person or virtually.⁷ Further, the conduct of such virtual hearings is not limited to only video conference, but also includes “<i>other appropriate means of communication</i>”.</p> <p>The provision for “<i>other appropriate means of communication</i>” is a prescient measure to future-proof⁸ the 2021 ICC Rules. Not only does the provision take into account the current video conferencing platforms, but it also makes concessions for future technology. This will ensure the longevity and success of the 2021 ICC Rules.</p>
<p>2020 LCIA Rules</p>	<p>Article 19.2</p> <p>While Article 26 of the 2021 ICC Rules was the first time the ICC expressly codified the option for hearings to be conducted virtually, the LCIA 2014 Rules already contained a provision for hearings to be conducted in this manner in Article 19.2.</p> <p>The 2020 LCIA Rules revision appears to merely clarify and expand the wording of this Article, so as to better accommodate the use of virtual hearings, both for domestic and cross-border disputes.</p>

⁶ ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic, Section III paragraph 23.

⁷ 2021 ICC Rules, Article 26(1).

⁸ Abhivav Bhushan and Sameer Thakur, “Nothing Changes if Nothing Changes: An Introduction to the 2021 ICC Rules of Arbitration” (*Kluwer Arbitration Blog*, 27 October 2020) <<http://arbitrationblog.kluwerarbitration.com/2020/10/27/nothing-changes-if-nothing-changes-an-introduction-to-the-2021-icc-rules-of-arbitration/>> accessed 24 December 2020.

<p>2018 AIAC Rules</p>	<p>Rule 28.4⁹</p> <p>Under Rule 28.4, “<i>the arbitral tribunal may direct that witnesses, including expert witnesses, be examined through means of telecommunication that do not require their physical presence at the hearing (such as video conferencing)</i>”.</p> <p>The wording of Rule 28.4 seems to limit the option of virtual hearings to the witness testimony stage only. Nonetheless, the AIAC has had virtual hearing solutions available for the use of parties for quite some time. The AIAC seems to have further embraced the concept of digitalisation by offering parties and tribunals access to its licensed versions of the Zoom and Webex platforms.¹⁰</p> <p>Additionally, in its effort to further facilitate virtual hearings, the AIAC is currently working on protocols for Virtual Arbitration Proceedings (VAP) and Virtual Mediation Proceedings (VMP).¹¹ These initiatives are a step in the right direction and will certainly be welcomed by many.</p>
<p>2016 SIAC Rules</p>	<p>Rule 19.1</p> <p>While there is no specific provision on virtual hearings in the 2016 SIAC Rules, the SIAC has confirmed in its COVID-19 FAQ page¹² that the Rules do not prohibit the conduct of virtual hearings. In fact, Rule 19.1 provides that “<i>the Tribunal shall conduct the arbitration in such manner as it considers appropriate, after consulting with the parties, to ensure the fair, expeditious, economical and final resolution of the dispute</i>”.</p> <p>It is expected that the forthcoming updated SIAC Rules, which are set to be issued in the third quarter of 2021, will include more specific protocols on the use of virtual hearings. Nonetheless, in the interim, the SIAC seems already to have effectively catered for</p>

⁹ Article 28(4) of the UNCITRAL Arbitration Rules (as revised in 2013) (**UNCITRAL Rules**). The UNCITRAL Rules are adopted in Part II of the AIAC Arbitration Rules 2018.

¹⁰ AIAC Newsletter #02 August 2020, Virtual Hearings at the AIAC. The newsletter can be accessed [here](#).

¹¹ Ibid.

¹² [SIAC COVID-19 FAQ](#)

	the conduct of virtual hearings and provided necessary guidance ¹³ for parties who wish to consider this method now.
--	---

While the ICC, LCIA, AIAC and SIAC have all made laudable efforts to provide virtual hearing solutions for their respective users, it is arguable whether the conduct of such hearings could adequately replace the immediacy of in-person hearings. For example, any glitch in internet connection would jeopardise the smooth running of witness testimony, and illegal activities like hacking and covert recording may compromise the security and confidentiality of the hearing. The [ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic](#) and [CIArb Guidance Note on Remote Dispute Resolution Proceedings](#) offer particularly helpful guidance on managing these risks, with suggested clauses for cyber security protocols and procedural orders dealing with the organisation of virtual hearings.

2. Changes in Multi-Party Arbitration: New Consolidation Provision

2021 ICC Rules	<p>Article 10(b)</p> <p>Under both the 2017 and 2021 ICC Rules, the ICC Court may consolidate two or more pending arbitrations between the same or different parties, so long as the parties have agreed to such consolidation.¹⁴</p> <p>The updated 2021 ICC Rules, however, seem to have broadened the scope of consolidation involving different parties. Article 10(b) provides that consolidation may occur when “<i>all of the claims are made under the same arbitration agreement <u>or agreements</u></i>”.¹⁵ This may mean that separate claims commenced under multiple related contracts with identical arbitration clauses can now be consolidated. Time will tell exactly how far this expansion extends.</p> <p>Further, Article 10(c) stipulates that consolidation may also occur where “<i>the claims in the arbitrations are <u>not</u> made under the same arbitration agreement or agreements, but the arbitrations are between the same parties, the disputes in the arbitrations arise in</i></p>
-----------------------	---

¹³ SIAC Guide on "[Taking Your Arbitration Remote](#)".

¹⁴ Article 10(a) of the 2017 and 2021 ICC Rules

¹⁵ Emphasis added.

	<i>connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible”.</i> ¹⁶
2020 LCIA Rules	<p>Article 22.7(ii)</p> <p>Similar to the 2021 ICC Rules, the 2020 LCIA Rules have enlarged their consolidation provisions to allow the consolidation of arbitrations brought under “<i>compatible arbitration agreement(s)...</i> either between the same disputing parties or arising out of the same transaction or a series of related transactions”.¹⁷</p> <p>Additionally, under Article 1.2 of the LCIA Rules, via “<i>a composite Request</i>”, a party may commence separate arbitrations against multiple respondents and under multiple arbitration agreements.</p>
2018 AIAC Rules	<p>Rule 10</p> <p>The wording of Rule 10 of the 2018 AIAC Rules mirrors that of Article 10 of the previous 2017 ICC Rules. As such, the scope of consolidation allowed under the AIAC Rules is limited compared to the new 2021 ICC Rules and 2020 LCIA Rules.</p>
2016 SIAC Rules	<p>Rules 6 and 8</p> <p>Compared to other institutional rules, the scope of consolidation under Rules 6 and 8 of the SIAC Rules seems wider and thus better equipped to allow for the efficient resolution of multi-party and multi-contract arbitrations.</p> <p>In particular, Rule 8 provides that consolidation is permissible not only where the parties have agreed to it or where the claims in the arbitration are made under the same arbitration agreement, but also where “<i>the arbitration agreements are compatible</i>”, regardless of whether they are made between the same parties.</p>

¹⁶ Emphasis added.

¹⁷ This is provided that no arbitral tribunal has been formed for those arbitrations, or if already formed, that such arbitral tribunal(s) is(are) composed of the same arbitrators.

	Similar to Article 1.2 of the new LCIA Rules, Rule 6 of the 2016 SIAC Rules allows a claimant to commence multiple arbitrations via a single Notice of Arbitration for all relevant arbitration agreements.
--	---

The expansion of the consolidation provisions as provided by the ICC, LCIA and SIAC Rules may prove useful in energy and construction disputes as such disputes typically arise from complex contractual frameworks, each involving numerous contracts and parties. With the arbitral institutions adopting a more liberal approach to consolidation, contract drafters should be more focused on the compatibility of related arbitration clauses when preparing project agreements. For example, if a consolidated arbitration is in fact the intended outcome, it is recommended that the arbitration agreements in all project agreements be subject to the same institutional arbitral rules.¹⁸

3. Changes in Multi-Party Arbitration: New Joinder Provisions

2021 ICC Rules	<p>Article 7.5</p> <p>Under the previous 2017 ICC Rules, “[n]o additional party may be joined to an arbitration after the confirmation or appointment of an arbitrator, unless all parties, including the additional party, otherwise agree”.</p> <p>The new Article 7.5 now dispenses with the need for agreement from all parties, and allows the tribunal to join a third party even after the appointment of arbitrators, so long as that third party consents to the constitution of the tribunal and Terms of Reference.</p> <p>Additionally, the tribunal must take into account all relevant circumstances in deciding a request for joinder including whether the tribunal has “<i>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</i>”. Besides, “any decision to join an additional party is without prejudice to the arbitral tribunal’s decision as to its jurisdiction with respect to that party”.</p>
-----------------------	--

¹⁸ The SIAC, in December 2017, had issued a [Proposal on a Cross-Institution Consolidation Protocol](#), which permits the consolidation of arbitrations subject to different institutional rules. Such a proposal promotes “institutional cooperation” and aims to facilitate the efficient and enforceable resolution of international commercial disputes. It remains to be seen whether the proposal would be adopted in the SIAC Rules revision.

<p>2020 LCIA Rules</p>	<p>Article 22.1(x)</p> <p>Unlike the 2017 ICC Rules, the permissibility of a joinder under the LCIA Rules is not dependent on whether the tribunal has been constituted or whether all parties have agreed to it.</p> <p>Instead, a tribunal has the power to allow joinder only after giving all parties a reasonable opportunity to state their views, and where both the applicant and additional party expressly consent to such joinder. Effectively, therefore, the LCIA’s treatment of joinder is similar to the newly revised Article 7.5 of the ICC Rules.</p>
<p>2018 AIAC Rules</p>	<p>Rule 9</p> <p>Under Rule 9 of the AIAC Rules, procedurally, a joinder may be requested before or after the constitution of the arbitral tribunal. In the former situation, the request will be decided by the Director of the AIAC.</p> <p>More crucially, however, the grant of a joinder is subject substantively to the minimum requirement of either (i) the consent of all parties (including the additional party) or (ii) establishing that the “<i>Additional Party is prima facie bound by the arbitration agreement</i>”.</p>
<p>2016 SIAC Rules</p>	<p>Rule 7</p> <p>The wording of Rule 7 of the SIAC Rules is similar to Rule 9 of the AIAC Rules.</p> <p>The alternative <i>prima facie</i> test as stipulated in these Rules is unique compared to other institutional rules. In practice, the <i>prima facie</i> test may be satisfied by showing that there has been an incorporation by reference, or an agency relationship between the applicant and the additional party, that results in the latter being bound by the arbitration agreement.</p> <p>In effect, satisfying the <i>prima facie</i> test replaces the need for parties’ agreement as the threshold factor that gives the tribunal discretion to consider joinder. The pros and cons of the <i>prima facie</i></p>

	<p>test as a threshold test (as stipulated in the AIAC and SIAC Rules) indeed present an interesting area of discussion. On the one hand, an additional party should not be allowed to renege on its agreement to arbitrate given through the arbitration agreement. On the other hand, the <i>prima facie</i> test may cause unnecessary expenditure, confusion and delay as parties will inevitably forcefully challenge, at what should otherwise be a preliminary stage, whether the additional party is or is not <i>prima facie</i> bound by the arbitration agreement.</p> <p>For now, whilst the Rules remain as they are, parties to multi-party and multi-contract transactions should perhaps consider bespoke drafting to record whether or not they agree to being joined in arbitration proceedings. Such clauses will reduce the risk of potential complications arising from the application of these institutional rules in particular cases.</p>
--	--

The revision in the 2021 ICC Rules appears to have increased the threshold for a successful joinder application. Though the *prima facie* jurisdiction test may be satisfied, we now foresee an enhanced and/or further area for argument over whether an arbitral tribunal has jurisdiction over the additional party at all.

4. Disclosure of Third-Party Funding

<p>2021 ICC Rules</p>	<p>Article 11(7)</p> <p>The 2021 ICC Rules have included new provisions on third-party funding. Under Article 11(7), each party is required to promptly disclose “<i>the existence and identity of any non-party which has entered into an arrangement for the funding of claims or defences and under which it has an economic interest in the outcome of the arbitration</i>”.</p> <p>This revision has been welcomed by the arbitral community as a preventive measure to avoid conflicts of interest between arbitrators and third-party funders. It is undeniable that third-party funders have a direct economic interest in the awards eventually issued. This requirement will improve the transparency of proceedings, avoid any inadvertent conflict of interest and, most importantly, ensure the impartiality and independence of the arbitrators.</p>
------------------------------	---

2020 LCIA Rules	The LCIA, AIAC and SIAC Rules have no provisions on third-party funding.
2018 AIAC Rules	
2016 SIAC Rules	

As the global arbitration scene has seen a surge in the usage of third-party funding, we are confident that other major arbitral institutions will follow the ICC’s lead in devising rules or guidance notes to require disclosure of third-party funding arrangements.

Realising Potential: The Way Forward

The revisions to the ICC Rules (and LCIA Rules) are a step in the right direction to further modernise and streamline arbitration proceedings. With the new SIAC Rules forthcoming later this year, 2021 has a lot in store for the arbitral community. Closer to home, it is hoped that with the recent appointment of the new AIAC Director, greater investment in time and resources will also be made in enhancing the efficiency and flexibility of AIAC arbitrations.

If you have any queries, please contact the authors:



Crystal Wong Wai Chin
 Partner
 Energy, Infrastructure & Projects |
 International Arbitration
 T: +603 6208 5938
 E: wwc@lh-ag.com



Anis Raihan Asmadi
 Pupil-in-Chambers
 Energy, Infrastructure & Projects |
 International Arbitration
 T: +603 6208 6218
 E: anisraihan@lh-ag.com