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RECENT TRENDS IN INTERNATIONAL ARBITRATION AND 2021 INTERNATIONAL RULE CHANGES

I. INTRODUCTION

Perhaps now more than ever, recent technological developments have facilitated cross-border contracting, especially for companies undertaking complex infrastructure construction projects or entering into energy-related agreements. Contracting parties are increasingly turning to various international arbitration institutions to help resolve any disputes between them. In 2019, for example, the International Chamber of Commerce (ICC) set a new record for cases filed with 869. That record lasted one year when, in 2020, 946 new cases were filed with the ICC.

This article investigates how current events have impacted various international arbitral institutions. First, the article sets out to define international arbitration. Second, the article details several of the world's leading international arbitral organizations by comparing and contrasting those organizations' procedures, advantages, and disadvantages. Third, the article investigates the rise of International Investment Arbitration and outlines how it splintered off from traditional International Commercial Arbitration. Fourth, the article reviews the impact of the COVID-19 pandemic on international arbitration and discusses whether arbitral organizations' adaptations are here to stay. Finally, the article reviews the 2021 changes to rules promulgated by the International Centre for Dispute Resolution (ICDR) and ICC and analyzes how current events are reflected in these changes.

II. DEFINING INTERNATIONAL ARBITRATION

A leading expert in international arbitration, Gary Born, defines international arbitration as “a means by which

international business disputes can be definitively resolved pursuant to the parties' agreement, by independent, nongovernmental decision-makers, selected by or for the parties, applying natural judicial procedures that provide the parties an opportunity to be heard.”² Arbitration is largely viewed as a viable alternative to traditional legal mechanisms for dispute resolution that arise in an international context.³ In fact, arbitration has become the primary tool for resolving disputes between states, individuals, and corporations in nearly all components of international trade.⁴

While international arbitration and litigation share some features, like the cross-examination of witnesses and the presentation of evidence, the two processes are inherently different. Even a litigation practitioner with 30 years of experience working in federal court can feel like a “fish out of water” when advocating before an arbitral tribunal for the first time.

There are hundreds of international arbitral institutions across the globe, each with its unique attributes, advantages, and disadvantages. As different as they may be, arbitral organizations generally share three essential characteristics: (1) they are a permanent organization, (2) they possess a set of arbitration rules, and (3) the institution offers a set of services to the parties outside of dispute resolution.⁵ A permanent arbitration organization is an entity whose “existence precludes, and outlasts, that of the tribunals constituted to decide particular disputes.”⁶ Arbitration rules are the codified procedures governing an institution's proceedings. Finally, the services provided by the organization reflect the level of institutional involvement and support offered.

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2. GARY BORN, *INTERNATIONAL COMMERCIAL ARBITRATION*, 64–65 (Kluwer Law International 2021).
3. WON KIDANE, *PART V: ARBITRATION, CHAPTER 12: INTERNATIONAL ARBITRATION, CHINA-AFRICA DISPUTE SETTLEMENT: THE LAW, ECONOMICS, AND CULTURE OF ARBITRATION*, 270 (Kluwer Law International 2011).
4. REDFERN AND HUNTER ON *INTERNATIONAL ARBITRATION* §1.01 (6th ed.) (Nigel, Partasides, Redfern, et al.) (Sep. 2015).
5. RÉMY GERBAY, *THE FUNCTIONS OF ARBITRAL INSTITUTIONS*, 11 (Kluwer Arbitration International 2016) (discussed in chapter 1 covering the topic of: understanding the notion of arbitral institution: definitions and typologies).
6. *Id.* at 12 (citing Diana Droulers, “Institutional Commercial Arbitration from the Inside” in Kaj Hober and others (eds), *Between East and West: Essays in Honor of Ulf Frankie* (Juris 2010) 142).

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Virtually all international arbitration organizations require a dispute to be truly “international” before it can be entitled to international arbitration. But there is no universal definition of “international” nor policy for determining what disputes are appropriate for arbitration.⁷ Perhaps the most widely adopted definition of “international,” for purposes of defining arbitration, comes from the United Nations Commission of International Trade Law (UNCITRAL). According to the UNCITRAL, parties to a dispute are deemed international (as is the arbitration) if:

- a. their places of business are in different countries;
- b. the place where a substantial part of the obligations of their commercial relationship to be performed is situated outside the country of any party;
- c. the place with which the subject-matter of the dispute is most closely connected is situated outside the country of any party;
- d. the place of arbitration is situated outside the country of any party; or
- e. one party with more than one place of business (including a parent and/or subsidiary) is situated outside the country of any party.⁸

Other factors impacting whether international arbitration is appropriate includes the rules of the governing institution, the contract or arbitration agreement, and the nature of the dispute.⁹ For example, most international arbitral institutions will not hear cases pertaining to family law, or where the dominant issue involves title to property, or cases involving personal bankruptcy matters.¹⁰

III. SELECTING THE RIGHT INTERNATIONAL ARBITRAL INSTITUTION

Each of the (many) global international arbitration organizations has unique traits. However, in recent years

the organizations’ procedures have become increasingly indistinguishable.¹¹ This is especially the trend in 2021, as some of these organizations released similar processes for emergency arbitration, use of technology, and transparency. Accordingly, when choosing an arbitral institution, more subjective factors should also be deliberated,¹² including the institution’s reputation, the arbitrators’ experience, and the quality and consistency of the institution’s staff.¹³ This is not to say traditional factors should be disregarded, *e.g.*, costs of the arbitration, privacy matters, expertise in certain areas, and fast-track arbitration or early-determination capabilities.¹⁴ When looking beyond the globe’s most prominent arbitral institutions, parties should also research the legal status of an arbitral institution, *i.e.*, if it is charitable or for-profit, whether the organization is generalist or specialist, the cultural background and approach of the organization, and whether the organization has any specific ties to a state or foreign government.¹⁵

Furthermore, it is important to keep in mind the power individual arbitrators have in determining an arbitration’s outcome. The ultimate result of an arbitration can depend largely on the specific approach of the arbitrator(s).¹⁶ The arbitrators’ legal background and training, experience, nationality, views on legal issues, and knowledge of the subject matter will all impact the result of the arbitration.¹⁷ Accordingly, selecting the arbitrator(s) is just as significant of a consideration as picking an arbitral institution. This part of the process must not be discounted or overlooked.

A. An Introduction to The Leading Arbitral Institutions

The scope of this article is to focus on rules¹⁸ and procedures of the London Court of International Arbitration (LCIA), the ICC, the ICDR, the Hong Kong International Arbitration Centre (HKIAC), and the Singapore International Arbitration Centre (SIAC). Established in 1892, the LCIA is probably the oldest

7. Arbitrability in International Arbitration, Practical Law UK Practice Note 2-522-6743.

8. UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006.

9. Arbitrability in International Arbitration, Practical Law UK Practice Note 2-522-6743.

10. *Id.*

11. INTERNATIONAL ARBITRATION: WHICH INSTITUTION? Ashurst Quickguides at 2 (citing the 2021 International Arbitration Survey: Adapting Arbitration to a Changing World).

12. *Id.*

13. *Id.*

14. *Id.*

15. Gerbay, *supra* note 5.

16. INTERNATIONAL ARBITRATION: WHICH INSTITUTION?, Ashurst Quickguides at 2 (citing the 2021 International Arbitration Survey: Adapting Arbitration to a Changing World).

17. *Id.*

18. Throughout this article, reference to the “Rules” generically is made without regard to a particular institution. The article specifically references “LCIA Rules”, “ICDR Rules”, *etc.*, where appropriate.

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international arbitral institution in the world and remains a global leader in international arbitration today.¹⁹ The LCIA is based in London and maintains a regional office in Dubai.²⁰ The LCIA is composed of three distinct components: the Company, the Arbitration Court, and the Secretariat.²¹ The Company is made up largely of prominent London-based arbitration practitioners and handles the organization's business affairs. The Arbitration Court is comprised of up to thirty-five members, plus representatives of associated institutions and former Presidents, and undertakes the responsibility over appointing tribunals, determining challenges to arbitrators, and otherwise ensuring the LCIA rules are being followed during arbitration.²² The Secretariat is responsible for the day-to-day administration of all LCIA disputes. The LCIA rules were recently updated in 2020.²³

The ICC Court is the arbitration body attached to the International Chamber of Commerce. The ICC Rules explain that the ICC Court is to play an instrumental role in ensuring the application of ICC Rules in an arbitration.²⁴ Like the LCIA, the ICC has a Secretariat. The ICC Court and the Secretariat both operate under the guidance of a Secretary General.²⁵ The ICC is headquartered in Paris and has a French choice of law provision.²⁶

The ICDR is the international arm of the American Arbitration Association (AAA) and maintains exclusive jurisdiction of all international matters brought to the AAA.²⁷ The ICDR Rules were also updated in 2021. The ICDR is based out of the United States but operates offices across the globe.²⁸ To promote advancement of arbitration and other forms of alternative dispute resolution, the ICDR also makes hearing facilities available to parties *via* its network of 85 cooperative agreements with countries

ranging from the United States to Austria to Kosovo to Uganda.²⁹

The HKIAC was established in 1985 and is well-regarded as the leading arbitration organization in Hong Kong.³⁰ The day-to-day operations of the organization are handled by the HKIAC Secretariat, which is led by the Secretary General.³¹ However, the HKIAC Council governs the organization.³² Unlike other organizations, the HKIAC also provides administrative support for ad hoc arbitrations.³³ The HKIAC is also the appointing authority under the Hong Kong Arbitration Ordinance. The HKIAC most recently updated its Rules in 2018.³⁴

The SIAC is Singapore's leading arbitral institution and maintains several offices worldwide.³⁵ The SIAC has three main bodies: the Board of Directors, the Court of Arbitration of SIAC, and the Registrar.³⁶ In 2016, the SIAC updated its Rules, which are supplemented by a practice note discussing appointment of arbitrators, arbitrators' fees, and financial management.³⁷

B. Institutional Involvement and Scrutiny of Awards

One of the greatest differences between the arbitral institutions is their approach to institutional involvement and administration. Some institutions like the HKIAC promote a "light touch" approach, giving the parties more freedom in carrying out the proceeding. Others, such as the ICC and LCIA, are much more heavily involved. Institutions with a "light touch" approach tend to value individual party autonomy and the decision-making authority of the tribunal. Conversely, organizations with a stronger presence view their involvement as a form of a guarantee or organizational seal of approval.

19. A quick guide to the rules of the leading arbitral institutions, Practical Law UK Practice Note 3-381-8450; THE INTERNATIONAL COMMERCIAL ARBITRATION INSTITUTIONS: HOW GOOD A JOB ARE THEY DOING?, Richard J. Graving, *Am. Univ. Int'l Law Review* (Vol. 4, Issue 2 at 343) (1989).

20. A quick guide to the rules of the leading arbitral institutions, Practical Law UK Practice Note 3-381-8450.

21. *Id.*

22. *Id.*

23. *Id.*

24. A quick guide to the rules of the leading arbitral institutions, Practical Law UK Practice Note 3-381-8450.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. A quick guide to the rules of the leading arbitral institutions, Practical Law UK Practice Note 3-381-8450.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. A quick guide to the rules of the leading arbitral institutions, Practical Law UK Practice Note 3-381-8450.

35. *Id.*

36. *Id.*

37. *Id.*

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One clear manifestation of the different approaches is found in the scrutiny of awards. The ICC requires all awards to be approved by the ICC Court before the award is rendered final by the tribunal.³⁸ The ICC Court also has the power to order amendments to awards and proceedings.³⁹ The SIAC similarly subjects awards to scrutiny by the Registrar not later than 45 days after proceedings are declared closed per SIAC Rule 32.3.⁴⁰ Meanwhile, organizations like the HKIAC and LCIA do not approve awards and therefore vest more power into the tribunal. Parties tend to have different views on scrutiny. Some view the additional level of scrutiny as reassuring and a form of quality assurance. Others view it as burdensome and counterintuitive—particularly in complex cases where a company believes the award of the tribunal (presumably rendered after careful deliberations) should not be second-guessed.

C. Appointment of Arbitrators

When selecting an arbitral institution, parties should consider whether they have a preference for the number of arbitrators and whether they want to be involved in the arbitrator selection process. Arbitral institutions vary in these procedures, and different parties may have different ideas on the importance of appointing their own arbitrators and the number of arbitrators involved in their case. The LCIA is unique in the sense that the organization (not the parties) appoints the arbitrators.⁴¹ This is true even when the parties' arbitration agreement calls for the parties to appoint the arbitrators, not a third party.⁴² The LCIA Rules expressly state, "[N]o party or third person may appoint any arbitrator" and the "LCIA Court alone is empowered to appoint arbitrators..."⁴³ Thus, if a party wants full control over the arbitrator selection process, the LCIA may not be their first choice. That said, parties may inform the LCIA Court of their arbitrator preference, which normally gives deference to these nominations.⁴⁴ In any event, unless the parties have contracted otherwise

or the LCIA considers it appropriate, the default is for the LCIA to appoint a sole arbitrator.⁴⁵

In ICC arbitrations, the tribunal is constituted through the parties' agreement (whether specified in the underlying contract or decided by mutual consent after proceedings begin) or *via* nomination to be confirmed by the ICC Court.⁴⁶ If the parties cannot agree on the makeup of the tribunal, the ICC Court appoints the arbitrator(s).⁴⁷ The ICC Rules also permit the Court to appoint each member of the tribunal, notwithstanding any agreement by the parties, but only in exceptional circumstances and to avoid a significant risk of unequal treatment and unfairness that may impact an award's validity.⁴⁸ This seemingly comes into play in only the most unusual of cases.

Parties to ICDR arbitrations appoint the arbitrator(s) per their agreement. Without an agreement, the ICDR appoints the arbitrator(s).⁴⁹ Like the LCIA, the default for both the ICC and ICDR is one arbitrator, unless the parties otherwise agree or a panel of three arbitrators is deemed more appropriate by the organization's administrator.⁵⁰

The SIAC and HKIAC are not too different from the ICC and ICDR. In SIAC and HKIAC arbitrations, where there is a sole arbitrator, a joint nomination process applies.⁵¹ Where there are three arbitrators, each party appoints one arbitrator and the court appoints the third.⁵² Where the parties are unable to reach an agreement or appoint an arbitrator, either the SIAC or HKIAC court will make the appointment.⁵³

D. Legal Status of Arbitral Institutions

The legal status of arbitral institutions should be considered when selecting an arbitral organization. Most arbitral institutions, including those explored here, are not-for-profit enterprises, isolated from any government entity. However, other institutions are for-profit or affiliated with a national government. With the establishment of Judicial Arbitration and Mediation Services, Inc. and the National

38. Article 34 of the ICC Rules (2021).

39. *Id.*

40. Article 32.3 of the SIAC Rules (2016).

41. Article 5 of the LCIA Rules (2020).

42. Article 7 of the LCIA Rules (2020).

43. Article 5.7 of the LCIA Rules (2020).

44. A quick guide to the rules of the leading arbitral institutions, Practical Law UK Practice Note 3-381-8450.

45. *Id.*

46. Article 12 of the ICC Rules (2021).

47. *Id.*

48. *Id.*

49. Article 12 of the International Dispute Resolution Procedures (IDRP), 2021.

50. Article 11 of the IDRP (2021); Article 12 of the ICC Rules (2021).

51. Article 9 of the SIAC Rules; Article 7 of the HKIAC Rules (2018).

52. Article 9 of the SIAC Rules (2016); Article 7 of the HKIAC Rules (2018).

53. Article 10 of the SIAC Rules (2016); Article 7 of the HKIAC Rules (2018).

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Arbitration Forum LLC, both domestic American arbitration groups, the world is seeing a proliferation of for-profit arbitral organizations whose practices are sometimes called into question.⁵⁴

Registered in France, the ICC is a corporate form of a non-profit entity.⁵⁵ It maintains an interesting legal status as it is linked to the International Chamber of Commerce, meaning it is not organizationally independent.⁵⁶ However, being linked to a chamber of commerce can offer an advantage of providing immediate legitimacy, since such an institution is established by its users.⁵⁷

Meanwhile, the LCIA is registered in England as a “company limited by guarantee.”⁵⁸ A company limited by guarantee is a non-profit venture that requires local personality.⁵⁹ A company limited by guarantee does not have shareholders, nor do they share capital.⁶⁰ Instead, they have members that act as guarantors in the event it becomes insolvent.⁶¹

The ICDR/AAA is unique because, like the LCIA, it is financially and organizationally independent and receives no government funding.⁶² Instead, the ICDR is incorporated under New York law and is designated as a not-for-profit corporation.⁶³ The SIAC, meanwhile, is linked to the Singaporean government and is “designated by the International Arbitration Act as competent for the certification of awards for enforcement purposes.”⁶⁴ This is a form of “statutory attribution of responsibilities.”⁶⁵ Finally, the HKIAC was granted charitable status in 1985 after historically being a company limited by guarantee.⁶⁶

E. Privacy

Privacy is another factor parties should consider when selecting an arbitral organization. Traditionally, privacy

and transparency requirements varied greatly from institution to institution. Organizations like the LCIA require parties to agree that material produced and awards rendered will be kept confidential absent prior written consent. Conversely, organizations like the ICC do not automatically require parties to keep materials confidential. The ICC also does not prohibit the publication of awards, including un-redacted awards, unless an objection is filed.⁶⁷ Similarly, under its new 2021 Rules, the ICDR will publish redacted awards if no objection is filed within six months.⁶⁸

Meanwhile, an award rendered in HKIAC arbitration is subject to stricter confidentiality requirements. The HKIAC Rules allow for publication of the awards only if all references to the parties’ names and other identifying information is deleted *and* if no party objects to such publication.⁶⁹ If an objection is raised, the award shall not be published.⁷⁰ SIAC’s Rules provide that all matters relating to the proceedings, pleadings, and awards remain confidential, except for matters otherwise in the public domain.⁷¹ However, with the consent of the parties, a SIAC tribunal may publish the awards in redacted form.⁷² Thus, if a party wants to fully avail itself of the privacy protections traditionally associated with arbitration, the LCIA appears to be the better choice, followed by the SIAC and HKIAC.

F. Costs and Fees of Arbitrating

The ICC, ICDR, SIAC, and HKIAC all have an *ad valorem* fee structure which means the costs of the arbitration are determined according to the sum in the dispute.⁷³ Although generally similar, each organization has a slightly different way of setting the cost structure. For ICC disputes, costs are established purely by the sum

54. Gerbay, *supra* note 5, at 22–24.

55. *Id.* at 20.

56. *Id.*

57. *Id.* at 22.

58. *Id.*

59. Gerbay, *supra* note 5, at 20.

60. *Id.*

61. *Id.*

62. *Id.* at 20–21. The LCIA, although originally established by the City of London and the London Chamber of Commerce, emancipated itself from these founding bodies over the years.

63. Gerbay, *supra* note 5, at 21.

64. *Id.* at 23.

65. *Id.*

66. *Id.*

67. ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, ¶¶57–59 (Jan. 1, 2021)

68. Article 40 of the IDRP (2021).

69. Article 45.5 of the HKIAC Rules (2018).

70. *Id.*

71. Article 39 of the SIAC Rules (2016).

72. Article 32.12 of the SIAC Rules (2016).

73. INTERNATIONAL ARBITRATION: WHICH INSTITUTION? Ashurst Quickguides at 11.

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of the dispute.⁷⁴ However, in addition to a non-refundable \$5,000.00 USD filing fee, two separate deposits must be paid to the ICC in advance of commencing the arbitration.⁷⁵ First, the “provisional advance” must be paid by the claimant after providing the Secretariat with the request for arbitration. This advance covers costs through the time that the “Terms of Reference” are completed.⁷⁶ Second, the “advance on costs” must be paid by both parties in equal shares.⁷⁷ The advance on costs is required to “cover the fees and expenses of the arbitrators and the ICC administrative costs” and is fixed soon after the respondent files its answer to the request for arbitration.⁷⁸ Prior payments made by the claimant are credited towards its share of the advance on costs.

Similar to the ICC, the ICDR permits the tribunal to set the costs of the arbitration and apportion the costs as it deems appropriate in reference to the sum of the dispute.⁷⁹ ICDR arbitrators are compensated through an hourly rate, and any disputes on the costs of the arbitration are handled by the administrator. The administrative costs are based upon the disputed amount and determined by the schedule of costs available on the ICDR website.⁸⁰ The tribunal and administrator generally require deposits to be paid during the arbitration.⁸¹

The Registrar maintains the power to set the costs in a SIAC arbitration, which includes the tribunal’s costs and expenses, the SIAC’s fees, and expert fees.⁸² The tribunal articulates in its award the total costs of the arbitration and decides how costs will be apportioned in the award unless the parties agree otherwise.⁸³ The parties must also pay deposits, and separate advances of costs may be established for the claimant and respondent if a counterclaim is filed.⁸⁴

Like the ICC, the HKIAC requires the parties to pay a deposit as an advance on costs.⁸⁵ The tribunal determines the costs within its award, and it may apportion the costs between the parties.⁸⁶ Parties may determine together whether the fees are determined on an *ad valorem* basis or an hourly rate.⁸⁷ Where the parties cannot agree, the HKIAC can fix the hourly rate of an arbitrator.⁸⁸

The LCIA takes a different approach wherein costs are not dependent on the amount in the dispute. Instead, costs and fees are time-based and charged according to the LCIA’s Schedule of Costs.⁸⁹ This includes a registration fee that is to be paid at the start of the arbitration.⁹⁰ Except for exceptional cases, the tribunal is compensated at an hourly rate not to exceed £500.⁹¹ The LCIA Court may also require the parties to make advanced payments, and a failure to make such payment may be considered to be a withdrawal of a claim, counterclaim, or cross-claim.⁹²

IV. THE RISE OF INTERNATIONAL INVESTMENT ARBITRATION AND COMPARING IT TO INTERNATIONAL COMMERCIAL ARBITRATION

While international arbitration has existed for centuries, two forms have emerged over the last several decades with “International Investment Arbitration” splintering from traditional “International Commercial Arbitration.” As discussed in this article, International Commercial Arbitration is characterized by an emphasis on private law, private contracts, and private parties.⁹³ When states participate in International Commercial Arbitration, they are generally understood to be acting in a private capacity.⁹⁴ Meanwhile, International Investment Arbitration is rooted in public international law, as opposed to private law derived from private contracts.⁹⁵ Thus, while International Commercial Arbitration and International

74. A quick guide to the rules of the leading arbitral institutions, Practical Law UK Practice Note 3-381-8450.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. Article 37 of the IDRP (2021).

80. A quick guide to the rules of the leading arbitral institutions, Practical Law UK Practice Note 3-381-8450.

81. *Id.*

82. Article 34 of the SIAC Rules (2016).

83. A quick guide to the rules of the leading arbitral institutions, Practical Law UK Practice Note 3-381-8450.

84. Article 34 of the SIAC Rules (2016).

85. Article 34 of the HKIAC Rules (2018).

86. *Id.*

87. INTERNATIONAL ARBITRATION: WHICH INSTITUTION? Ashurst Quickguides at 11.

88. *Id.*

89. *Id.*

90. *Id.*

91. LCIA Rules, Schedule of Arbitration Costs (October 2020).

92. Article 24.8 of the LCIA Rules (October 2020).

93. Anetha Roberts, *Divergence Between Investment and Commercial Arbitration*, Proceedings of the Annual Meeting (American Society of International Law), Vol. 106, Confronting Complexity (2012).

94. *Id.*

95. *Id.*

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Investment Arbitration are procedurally similar, they vary when it comes to substantive law.⁹⁶

In International Investment Arbitration, states act in their public capacity as sovereigns that enter into treaties. States also perform as regulators, in contrast to acting as a contracting party.⁹⁷ In International Investment Arbitration, the investment treaties themselves are subject to international law and therefore must be interpreted within the context of public international law.⁹⁸

International Commercial Arbitration and International Investment Arbitration also have varying impacts. Generally speaking, International Commercial Arbitration only has an immediate impact on the parties to the dispute.⁹⁹ However, International Investment Arbitration has the potential to impact a country's population.¹⁰⁰ This difference is perhaps most visible in the varying transparency mechanisms that exist between the two forms of arbitration. International Investment Arbitration awards are often made public, given their potential to impact the public, and many awards and some pleadings are published due to the public interest in international investment disputes.¹⁰¹ Comparatively, International Commercial Arbitration awards and pleadings often remain confidential as previously discussed (although the publication of such awards seems to be trending in favor of transparency).¹⁰²

Party autonomy is also different in International Commercial Arbitration and International Investment Arbitration. Unlike International Commercial Arbitration, International Investment Arbitration deals with an investor's claim against a nation-state. Furthermore, investment treaties serve the sole purpose of protecting investors, whereas private contracts generally protect the interests of both parties.¹⁰³ Accordingly, in International Investment Arbitration, the "state has no commensurable

right to [bring suit against] the investor."¹⁰⁴ This is in contrast to International Commercial Arbitration, where both parties to the agreement have equal grounds to request arbitration.

Thus, while historically, both International Investment Arbitration and International Commercial Arbitration were lumped together as international arbitration, today they exist as mechanisms to address disputes of fundamentally different types. Indeed, International Investment Arbitration came into being in the latter half of the twentieth century as a result of the first bilateral investment treaties.¹⁰⁵ These treaties first emerged in 1959 and became more prevalent after the World Bank initiated the ICID-Convention in 1965.¹⁰⁶ Since then, International Investment Arbitration has only become more popular. For example, the ICC has seen a 67% increase in International Investment Arbitration over the last five years.¹⁰⁷ And experts speculate that International Investment Arbitration will only become more frequent as disputes pertaining to COVID-19 make their way into arbitral arenas.¹⁰⁸ Questions such as: whether investors will be indemnified for losses stemming from the global pandemic; whether states will be insulated from the consequences of the measures taken in response to the outbreak; and whether states' COVID-19 measures constitute a breach of contract will all likely be answered through International Investment Arbitration.¹⁰⁹

V. COVID-19'S IMPACT ON INTERNATIONAL ARBITRATION

International arbitration showed no immunity to the global COVID-19 pandemic. Experts predict that for years to come, arbitrations will center on COVID-19 claims.¹¹⁰ Pandemic-related disputes over force majeure clauses, corporate restructuring, and insolvency arising from the pandemic will likely be resolved in international arbitration

96. *Id.*

97. *Id.*

98. *Id.*

99. Nigel Blackaby, *PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION*, 225 (Wolters Kluwer 2006) (see chapter 11: Investment Arbitration and Commercial Arbitration (or the Tale of the Dolphin and the Shark)).

100. *Id.*

101. *Id.* at 228.

102. *Id.*

103. *Id.*

104. Pieter Parmentier, *International Commercial Arbitration v. International Investment Arbitration – Similar Game But Somehow Different Rules* 4 (Mar. 1, 2018), <https://ssrn.com/abstract=3200648>.

105. Karl-Heinz Bockstiegel, *Commercial and Investment Arbitration: How Different Are they Today? The Lalive Lecture 2012*, 28 *Arb. Int'l—J. London Ct. Int'l Arb.* 577, 577–78 (2012).

106. *Id.*

107. INT'L CHAMBER OF COM., *ICC Dispute Resolution 2019 Statistic*, 10 (2020). In 2019, 212 of the 869 new cases filed with the ICC involved states or state-owned enterprises.

108. See Federica Paddeu & Kate Parlett, *COVID-19 and Investment Treaty Claims*, *KLUWER ARBITRATION BLOG* (Mar. 30, 2020), <http://arbitrationblog.kluwerarbitration.com/2020/03/30/covid-19-and-investment-treaty-claims/>.

109. *Id.*

110. *Id.*

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institutions across the world—giving way to a new field of experts specializing in COVID-19 arbitrations.¹¹¹ Additionally, numerous procedural changes have been implemented as a result of the pandemic throughout the arbitral institutions.¹¹² As the world strives to achieve a post-pandemic state, the question becomes whether such changes are permanent. The following sections outline some of the major adaptations arbitral institutions have made in light of the global pandemic and compares them to the previous status quo.

A. Electronic Filing

Pre-pandemic, most arbitral institutions required that requests for arbitration be submitted in hard copies.¹¹³ While some arbitral institutions had begun establishing an electronic mechanism for filing demands for arbitration before March 2020, many still required, at minimum, hard copy documentation of the request transmission.¹¹⁴ Since the process of adopting new rules is tedious and slow-moving, many arbitral institutions simply relaxed their rules after March 2020 pertaining to hard copy filings. Others released practice notes expressing a preference for electronic submissions.¹¹⁵ Additionally, as arbitral institutions increased their capacity to manage electronic submissions, many now provide that hard copies will only be required upon request from one of the parties.¹¹⁶

One of the main reasons for this new approach to electronic submissions is that arbitral institutions' staff was forced to work from home.¹¹⁷ Most arbitral institutions lost the ability to have staff in their offices due to the global onset of lockdowns. Accordingly, staff was unable to access the hard copies as there was no one available to collect and distribute the hard copies as they were mailed in. It is unlikely that arbitral institutions will revert to

requiring hard copies as staff return to their offices. This is because the infrastructure for electronic submissions is now in place, allowing for more efficient and streamlined submissions.

B. Notification of the Award

Before the outbreak of COVID-19, arbitral rules generally required that original copies of the awards be signed by the arbitrators.¹¹⁸ The award then was to be transmitted either to the institution or directly to the parties as part of the notification process.¹¹⁹ Some institutions allowed the parties to be notified in advance of the award *via* electronic communication.¹²⁰ Other institutions permitted electronic notification upon the consent of the parties. Now, some organizations provide that notification is to occur through email only, or that it is to be submitted electronically and followed by original copies.¹²¹ However, generally speaking, most institutions will only permit electronic notification with the consent of both parties.¹²² Other institutions promise that transmission of the original awards will occur after the organization reopens.

C. Extension of Deadlines and Format of Proceedings

Under the traditional rules, absent agreement by the parties, deadlines were not normally extended unless exceptional circumstances existed.¹²³ Such requests for extensions were to be considered by arbitral tribunals and the institution and approved at their discretion.¹²⁴ In the early days of the pandemic, arbitrations were widely postponed.¹²⁵ As the world acclimated to pandemic life, arbitration hearings were rescheduled for remote proceedings. Today there is a relatively fair mix of remote and in-person hearings, the latter still being a widely preferred method, if possible. The concern remains that advocacy skills are more effective in-person than in a remote environment.¹²⁶ That

111. *Id.*

112. GUSTAV FLECKE-GIAMMARCO, ET AL., *Arbitrating in Uncertain Times—Institutional Responses to COVID-19*, 18 German Arbitration Journal, 133 (2020).

113. *Id.* at 134.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. Gustav Flecke-Giammarco, Gebhard Bucheler, et al., *Arbitrating in Uncertain Times—Institutional Responses to COVID-19*, 18 German Arbitration Journal, 133, 135 (2020).

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. Gustav Flecke-Giammarco, Gebhard Bucheler, et al., *Arbitrating in Uncertain Times—Institutional Responses to COVID-19*, 18 German Arbitration Journal, 133, 135 (2020).

124. *Id.*

125. *Id.*

126. Maria Solana Beserman Balco, *COVID-19 and new ways of doing arbitration: are they here to stay?*, XVII, *Revista Brasileira de Arbitragem*, 129–144, 132 (2020).

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said, many arbitral institutions issued recommendations that hearings be conducted virtually.¹²⁷ It remains unclear how arbitral institutions whose rules provide that a party may demand an in-person hearing will respond to these new recommendations.

VI. CHANGES TO THE ICC AND ICDR RULES IN LIGHT OF CURRENT TRENDS

Earlier this year, both the ICC and ICDR updated their Rules to reflect the impact of COVID-19 and the continued rise of International Investment Arbitration. The changes implemented by the institutions mirror each other in a few key areas: joinder/consolidation, transparency, third-party funding, the use of technology, and expedited procedures. However, the institutions deviated on some updates. For example, the ICDR established the International Administrative Review Council, updated its Emergency Measures of Prevention, clarified the role of the tribunal secretary, and established early disposition procedures. Meanwhile, the ICC added provisions relating directly to International Investment Arbitration and the ICC Court's ability to appoint arbitrators notwithstanding the parties' agreement, codified its governing law when settling disputes, and provided greater insight into the ICC's internal procedures. These changes reflect the prevailing times and shed light on what COVID-era policies may permanently be adopted.

A. Joinder/Consolidation

Both the ICC and the ICDR updated their provisions discussing joinder and consolidation, choosing to take a more liberal approach to both actions. Under the Rules for both the ICC and ICDR, in certain circumstances, additional parties may be joined to a pending arbitration regardless of opposition from other parties. Article 7(5) of the ICC Rules now allows the arbitral tribunal to join a third party after the appointment of the arbitrators at a party's request, even where the other party does not consent to the joinder.¹²⁸ In doing so, the arbitral tribunal must consider all "relevant circumstances" which include (i) whether the arbitral tribunal has a prima facie jurisdiction over the additional party, (ii) the timing of the request, (iii) possible conflicts of interest, and (iv)

the procedural impact of the joinder.¹²⁹ Similarly, Article 8(1) of the ICDR Rules permits consenting additional parties to be joined in a pending arbitration, regardless of opposition from other parties already involved in the proceeding.¹³⁰

Furthermore, the ICDR relaxed its requirements for consolidating proceedings. Previously, consolidation was permitted if the claims/counterclaims arose under the same arbitration agreement or if the arbitrations involved the same parties and the disputes arose in connection with the same legal relationship. Consolidation no longer requires the presence of the "same" parties, so long as the parties are "related."¹³¹ When determining whether it is better to arbitrate under the ICC or ICDR, consider whether the contracting entity has subsidiaries or affiliates under separate contracts with subsidiaries or affiliates of the entity's counter-party. If so, the ICDR may be a better choice to the extent a dispute arises under multiple contracts, *i.e.*, it will be easier to consolidate the proceedings under the ICDR than in an ICC arbitration, which still requires the existence of the "same parties."

These new approaches to joinder and consolidation have the power to limit conflicting opinions from the respective Courts, as well as to increase efficiency. This is because these approaches assist in preventing situations where different tribunals reach separate and different conclusions on common factual and legal issues.

B. Transparency and Privacy

There have been increasingly vocal calls for greater transparency in International Commercial Arbitration. There are several reasons why parties may wish to keep their proceedings confidential, ranging from protecting their reputation to avoiding media involvement. Accordingly, frequent participants in arbitration may find it interesting to know that both the ICC and ICDR have set to placate some of these demands in their 2021 Rules by updating their transparency and privacy guidelines.

For example, the ICDR left its original publicity clause intact, but it has been moved to the section of the Rules detailing confidentiality.¹³² Furthermore, the ICDR added

127. *Id.*

128. INT'L CHAMBER COMM. (ICC), *2021 Arbitration Rules*, at art. 7.5 (2021), https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_7.

129. *Id.*

130. INT'L CTR. DISP. RESOL. (ICDR), *International Dispute Resolution Procedures (including mediation and Arbitration Rules)* 20, (effective Mar. 1, 2021).

131. *Id.* at art. 9(1).

132. *Id.* at 36 (art. 40).

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a new provision explaining that it may edit select “awards, orders, decisions, and rulings” to “conceal the names of the parties and other identifying details.”¹³³ The ICDR may then publish the doctored documents.¹³⁴ However, this new provision includes the caveat that a party may object to publication in writing “within six months from the date of the award.”¹³⁵

In a similar effort to broaden transparency, the ICC’s 2021 ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration (ICC 2021 Note) clarifies that the ICC will now publish the names of law firms representing parties in the case and the name of administrative secretaries.¹³⁶ Section IV of the ICC 2021 Note confirms that the ICC may publish “ICC Awards and/or orders, as well as any dissenting and/or concurring opinions made as of 1 January 2019.”¹³⁷ However, the ICC 2021 Note also provides that any party has the right to notify the Secretariat in advance that it does not wish for the ICC award or any documents to be published.¹³⁸

One potential problem is that the ICC Rules themselves do not explicitly reference the ICC 2021 Note (which is, in turn, an approximately 40-page document). Practitioners who do not routinely handle international arbitration may not even be aware that the ICC 2021 Note exists. They may therefore be unfamiliar with details impacting important considerations when drafting agreements on the front-end. This is true not only with respect to publication of awards but respecting all matters the ICC 2021 Note addresses, such as hearing protocol, expeditious treatment of manifestly unmeritorious claims or defenses, expedited procedures, *etc.*

C. Third-Party Funding

The ICC and ICDR 2021 Rules now both expressly address the rising phenomenon of third-party funding. Article 14(7) of the ICDR Rules details that the tribunal may, through a party’s application, or on its own initiative, require parties to disclose whether any non-party “has undertaken to pay or to contribute the cost of a party’s

participation in the arbitration.”¹³⁹ If such third-party funding exists, the party may be required to disclose the identity of the payor and the nature of the payor’s undertaking.¹⁴⁰ Furthermore, parties may be required to disclose “[w]hether any non-party (such as a funder, insurer, parent company, or ultimate beneficial owner) has an economic interest in the outcome of the arbitration, and if so, . . . the nature of their interest.”¹⁴¹ Taking it one step further, Article 11(7) of the ICC Rules require the parties to *proactively* inform the arbitral tribunal, the other parties, and the ICC Secretariat of any “non-party which has entered into an arrangement for the funding of claims or defences [sic] and under which it has an economic interest in the outcome of the arbitration.”¹⁴² These new provisions reflect the belief that disclosure of third-party funders reduces the risk of conflicts of interest between arbitrators and third-party funders and reaffirms the ICC’s and ICDR’s dedication to impartiality.

D. Technology

The COVID-19 pandemic accelerated international arbitration’s entry into the digital age and demonstrated to the global legal community, the power of incorporating technology into arbitral practices. Under the new Article 26 of the ICDR Rules, a “hearing or portion of a hearing may be held by video, audio, or other electronic means” with the parties’ consent or when “the tribunal determines, after allowing the parties to comment, that doing so would be appropriate and would not compromise the rights of any party to a fair process.”¹⁴³ As before, witnesses may also be examined through means that do not require their physical presence if the tribunal determines such appropriate.

Similar to the 2021 ICDR Rules, Article 26 of the ICC Rules empowers arbitral tribunals to decide between conducting hearings in-person or remotely as long as the parties are consulted as a preliminary manner and the tribunal considers the “relevant facts and circumstances.”¹⁴⁴ The ICC Rules permit any “appropriate means of communication” for hearings.¹⁴⁵

133. *Id.*

134. *Id.*

135. *Id.*

136. INT’L CT. OF ARB., *Note to Parties and Arbitral Tribunals on the Conduct of Arbitration* 10 (Jan. 1, 2021) ((§ IV)(B)(¶52)).

137. *Id.* (§ IV-C-at ¶57).

138. *Id.* (§ IV-C-59).

139. INT’L CTR. DISP. RESOL., *supra* note 130, at 25 (art. 14(7)).

140. *Id.* (art. 14(7)(a)).

141. *Id.* (art. 14(7)(b)).

142. INT’L CHAMBER COMM., *supra* note 128, at art. 11(7).

143. INT’L CTR. DISP. RESOL., *supra* note 130, at 31 (art. 26).

144. INT’L CHAMBER COMM., *supra* note 128, at art. 26(1).

145. *Id.*

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These changes should not be understood as entitling a party in every dispute to virtual hearings, but instead should be viewed as establishing an alternative where the tribunal deems it appropriate.

ICDR Article 32(4) now permits orders or awards to be signed electronically unless the applicable law requires a physical signature, the parties agree otherwise, or the arbitral tribunal or Administrator determines otherwise.¹⁴⁶ The 2021 ICDR Rules also expressly provide that all submissions, notifications, and communications are to be sent electronically per 3(1).¹⁴⁷

Also new to the ICDR Rules is Rule 22(3), which provides mechanisms for data protection.¹⁴⁸ This new provision requires that cybersecurity, data protection, and privacy shall be discussed to “provide the appropriate level of security and compliance in connection with the proceeding.”¹⁴⁹ This provision is an obvious and sensible reaction to the alarming surge in ransomware attacks and other data breaches.

E. Expedited Procedures

Expedited procedures have become increasingly popular over the years for their ability to promote efficiency and lower the costs of arbitration. Recognizing this, both organizations broadened their financial threshold for participating in their Expedited Procedures. The ICDR changed its amount in controversy limit from \$250,000 to \$500,000.¹⁵⁰ Meaning, in an ICDR arbitration, the Expedited Procedures shall now apply in any case where no disclosed claim or counterclaim exceeds \$500,000. Though the wording has changed slightly, there is no other significant change to the ICDR’s Expedited Procedures. Meanwhile, the ICC expanded its Expedited Procedure threshold from \$2,000,000 to \$3,000,000.¹⁵¹ This amendment only concerns arbitration agreements concluded on or after 1 January 2021.¹⁵²

F. 2021 Changes Unique to the ICDR

In addition to the changes described above, the ICDR implemented several other provisions unique to the institution.

First, the introduction section to the ICDR Rules now contains the UNCITRAL’s Model Law definition of “international arbitration” and explains that the ICDR has incorporated this definition into its procedures to determine if and when a case is deemed international.¹⁵³

Second, in a new section titled “Features of the International Arbitration Rules”, the ICDR now explicitly describes its Rules’ goals by providing an overview of the updated and new provisions.¹⁵⁴ The section summarizes the ICDR’s goals and rule changes as follows:

- i. Codify the ICDR’s practice of having the International Administrative Review Council, which is comprised of current and former ICDR executives, decide arbitrator challenges and other administrative disputes;
- ii. Give the arbitral tribunal the authority to decide issues of arbitrability and jurisdiction without any need to refer such matters first to a court;
- iii. Provide that the parties and tribunal shall discuss in the procedural hearing issues related to cybersecurity, privacy, and data protection;
- iv. Create a presumption that parties will mediate during the arbitration, with any party being able to opt out;
- v. Allow parties to request permission to submit an early disposition application for issues that have a reasonable possibility of success, will dispose of or narrow issues, or add economy;
- vi. Authorize access to a special emergency arbitrator for urgent measures of protection within three (3) business days of filing with a criteria for the filing party to set forth its reasoning why relief is likely to be found and what injury will be suffered if relief is not granted;
- vii. Allow the tribunal to manage the scope of document and electronic document requests and to manage, limit, or avoid U.S., litigation-style discovery practices.¹⁵⁵

146. INT’L CTR. DISP. RESOL., *supra* note 130, at 33 (art. 32).

147. *Id.* at 18 (art. 3(1)).

148. *Id.* at 28 (art. 22(3)).

149. *Id.*

150. *Id.* at 17 (art. 1(4)).

151. INT’L CHAMBER COMM., *supra* note 128, at app. VI (art. 1(2)).

152. *Id.* at app. VI (art. 1(2)(b)).

153. INT’L CTR. DISP. RESOL., *supra* note 130, at 5.

154. *Id.* at 7–8 (Features of the International Arbitration Rules).

155. Emphasis added.

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- viii. Permit a party or the tribunal to request disclosure of third-party funders and other non-parties;
- ix. Contain express provisions allowing for “video, audio or other electronic means” during the proceedings;
- x. Provide that electronically-signed orders and awards can be issued unless law, the administrator, or party agreement provides otherwise; and
- xi. Permit a party to request the tribunal make a separate award for any fees the party pays in advance on behalf of another party.¹⁵⁶

Therefore, this new section reflects the ICDR’s commitment to change and progress, and it serves as an outline for the changes implemented in the 2021 Rules. Notably, as emphasized above, this new section explicitly references a preference to avoid U.S. litigation-style discovery practices. A comparison of discovery in litigation versus arbitration could alone serve as a lengthy article, and numerous scholars have indeed provided helpful commentary. While discovery in arbitration is not the focus of this article, the 2021 ICDR Rules appear to be the first instance of an institution expressly drawing a distinction (at least within the Rules themselves) as to the scope of discovery in international arbitration. In that respect, a party desiring to avoid broad discovery in arbitration may be well-served to consider the ICDR.

Third, new Article 5 to the ICDR Rules establishes the International Administrative Review Council (IARC).¹⁵⁷ The IARC may be called upon to decide issues relating to arbitrator challenges, continuing services of an arbitrator, disputes over the number of arbitrators to be appointed, and whether the administrative requirements to file or initiate an arbitrator have been met.¹⁵⁸ Furthermore, “[i]f the parties do not agree on the place of the arbitration, the IARC may make an initial determination as to the place of the arbitration, subject to the power of the arbitral tribunal to make a final determination.”¹⁵⁹

Fourth, Article 23 of the ICDR Rules is new and allows the arbitral tribunal to decide any claim or counterclaim before a hearing on the merits.¹⁶⁰ This application for early

disposition is permissible if the tribunal decides “that the application “(a) has a reasonable possibility of succeeding, (b) will dispose of, or narrow, one or more issues in the case, and (c) that consideration of the application is likely to be more efficient or economical than leaving the issue to be determined with the merits.”¹⁶¹ Under Article 23(2), each party must have the right to make their case whether their application should be heard.¹⁶² Article 23(3) clarifies that the arbitral tribunal is empowered to make any order or award pertaining to the early disposition of any issue presented.¹⁶³

Fifth, another new feature of the 2021 ICDR Rules is the establishment of the arbitral secretary. Under Article 17, with the consent of the parties, the tribunal may appoint an arbitral tribunal secretary.¹⁶⁴ The secretary is to serve under ICDR guidelines, Rules, and procedures.

Sixth, some slight changes (emphasized below) were made to what is now Article 7: Emergency Measures of Protection. In the updated version of the ICDR Rules, a party applying for emergency relief must set forth:

- (a) The nature of relief sought;
- (b) The reason why such relief is required *before the tribunal is appointed*;
- (c) The reasons why the party is *likely to be found to be entitled to such relief*; and
- (d) *What injury or prejudice the party will suffer if relief is not provided.*¹⁶⁵

The most significant changes are located in subsections (b) and (d), which clarify the time frame for when such relief should be granted and the harm in not providing emergency relief, respectively.

Finally, the 2021 ICDR Rules establish a new deposit protocol for ICDR arbitrations. Article 39(3) states that the “[f]ailure of a party asserting a claim or counterclaim to pay the required fees or deposits shall be deemed a withdrawal of the claim or counterclaim. In no event, however, shall a party be precluded from defending a claim or counterclaim.”¹⁶⁶ This provision now brings the ICDR more in line with the LCIA respecting a party’s

156. INT’L CTR. DISP. RESOL., *supra* note 130, at 7–8.

157. *Id.* at 19 (art. 5 of the IDRP (2021)).

158. *Id.*

159. *Id.*

160. *Id.* at 29 (art. 23(1)).

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 27 (art. 17).

165. *Id.* at 19–20 (art. 7(1)(a)–(d)) (emphasis added).

166. *Id.* at 36.

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failure to pay required deposits. Article 39(4) permits a party that paid a deposit for a non-paying party to request a separate award for the recovery of the payment, plus interest.¹⁶⁷ Under Article 39(5), if no party pays the requested deposits, the arbitration may be suspended or terminated.¹⁶⁸ If the tribunal has not yet been appointed, the Administrator may terminate the proceedings.¹⁶⁹

G. 2021 Changes Unique to the ICC

Like the ICDR, the ICC also has a few unique updates to its Rules. Recognizing the growth in International Investment Arbitration, the ICC added new Investor-State Dispute Settlement (ISDS) provisions to the Rules.

First, addressing the increased concern for neutrality, Article 13(6) bars *all* arbitrators from holding the same nationality of any of the parties when the dispute arises from a treaty unless the parties agree otherwise.¹⁷⁰ This is in contrast to the 2017 Rules, which only prevented sole arbitrators and chairs from holding the same nationality as one of the parties.¹⁷¹ Regarding emergency arbitration for investor-state disputes, Article 29(6) provides that where “the arbitration agreement upon which the application is based arises from a treaty[,]” emergency arbitration provisions are unavailable.¹⁷² However, emergency proceedings are still available for contract-based arbitrations involving a state or state entity.

Second, Article 12(9) states “[n]otwithstanding any agreement by the parties on the method of the constitution of the arbitral tribunal, in exceptional circumstances the Court may appoint each member of the arbitral tribunal to avoid a significant risk of unequal treatment and unfairness that may affect the validity of the award.”¹⁷³ Article 12(9) is an entirely new provision, and the ICC Rules do not clarify what constitutes “exceptional circumstances.”

Third, the ICC used the 2021 update to provide greater insight into the ICC’s internal functions. Article 5(1) of Appendix II states that the ICC Court may detail the underlying reasoning leading to its decisions on

the existence and scope of a prima facie arbitration agreement, consolidation of arbitrations, the appointment of arbitrators, challenges to arbitrators, and replacement of arbitrators upon any party’s request.¹⁷⁴ Appendix II 5(2) provides that “any request for the communications of reasons must be made in advance of the decision in respect of which reasons are sought.”¹⁷⁵ Furthermore, Appendix II at Article 5(3) emphasizes that “in exceptional circumstances, the Court may decide not to communicate the reasons for any of the above decisions.”¹⁷⁶ However, these exceptional circumstances are not defined nor illustrated in the Rules.

Fourth, the new Article 43 expressly spells out that “[a]ny claims arising out of or in connection with the administration of the arbitration proceedings by the Court . . . shall be governed by French Law and settled by the Paris Judicial Tribunal.”¹⁷⁷ Additionally, the ICC Rules confirm that the Paris Judicial Tribunal will have exclusive jurisdiction over such claims.¹⁷⁸

Finally, the 2021 ICC Rules set out a provision for the exclusion of new counsel. Article 17 requires that the parties promptly notify the ICC Secretariat, other parties, and the arbitral tribunal of any changes in representation.¹⁷⁹ This appears to be an effort to prevent conflicts of interest between the arbitrators and new party representatives.

VII. CONCLUSION

Though arbitral institutions are becoming increasingly similar to one another, they still maintain a few key differences. Arbitral organizations took similar approaches addressing the COVID-19 pandemic, and only time will tell which adaptations will become permanent. Furthermore, the rise of International Investment Arbitration poses an interesting question for arbitral institutions. Finally, the impacts of International Investment Arbitration and the COVID-19 pandemic are evidenced through the updated Rules of the ICC and ICDR.

167. *Id.*

168. *Id.*

169. *Id.* (art. 39(5)).

170. INT’L CHAMBER COMM., *supra* note 128, at art. 13(6).

171. INT’L CHAMBER COMM., *2017 ICC Arbitration Rules*, at art. 13(5), (Jan. 3, 2017), <https://www.international-arbitration-attorney.com/2017-icc-arbitration-rules/>.

172. INT’L CHAMBER COMM., *supra* note 128, at art. 29(6).

173. *Id.* at art. 12(9).

174. *Id.* at app. II (art. 5(1)).

175. *Id.* at app. II (art. 5(2)).

176. *Id.* at app. II (art. 5(3)).

177. *Id.* at art. 43.

178. *Id.*

179. *Id.* at art. 17(1).