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21 KEY ARBITRATION DEVELOPMENTS FROM 2020

12. Confirmed importance of joinder of third parties in ICC and LCIA Rules

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The new ICC and LCIA rules further **streamline** the commencement of arbitrations, arguably reflecting **user feedback**.

This includes the development and confirmation of the importance of “joinder” of third parties.

The new ICC rules permit tribunals to allow joinder of additional parties **after the constitution** of the tribunal on the condition that the third party **accepts the constitution** of the tribunal and **agrees to the Terms of Reference**: Article 7(5).

The previous (2017) ICC Rules permitted joinder only with the **consent of all parties** and **before the constitution** of the tribunal.

Pursuant to Article 7(5) of the 2021 ICC Rules, in deciding whether to grant a joinder request, the tribunal is to take into account “*all relevant circumstances*”, which may include:

1. whether the arbitral tribunal has **prima facie jurisdiction** over the additional party
2. the **timing** of the joinder application
3. possible **conflicts** of interest
4. the impact of the joinder on the **procedure**

The new ICC Rules therefore provide more **time and flexibility** for parties in enabling them to seek to join relevant third parties to the proceedings **after the commencement of proceedings.**

This **recognises the practicalities of disputes** where it may not always be obvious at the outset that a third party should also be involved in the **interests of expediency and consistency.**

The 2020 LCIA Rules remain as per the 2014 Rules with respect to joinder: applications can be **made before or after constitution** of the tribunal following which the **tribunal has the power to allow** one or more third party to be joined to the arbitration if the **third party consents to being joined**: Article 22.1(x).

Joinder raises several **complex issues** concerning two of the central features of arbitration: **party autonomy** and **confidentiality**.

There is a **balancing act** between maintaining the above basic tenets of arbitration and maximising efficiency and the benefits of arbitration over litigation.

On one hand, joinder opens the door to arbitrations involving **parties not originally intended to be involved** in the proceedings (akin to litigation) and the detail of that dispute being shared outside of the arbitration agreement.

On the other hand, joinder provides a mechanism for **improving efficiency** in resolving complex disputes by arbitration and **mitigates the risk of inconsistent or contradictory outcomes** from separate proceedings.

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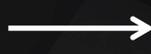
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